

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

BARBARA A BIRKENHOLTZ
Claimant

NEWTON CARE LLC
Employer

APPEAL 15A-UI-13539-JP-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 11/15/15
Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the December 4, 2015, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on December 30, 2015. Claimant participated. Employer participated through administrator, Ron Semler.

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 business office manager from June 2, 2010, and was separated from employment on November 19, 2015, when she was discharged.

On November 5, 2015, claimant was outside of the office when Mr. Semler drove around the building. Mr. Semler approached claimant and told her there were going to be a couple more Medicaid pending residents for her to process. Claimant responded to Mr. Semler, "f[@#]k you." Mr. Semler told claimant he was just kidding. Claimant told Mr. Semler that she was not kidding. There were other employees that witnessed this exchange. On November 6, 2015, Mr. Semler asked claimant if she really meant to say that to him and she said she stood by her words.

On November 12, 2015, the employer was conducting a room change for a resident. Claimant told Mr. Semler that she was very upset with the way the room change was being done and she was upset about a prior room change. Claimant was upset with the ownership of the employer. Claimant was in her office at her desk. Claimant would sit then stand then sit then stand. Mr. Semler could tell by claimant's actions and tone of voice that she was agitated. The employer has a team if an employee feels that something is going wrong at residence. The purpose of the team is to discuss the issues and come to a decision that will best benefit the resident and the employer. The proper procedure for claimant would have been to go to the team or to present a better idea to solve the problem. Mr. Semler asked claimant if she had a

better idea to solve the problem, and claimant did not respond. Claimant told Mr. Semler that she was going to call the ombudsman. Mr. Semler then told claimant he would call the ombudsman. Claimant then said the only concern the employer had was making money. "You know [the owners] would not bring their own family members [into this building]." Claimant was red faced and had a raised voice and was angry. Mr. Semler then shut the door and asked what was wrong. Claimant refused to speak to Mr. Semler. Mr. Semler then left.

Mr. Semler does not discipline employees without consulting with other people. The employer typically gives three warnings prior to discharge; however, because the severity of the incidents on November 12, 2015 and November 5, 2015, the employer discharged claimant.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct. Benefits are denied.

It is the duty of an administrative law judge and the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge, as the finder of fact, may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other evidence you believe; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. This administrative law judge finds the employer's version of events to be more credible than claimant's recollection of those events.

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).

Misconduct must be "substantial" to warrant a denial of job insurance benefits. *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). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988). "The use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct, even in the case of isolated incidents or situations in which the target of abusive name-calling is not present when the vulgar statements are initially made." *Myers v. Emp't Appeal Bd.*, 462 N.W.2d 734 (Iowa Ct. App. 1990).

On November 12, 2015, claimant was upset with the way two recent room changes had occurred. Mr. Semler saw that claimant was upset and asked her what was wrong. Mr. Semler testified that he could tell by claimant's actions and tone of voice that she was very agitated. The claimant would sit then stand then sit then stand. Claimant refused to communicate with Mr. Semler when she was asked how to resolve the situation. Claimant also refused to respond to Mr. Semler when he asked her what was wrong. The employer determined this conduct to be insubordination, and coupled with claimant's conduct on November 5, 2015, the employer made the decision to discharge her.

The incident on November 5, 2015 occurred when Mr. Semler approached claimant in his vehicle while she was outside. Mr. Semler told claimant he had a couple of Medicaid pending residents for her to process. Claimant told Mr. Semler, "[@#]k you." Mr. Semler responded to claimant that he was just kidding. Claimant's argument that she said the comment because she was under a lot of stress is not persuasive. After hearing that Mr. Semler was just kidding, instead of apologizing for her comment or explaining why she made the comment, claimant reinforced her position and told Mr. Semler that she was not kidding. There were other employees outside that observed claimant's comment to Mr. Semler, her supervisor. Furthermore, on November 6, 2015, Mr. Semler approached claimant and asked her if she really meant to say that to him and she told him that she stood by her words.

The employer is entitled to expect its employees to treat co-workers and supervisors with respect. Clearly claimant's comment of "[@#]k you" to her supervisor was confrontational and

disrespectful. It is also important to note that claimant said this in front of another employee. This is misconduct without prior warning. Benefits are denied.

DECISION:

The December 4, 2015, (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

jp/css