IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

BETTY A WAGNER
Claimant

GOOD SAMARITAN SOCIETY INC
Employer

APPEAL NO. 11A-UI-16289-VST

ADMINISTRATIVE LAW JUDGE DECISION

OC: 11/20/11
Claimant: Appellant (2)

Section 96.5-2-A – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated December 15, 2011, reference 02, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on January 24, 2012. Claimant participated. Chris Moritz was a witness for the claimant. The employer participated by Mary Heller, Office Manager, and Yvonne Kleppe, Dietary Manager. The record consists of the testimony of Yvonne Kleppe; the testimony of Betty Wagner; the testimony of Chris Moritz; and Employer's Exhibits 1-9. Mary Heller did not testify.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a nursing home located in West Union, Iowa. The claimant was a dishwasher and had worked for the facility since September 22, 1986. She was a full-time employee. Her last day of work was November 22, 2011. She was terminated on November 22, 2011.

The reason for her termination was the employer's belief that she and another employee named Chris Moritz, had cornered a third employee named Doris about Doris taking personal time off (PTO) for the upcoming birth of her granddaughter. The claimant allegedly told Doris that another employee was on light duty and that they did not want to be short handed. This conversation was supposed to have taken place on November 16, 2011. The employer considered this a "Group II" violation, which was a failure to follow policies and procedures and was inconsiderate. The claimant had received a final warning in the employer's disciplinary process in May 2011 for not properly washing her hands.

The claimant and Ms. Moritz had only told Doris that another employee had fallen. The claimant also asked how Doris' daughter was doing. No mention was made of PTO or that Doris could not take PTO or light duty.

REASONING AND CONCLUSIONS OF LAW:

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.

871 IAC 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.

Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Misconduct excludes errors of judgment or discretion in isolated instances and simple acts of negligence. The employer has the burden of proof to establish misconduct.

There is insufficient evidence of misconduct in this record. The claimant was terminated because the employer believed that she and another employee named Chris Moritz confronted a third employee named Doris. The claimant supposedly said that still another employee had fallen and was on light duty and that Doris' daughter better have her baby fast because they did not want to be short handed. Doris did not testify at the hearing. Both the claimant and Chris

Moritz did testify at the hearing and they both denied saying anything at all about PTO or telling Doris she could not take her PTO or being inconsiderate of Doris in any way.

The employer's evidence is essentially hearsay. Two witnesses denied that the conversation took place as reported to the employer by Doris. While hearsay testimony is admissible it is insufficient to establish misconduct. Findings must be based upon the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs. Iowa Code Sec. 17A.14(1). Allegations of misconduct 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. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

The Iowa Court of Appeals set forth a methodology for making the determination as to whether hearsay rises to the level of substantial evidence. In Schmitz v. Iowa Department of Human Services, 461 N.W.2d 603, 607-608 (Iowa App. 1990), the Court required evaluation of the "quality and quantity of the [hearsay] evidence to see whether it rises to the necessary levels of trustworthiness, credibility and accuracy required by a reasonably prudent person in the conduct of their affairs." To perform this evaluation, the Court developed a five-point test, requiring agencies to employ a "common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better evidence; (4) the need for precision; (5) the administrative policy to be fulfilled." Id. At 608.

Because Doris did not testify, the administrative law judge cannot weigh her testimony against the testimony of the claimant and Ms. Moritz. No videotape was produced that would show what words were spoken to Doris. The fact that a conversation took place during work hours does not prove misconduct. Since there is insufficient evidence of misconduct, benefits are allowed if the claimant is otherwise eligible.

DECISION:

The decision of the representative dated December 15, 2011, reference 02, is reversed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

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Vicki L. Seeck
Administrative Law Judge

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Decision Dated and Mailed

vls/css