

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

CATHERINE UBADIGBO
Claimant

CANDEO
Employer

APPEAL 21A-UI-11997-SN-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 03/15/21
Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(1)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from the March 23, 2021, (reference 03) unemployment insurance decision that benefits based upon the conclusion she was discharged on January 6, 2021. The parties were properly notified of the hearing. A telephone hearing was held on July 16, 2021. The claimant participated and testified. The employer participated through Human Resources Administrator Rebecca Helm. Daily Service Manager Jennifer Fischer and Community Services Tony Raymer were not made available to testify because they are no longer employees of the employer. Exhibits D-1 and D-2 were received into the record.

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:

The claimant was employed as an intellectual disability instructor from December 3, 2020, until this employment ended on January 6, 2021, when she was terminated. Daily Service Manager Jennifer Fischer was the claimant's immediate supervisor.

The employer has a policy it calls its values statement stating that clients are supposed to be treated with respect. The claimant received training regarding this value statement during a two-week onboarding process after being hired.

On January 3, 2021, a client reported to Ms. Fischer that the claimant referred to her as "evil" and added that she "would burn in hell." Ms. Fischer spoke with the client later that day, who did not change the construction of the statement. The claimant did not make this statement to the client. Ms. Fischer did not talk to the claimant about the allegation.

On January 6, 2021, Director of Clinical and Community Services Tony Raymer and Ms. Fischer terminated the claimant for three reasons. First, the client's story did not change in subsequent interviews. Second, the claimant was in her 90-day probationary period. Third, they also found the claimant's general demeanor to be consistent with a statement of this kind.

The claimant did not receive formal or informal discipline prior to her termination.

A disqualification decision was mailed to the claimant's address of record on March 23, 2021. (Exhibit D-1) The claimant did not receive the decision. The first notice of disqualification was a phone call she had with Iowa Workforce Development staff on April 26, 2021. The appeal was sent immediately after receipt of that conversation. (Exhibit D-2)

REASONING AND CONCLUSIONS OF LAW:

The first issue to be considered in this appeal is whether the claimant's appeal is timely. The administrative law judge determines it is.

Iowa Code section 96.6(2) provides:

2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of issuing the notice of the filing of the claim to protest payment of benefits to the claimant. All interested parties shall select a format as specified by the department to receive such notifications. The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of section 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to section 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving section 96.5, subsections 10 and 11, and has the burden of proving that a voluntary quit pursuant to section 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 1, paragraphs "a" through "h". Unless the claimant or other interested party, after notification or within ten calendar days after notification was issued, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The claimant did not have an opportunity to appeal the fact-finder's decision because the decision was not received. Without notice of a disqualification, no meaningful opportunity for appeal exists. See *Smith v. Iowa Employment Security Commission*, 212 N.W.2d 471, 472 (Iowa 1973). The claimant timely appealed the conversation she had with the Iowa Workforce Development representative in late April. Therefore, the appeal shall be accepted as timely.

The next issue is whether the claimant's separation was disqualifying. The administrative law judge concludes the claimant was discharged from employment for a non-disqualifying reason.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 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. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). 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).

The decision in this case rests, at least in part, on the credibility of the witnesses. It is the duty of the administrative law judge as 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 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. *Id.* 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 believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

After assessing the credibility of the witnesses who testified during the hearing, reviewing the exhibits submitted by the parties, considering the applicable factors listed above, and using his own common sense and experience, the administrative law judge finds the claimant and employer credible in certain respects and not credible in other respects as reflected in the findings of fact. The employer's testimony is weaker because it does not have eye witness testimony to the specific statement. Only claimant can provide that. That is why the administrative law judge finds the claimant's denial of the statement credible. At the same time, he does find the claimant's communication style to be coarse and perhaps generally suspect in the profession of caring for children with disabilities.

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

The administrative law judge does not find the claimant made the statement to the client on January 3, 2021. Since the claimant ultimately did not engage in the behavior she was accused of, she did not engage in disqualifying misconduct.

Iowa Admin. Code r. 871-24.32(5) provides:

(5) Trial period. A dismissal, because of being physically unable to do the work, being not capable of doing the work assigned, not meeting the employer's standards, or having been hired on a trial period of employment and not being able to do the work shall not be issues of misconduct.

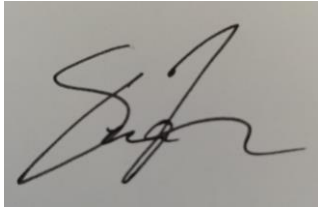
Discharge within a probationary period, without more, is not disqualifying. Failure in job performance due to inability or incapacity is not considered misconduct because the actions were not volitional. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979). Where an individual is discharged due to a failure in job performance, proof of that individual's ability to do the job is required to justify disqualification, rather than accepting the employer's subjective view. To do so is to impermissibly shift the burden of proof to the claimant. *Kelly v. Iowa Dep't of Job Serv.*, 386 N.W.2d 552 (Iowa Ct. App. 1986).

The administrative law judge does find her communication style to not be aligned to the profession, but these sorts of mere misunderstandings are the ones experienced during the hearing. He does think Mr. Raymer and Ms. Fischer made the flawed deductive leap that this misunderstanding prone communication style made the otherwise incredible allegation about her calling a child client "evil" and predicting "they would burn in hell" credible. To the extent the employer terminated her regarding this behavior; it is merely terminating her for isolated negligent behavior or for poor performance. Many well-meaning people lack the communication

style to meet the expectations of the employer's industry. Ultimately, it is the employer's burden to prove the claimant engaged in the conduct alleged and it did not meet that burden.

DECISION:

The March 23, 2021, (reference 03) unemployment insurance decision is reversed. The claimant was discharged from employment due to non-disqualifying conduct. Benefits are granted, provided she is otherwise eligible.

A handwritten signature in black ink on a light gray background. The signature is stylized and appears to read 'Sean M. Nelson'.

Sean M. Nelson
Administrative Law Judge
Unemployment Insurance Appeals Bureau
1000 East Grand Avenue
Des Moines, Iowa 50319-0209
Fax (515) 725-9067

July 28, 2021
Decision Dated and Mailed

smn/lj