IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

68-0157 (9-06) - 3091078 - EI

THELMA M GRAGG
Claimant

SYSTEMS UNLIMITED INC
Employer

APPEAL NO. 10A-UI-02737-NT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/10/10
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Claimant filed a timely appeal from a representative's decision dated February 10, 2010, reference 01, which held the claimant not eligible to receive unemployment insurance benefits based upon her separation from Systems Unlimited, Inc. After due notice, a hearing was held by telephone on June 4, 2010. Claimant participated personally. Participating on behalf of the claimant was John Daufeldt, Attorney at Law. The employer participated by Melinda Haley and Mona Dowiat.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

Having considered all of the evidence in the record, the administrative law judge finds: Thelma Gragg was employed by Systems Unlimited, Inc. from December 3, 1991 until January 8, 2010 when she was discharged from employment. Ms. Gragg held the position of full-time direct care worker and was paid by the hour. Her immediate supervisor was Gail Vanhauen.

In the claimant's job position she was required to provide direct support and living assistance to disabled individuals at group facilities. The claimant was discharged after receiving complaints from a co-worker and another complaint from a guardian about the manner in which Ms. Gragg performed her duties. The guardian had alleged that Ms. Gragg was unwilling to wash clothing that a resident had brought back from a holiday outing. The co-worker who had worked with the claimant on approximately eight occasions alleged to the company that Ms. Gragg had not given male residents choices and had "bossed them around." The co-worker also alleged that the claimant had yelled at one of the residents. Prior to discharging the claimant the employer did not give Ms. Gragg an opportunity to deny or explain the allegations. The claimant subsequently appealed the discharge through the employer's internal chain of command but her discharge was confirmed.

Ms. Gragg had received a written warning from the company on March 25, 2009 about the manner in which she treated residents and was warned at that time that further incidents would result in her being required to agree to a last chance type of agreement for continued employment. Ms. Gragg was also required to attend additional training. Ms. Gragg attended the training and attempted to improve her manner of performing her duties and her demeanor. Subsequently the claimant received her annual evaluation. The evaluation categorized the claimant as being a very good employee and did not refer to any negative aspects of her performance. Ms. Gragg received no further warnings after the evaluation that took place until her discharge on January 8, 2010.

The claimant denies yelling at any individuals and maintains that if her voice was raised it was only because bath water was running and she was attempting to get the attention of a resident. Claimant denies bossing residents around and treating them inappropriately. It is the claimant's position regarding the unwillingness to do the laundry of a resident that she did not refuse but initially indicated that the summer clothes would not immediately be washed because they would not be immediately needed. Claimant testified that she nonetheless did all the laundry for that individual.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record is sufficient to warrant the denial of unemployment insurance benefits. It is not.

Iowa Code section 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.

871 IAC 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.

The employer has the burden of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating the claimant but whether the claimant is entitled to unemployment insurance benefits. Infante v. Iowa Department of Job Service, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying terminating of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. Pierce v. Iowa Department of Job Service, 425 N.W.2d 679 (Iowa App. 1988). Poor work performance is not misconduct in the absence of evidence of intent. Miller v. Employment Appeal Board, 423 N.W.2d 211 (Iowa 1988).

An employer may discharge an employee for any number of reasons or no reason at all if it not contrary to public policy. But if it fails to meet its burden of proof in establishing job-related misconduct as the reason for separation, the employer incurs potential liability for unemployment insurance benefits related to that separation. In this case the employer relies on hearsay to establish job-related misconduct. In contrast, the claimant appeared in person and provided sworn testimony denying refusing to perform laundry duties and denying yelling or "bossing" the individuals under her care. While hearsay is admissible in administrative proceedings it cannot be accorded the same weight as sworn, direct testimony.

Based upon the evidence in the record, the administrative law judge concludes that although the claimant had been warned in the past, she had made a concerted effort to improve her work performance and demeanor and had been given no subsequent indication why she had been placed on a last chance agreement to continue in employment in August 2009. Claimant received no additional warnings from the company but was discharged on January 8, 2010 based on the allegations about her conduct made by a guardian and a new employee.

While the decision to terminate Ms. Gragg may have been a sound decision from a management viewpoint, the evidence in the record is not sufficient to warrant the denial of unemployment insurance benefits. Benefits are allowed, providing the claimant meets all other eligibility requirements of Iowa law.

DECISION:

The representative's decision dated February 10, 2010, reference 01, is reversed. The claimant was discharged for no disqualifying reason. Unemployment insurance benefits are allowed, providing the claimant meets all other eligibility requirements.

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Terence P. Nice
Administrative Law Judge

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Decision Dated and Mailed

pjs/pjs