IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

KATHY PURDY
Claimant

CARE INITIATIVES
Employer

APPEAL NO: 10A-UI-03126-BT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/31/10
Claimant: Appellant (2)

Iowa Code Section 96.5(2)(a) - Discharge for Misconduct

STATEMENT OF THE CASE:

Kathy Purdy (claimant) appealed an unemployment insurance decision dated February 24, 2010, reference 01, which held that she was not eligible for unemployment insurance benefits because she was discharged from Care Initiatives (employer) for work-related misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on April 13, 2010. The claimant participated in the hearing. The employer participated through Administrator Matt Smith, Director of Nursing Jennifer West, and Attorney Susan Schneider. Employer's Exhibits One through Eight and Claimant's Exhibits A, B, and C were admitted into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

The issue is whether the employer discharged the claimant for work-related misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was employed as a full-time certified nurse's assistant from January 10, 2000 through February 1, 2010 when she was fired per the employer's progressive disciplinary policy. The employer's disciplinary policy provides for a verbal, a written and a final written warning before termination occurs. The incident prompting the termination occurred on February 1, 2010 when an employee reported to the employer that a resident, for whom the claimant provided care, had fecal matter on her hands. The administrator did not question the claimant about the matter. He looked at her record, reviewed the staff assignment sheet and spoke with other employees before deciding the claimant should be terminated. The claimant denied that she left fecal matter on the resident's hands and provided statements from two other employees confirming the resident did not have fecal matter on her hands that morning.

The claimant had been given a final written warning on December 30, 2009 for not giving two hours notice for her absence and for not finding a replacement. She had reported to work that day but was not feeling well and had been unable to find a replacement. She called her doctor's

office since she had recently been seen and asked the doctor's office for a medical excuse. The doctor's office faxed over a medical excuse taking the claimant off work through January 1, 2010. Even though she had reported to work that morning and done everything possible to complete her shift, the employer determined she should receive a final written warning.

There were two other verbal warnings and one written warning in the last six months of her employment. The employer did not provide any disciplinary warnings for the first nine years and six months of her employment. She was warned on June 9, 2009 for smoking outside with three residents without any of the residents wearing a smoking apron. The claimant testified the administrator allowed certain employees to go without their aprons but not others. She received a second verbal warning on November 3, 2009 for taking too many smoke breaks and for failing to check with the charge nurse prior to the breaks. The only other written warning was for failing to get a resident's weight and failing to fill out a bowel movement list two days in a row.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant for work-connected misconduct. A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code section 96.5-2-a.

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 claimant, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. Miller v. Employment Appeal Board, 423 N.W.2d 211 (Iowa App. 1988).

The claimant was discharged on February 1, 2010 per the employer's progressive disciplinary policy. Misconduct must be substantial in nature to support a disqualification from unemployment benefits. Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1982). The focus is on deliberate, intentional, or culpable acts by the employee. Id. The claimant had worked for the employer for ten years and her disciplinary warnings were for minor and insignificant incidents. With regard to the final incident, Administrator Matt Smith admitted he did not even question the claimant as to whether she was involved. He conducted an "investigation" in which he looked at the assignment sheets and talked to her co-workers but did not actually speak with the claimant about it before he met with her at the termination meeting. When questioned about it by the administrative law judge, Mr. Smith stated he "had no reason to believe she would tell me the truth." He was asked whether the claimant was a known liar and he stated yes but was unable to provide any evidence supporting that claim.

Quite to the contrary, the administrative law judge found the claimant to be very credible and quite forthright in her testimony; she admitted that certain disciplinary actions were warranted but others were not. The claimant testified that the resident in question, required two employees to transfer her and that she was taken to breakfast by another staff member on February 1, 2010. The administrator confirmed the resident does require two persons for transfers, which demonstrates that two staff members got her up and out of bed that morning. The claimant's final performance appraisal, dated less than two weeks earlier, shows that the employer was satisfied with every aspect of her performance, with the exception of attendance and cigarette breaks. It seems that an administrator would have given any employee an opportunity to explain themselves before being terminated, let alone a long-term employee with a good performance review. The claimant's testimony is relied upon in that she was not aware the resident's hands were dirty and that another employee took the resident to the cafeteria. Additionally, the final warning was unfair and unwarranted and without that, she would not have been terminated according to the progressive disciplinary policy. The employer has not met its burden. Work-connected misconduct as defined by the unemployment insurance law has not been established in this case and benefits are allowed.

DECISION:

The unemployment insurance decision dated February 24, 2010, reference 01, is reversed. The claimant was discharged. Misconduct has not been established. Benefits are allowed, provided the claimant is otherwise eligible.

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Susan D. Ackerman
Administrative Law Judge

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Decision Dated and Mailed

sda/pjs