IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

JENNY NGUYEN Claimant **CATHOLIC HEALTH INITIATIVES - IOWA** Employer	**APPEAL 15R-UI-05387-KC-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 02/01/15** **Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant filed an appeal from the February 17, 2015, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on June 11, 2015. The claimant participated. The employer participated through Karen Malloy, human resources representative. Exhibit A was received into evidence.

ISSUE:

Was the claimant discharged due to disqualifying, work-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a registered nurse. She began employment with Catholic Health Initiatives as a CNA in September 18, 2006. She became a registered nurse (RN) April 2014 and assumed a new position as an RN in August 2014. The last day that she worked was January 26, 2015 and she was separated from employment on April 7, 2015.

On January 29, 2015, the claimant learned that she was the subject of an investigation of the Office of Inspector General of the Department of Health and Human Services (OIG). OIG placed her on an exclusion list which prohibited her from participating in any capacity in Medicare, Medicaid, and all Federal health care programs as defined in section 1128B(f) of the Social Security Act. (Exhibit A) She could not work in a health care facility that provided services under those federal programs until she was reinstated. The claimant informed her supervisor of the situation and provided the notice she received to Malloy. She was placed on a temporary, unpaid suspension on January 29, 2015.

The employer told the claimant that for a 90-day period, if she was removed from the excluded provider list, she could return to her position within her unit, in effect job protection. If the investigation took longer and she was removed from the list thereafter, she could apply for any

open position on any unit in the hospital during a second 90-day period. She had a total of 180 days to resume employment.

The claimant received a letter dated March 13, 2015, stating that she had until March 20, 2015 to respond to the employer's assertion that a review of an online posting from OIG indicated she was excluded from participation in a federal government health care program. She was supposed to provide documentation that the listing was inaccurate. The claimant did not respond because there was insufficient time to do so, based on when she received the letter.

The compliance director and human resources manager for the employer received notification from OIG in April 2015. The employer did not disclose the contents of the notice. On April 7, 2015, the employer terminated the claimant's employment. The employer terminated the claimant's employment weeks before the initial 90-day period ended. The claimant was removed from the excluded provider list in May 2015. The second 90-day period which the employer gave the claimant had not ended at that time.

REASONING AND CONCLUSIONS OF LAW:

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

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). 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.

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.
>
> 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.

Iowa Admin. Code r. 871-24.32(9) provides:

> (9) Suspension or disciplinary layoff. Whenever a claim is filed and the reason for the claimant's unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as discharged, and the issue of misconduct must be resolved. Alleged misconduct or dishonesty without corroboration is not sufficient to result in disqualification.

Iowa Admin. Code r. 871-24.32(8) provides:

> (8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation.

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 assess points or impose discipline up to or including discharge for the incident under its policy.

The parties agree that the employer's policy is to provide a 90-day unpaid suspension during which an employee may correct the situation and return to his or her former position. The parties also agree that the employer provides a second 90-day period during which an employee may correct the situation and reapply for any open position in the hospital. The employer told the claimant those provisions applied to her. The employer chose to terminate her employment before the first 90-day period had lapsed, contrary to its own policy and what she had been told. The claimant was removed from the excluded list in May 2015, during the second 90-day period given to her by the employer. She relied on the employer's statements. The employer identified no other reason to terminate the claimant's employment.

The employer has not met its burden of proof to establish a current or final act of misconduct, and, without such, the history of other incidents need not be examined. Benefits are allowed.

DECISION:

The February 17, 2015, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

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Kristin A. Collinson
Administrative Law Judge

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Decision Dated and Mailed

kac/pjs