IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

SHEILA R COLE Claimant **BLACK HAWK COUNTY** Employer	**APPEAL 14A-UI-06999-LT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 06/15/14** **Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from the July 1, 2014 (reference 01) unemployment insurance decision that denied benefits based upon a discharge from employment. The parties were properly notified about the hearing. A telephone hearing was held on July 29, 2014. Claimant participated and was represented by Luke Guthrie, Attorney at Law. Employer participated through Human Resources Coordinator Audra Heineman.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a developmental aide from June 2007 and was separated from employment on June 16, 2014. On Saturday, May 24, 2014 at 6:35 p.m., claimant observed a questionable incident involving two coworkers and a resident. Later the same day at 9 p.m., near the end of shift, she observed what she considered dependent adult abuse of the same resident by the same coworkers. On May 25 between 5 p.m. and 6 p.m. she asked Nurse Jessie Nelson to look at the resident's bruises and told her what happened. Nelson made a written report and called supervisor of support services specialist Lisa Glass, who was not on duty. Nelson was the claimant's default supervisor. Nelson did not tell claimant to report to Glass or otherwise. Claimant worked Monday, the Memorial Day holiday. Glass did not work but Jessie Nelson did. Claimant and Nelson had no further communication about the report. On Tuesday, May 27 when Glass was next at work claimant reported what she saw. Glass did not mention Nelson telling her what happened. Glass asked her to write a statement and leave it for her. Claimant did so later that night at home and gave it to Glass the next day at work. There was no further communication about the report until June 2 or 3 when claimant met with Human Resources Generalist Angie Moss, who asked her when she saw it and why she did not report it right away. There was no indication of possible discipline. Claimant went to Moss again the next day to ask her if anything would happen to her. Moss told her, "No, nothing's going to happen to you. You're fine." On June 5 claimant called supervisor Kim Wagner to ask her if anything was going to happen to her. Wagner told her there was a possibility of a

three-day suspension or termination but that she would go to bat for her. Claimant had not read the policy but thought the report must be made within 48 hours and could not recall if a supervisor, the supervisor on duty, or the administrator should be notified. The employer's policy requires that an individual aware of possible abuse must immediately notify Greg Hanson, Administrator, and DIA. Nelson did not notify Hanson or DIA and Glass did not notify DIA, but left it to Hanson.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

Iowa Code § 96.5-2-a provides:

> An individual shall be disqualified for benefits:
>
> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
>
> a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

Iowa Admin. Code r. 871-24.32(1)a provides:

> Discharge for misconduct.
>
> (1) Definition.
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> a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.,* 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r. 871-24.32(4) provides:

> (4) Report required. The claimant's statement and the employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate

> the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.,* 391 N.W.2d 731 (Iowa Ct. App. 1986).

When the record is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. *Schmitz v. Iowa Dep't Human Servs.*, 461 N.W.2d 603, 607 (Iowa Ct. App. 1990). Both the quality and the quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See, Iowa Code § 17A.14 (1). In making the evaluation, the fact-finder should conduct a common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be fulfilled. *Schmitz*, 461 N.W.2d at 608. The Iowa Supreme Court has ruled that if a party has the power to produce more explicit and direct evidence than it chooses to present, the administrative law judge may infer that evidence not presented would reveal deficiencies in the party's case. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976).

The two people with any direct knowledge of the situation, other than claimant, were listed as witnesses but were not available to testify as they were working off-site and were not available, even by cellular telephone. No request to continue the hearing was made and no written statements of those individuals were offered. Given the serious nature of the proceeding and the employer's allegations resulting in claimant's discharge from employment, the employer's nearly complete reliance on hearsay statements is unsettling. Nor did the employer bother to submit a copy of the policy at issue. Mindful of the ruling in *Crosser*, *id.,* and noting that the claimant presented direct, first-hand testimony while the employer relied upon second-hand reports, the administrative law judge concludes that the claimant's recollection of the events is more credible than that of the employer.

A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy. The conduct for which claimant was discharged was merely an isolated incident of poor judgment in not reading and following the specific policy (although the administrative law judge questions whether the policy really requires a DIA report from a non-management or supervisory worker). While she may not have followed the letter of the policy, she did report her concerns to the holiday-weekend acting supervisor within 24 hours. Nelson and Glass were not disciplined for failure to report to

Hanson or DIA immediately, thus the claimant seems to have been the subject of disparate treatment. Furthermore, inasmuch as employer had not previously warned claimant about the issue leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Training or general notice to staff about a policy is not considered a disciplinary warning. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given.

DECISION:

The July 1, 2014 (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. The benefits withheld shall be paid, provided she is otherwise eligible.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

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