

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

SAVINA F CERVENE
Claimant

APPEAL NO. 14A-UI-09262-SWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

PINNACLE HEALTH FACILITIES XVII L
Employer

OC: 08/03/14
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

The employer appealed an unemployment insurance decision dated August 28, 2014, reference 03, that concluded the claimant's discharge was not for work-connected misconduct. A telephone hearing was held on September 25, 2014. The parties were properly notified about the hearing. The claimant participated in the hearing with a witness, Esada Moore. Nicole Strange participated in the hearing on behalf of the employer. Exhibit One was admitted into evidence at the hearing.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant worked full time for the employer as a registered nurse from April 6, 2012, to July 31, 2014. Her supervisor was the director of nursing, Nicole Strange. Deb Baker was the administrator of the facility. She was entitled to two 15-minute breaks and a 30-minute lunch break during her work shift. She was informed and understood that under the employer's work rules, she was required to punch out on the timekeeping system for her 30-minute lunch and whenever she left the building for a break. She had been warned in August 2012 about a medication error, not following procedure on a non-witnessed fall by a resident, and taking excessive smoke breaks. After August 2012, the claimant would punch out for her smoke breaks and was never warned again about this. She was warned on January 2, 2013, about not completing an order properly. She was warned on June 19, 2014, for not completing the employer's triple check process on her shift when another nurse made transcription error.

On Monday, July 28, 2014, a coworker, Nikki Williams, reported to the director of nursing, Nicole Strange, that on July 25 the claimant was rude to her and had grabbed papers out of her hand to see how many residents Williams was covering. The claimant was not rude and never grabbed papers out of Williams' hands.

Strange suspended the claimant pending investigation on July 28, 2014, based on Williams' allegations for violating the employer's personal conduct rules by failing to maintain a pleasant work environment.

After the claimant was suspended, Williams alleged that the claimant had also taken five to six breaks outside the building and had only punched out for lunch. In fact, the claimant properly punched out for lunch and had not left the building for further breaks. The time records show that the claimant had punched out for breaks properly and the employer had not questioned her about this since August 2012.

Strange questioned other employees about the claimant's conduct after she was suspended. Other employees reported that the claimant was taking excessive breaks, often was stressed out and frantic, was quick to blame others for errors, and was responsible for chaotic working conditions due to her anxious and erratic demeanor. Strange also noted as part of her investigation that on July 24, she had found some prescription crème in a resident room and had requested that the claimant go through rooms to see if there were other prescription items. When the claimant brought back some other prescription items and said that she would normally remove such items when admitting residents, Strange told the claimant not to make excuses for herself or blame others. She determined the claimant had made negative comments to employees about others. Debra Baker had reported that the claimant would often ask what Baker considered unnecessary questions. As an example of the claimant escalating things unnecessarily, Baker claimed that the claimant had made a false accusation that a certified nursing assistant had reported to the claimant that a nurse had called this African-American CNA a "nigger." In fact, the report the claimant had received from the CNA was that the nurse had used the word "nigger" in reference to residents and had made a comment to the CNA that the nurse's husband told her to stop acting like a nigger.

The employer discharged the claimant on July 31, 2014, because the employer determined that the claimant had taken several breaks outside the facility without punching out and was not conducting herself professionally and maintaining a pleasant work environment.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

The unemployment insurance law disqualifies claimants discharged for work-connected misconduct. Iowa Code § 96.5-2-a. The rules define misconduct as (1) deliberate acts or omissions by a worker that materially breach the duties and obligations arising out of the contract of employment, (2) deliberate violations or disregard of standards of behavior that the employer has the right to expect of employees, or (3) carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design. 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 misconduct within the meaning of the statute. 871 IAC 24.32(1).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Iowa Code § 96.6-2; Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial

and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000).

The unemployment insurance rules provide: "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." 871 IAC 24.32(8).

The current act of misconduct here is based on Nikki Williams hearsay report to Nicole Strange that the claimant had taken five to six breaks of 20 minutes without punching out beyond the lunch break and had grabbed documents out of her hands. The claimant denied these allegations.

The findings of fact show how I resolved the disputed factual issues in this case by carefully assessing of the credibility of the witnesses and reliability of the evidence and by applying the proper standard and burden of proof. The employer's evidence consisted of hearsay statements from individuals who were not under oath or subject to cross-examination. The Iowa Court of Appeals has established standards for determining whether hearsay evidence "rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs." Schmitz v. Iowa Department of Human Services, 461 N.W.2d 603 (Iowa App. 1990). These standards involve 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 upheld. Id. at 608.

The hearsay in this case is ordinary hearsay not subject to any known exception to the hearsay rule that would buttress its reliability. As the hearing was by telephone, non-hearsay evidence was easily available at no cost and with no burden to the employer. Since the hearing involves resolving disputed facts based on credibility and the result of the hearing grants or denies benefits to an unemployed person, the need for accurate information is essential. Finally, there is no policy that would favor presenting hearsay statements over live witnesses in this case. The claimant actually showed through her witness, Esada Moore, that the administrator's statement—alleging the claimant had untruthfully made a report about racial comments—was inaccurate, which undercuts the employer's credibility.

While the employer may have been justified in discharging the claimant because of her unsatisfactory, frantic, and questioning conduct, work-connected misconduct as defined by the unemployment insurance law has not been established. No current act of willful and substantial misconduct has been proven in this case.

DECISION:

The unemployment insurance decision dated August 28, 2014, reference 03, is affirmed. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

Steven A. Wise
Administrative Law Judge

Decision Dated and Mailed

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