

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

STEVEN C LOTMAN
Claimant

CHILDSERVE COMMUNITY OPTIONS INC
Employer

APPEAL 16A-UI-08553-JP-T
ADMINISTRATIVE LAW JUDGE
DECISION

OC: 07/10/16
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the August 3, 2016, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on August 24, 2016. Claimant participated. Employer participated through staff relations specialist Katelin Larson and service manager Emily Garcia.

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 day health assistant from August 20, 2010, and was separated from employment on July 11, 2016, when he was discharged.

Claimant was responsible for providing direct care to the employer's clients, children and young adults with physical and mental disabilities. Claimant would take the clients on trips during the day. Claimant had transported clients on trips prior to July 7, 2016.

The employer has a number of written work rules in the employee handbook. The work rules require employees to provide care or treatment to its clients. The work rules prohibit employees from neglecting a client. The work rules also prohibit any conduct that may negatively affect the reputation of the employer. The work rules prohibit employees from abandoning a client. Claimant was aware of the work rules. The employer also requires employees, including claimant, to contact 911 within two minutes of noticing a client is missing. Claimant was aware of this requirement.

On July 7, 2016, claimant was working his scheduled shift. Claimant and another staff member took seven clients on a trip to the State Capital. Around 3:00 p.m. claimant and the staff member decided to leave. Claimant and the staff member gathered the children. One client eloped (ran off) from the group. Clients eloping have happened before to claimant. Claimant spent a considerable amount of time gathering this client. Claimant finally got the client into the

mini-van after a lot of stress and anxiety. During this time, the other staff member had the other six clients. The staff member then transferred four other clients to claimant for transportation. Claimant was aware that the staff member transferred four clients to him; this gave claimant responsibility for a total of five clients for transportation. Claimant was driving a mini-van and the other staff member was driving a smaller vehicle. After securing four of the five clients in the mini-van, claimant forgot about the last client and he left with only four clients, instead of the five he was responsible for. Claimant left one client behind. Claimant did not do a headcount of clients inside the vehicle before he left. Approximately five minutes after claimant had left the State Capital, he noticed a client was missing. Claimant then turned the vehicle around to go back to the State Capital to get the client. Claimant did not contact the employer about the missing client. Claimant received a text message from the day habilitation coordinator on the way back to the State Capital. The day habilitation coordinator asked about claimant's estimated time of arrival. Claimant responded to the text message that he had left a client at the State Capital and he was going back to pick up the client.

When claimant arrived at the State Capital, he yelled and looked from the van, but did not find the client. Claimant parked the vehicle and told all four clients to stay in the van. Claimant then ran inside the building without the four clients and asked security about the client that was missing. Claimant then returned to the vehicle. The vehicle was only out of claimant's sight for twenty or thirty seconds. Clients are not supposed to be left alone. Claimant was aware the clients are not supposed to be left alone.

Claimant then drove to the law enforcement building instead of calling 911. When claimant arrived at the law enforcement building, he left the clients inside the van and went into the building. Claimant was away from the clients approximately forty to sixty seconds while talking to the dispatcher. After speaking with the dispatcher, he went to the van and waited for the law enforcement officer to arrive. After claimant spoke to the law enforcement officer, he drove around the State Capital area looking and yelling for the missing client. Ms. Garcia then told claimant to come back to the employer.

When claimant arrived back at the employer, he was put on administrative leave. The employer interviewed claimant on July 8, 2016. Claimant explained that because of the elopement, he was under high stress and anxiety and that contributed to the client being left. Since August 2015, claimant had not made a request for an accommodation or indicated that he needed an accommodation. The client that claimant left behind on July 7, 2016 had two prior incidents of elopement (running away). Claimant was aware of this client's history of elopement. Claimant was discharged on July 11, 2016.

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 employer is entitled to establish reasonable work rules and expect employees to abide by them. Workers in the dependent care profession, reasonably have a higher standard of care

required in the performance of their job duties. The employer provides direct care of the children and young adults with physical and mental disabilities. The employer requires that its clients not be left alone when they are out in the community.

On July 7, 2016, claimant was responsible for transporting five clients from the State Capital back to the employer. Prior to leaving the State Capital, claimant had accepted responsibility for all five of the clients he was transporting. Even though claimant had knowingly accepted responsibility for all five clients, he left the State Capital with only four clients. Claimant's argument that the client that he left behind had a past history of elopements is not persuasive. Claimant was aware of this client's history of elopements and thus was on notice that he needed to make sure that client did not elope prior to leaving.

It is also not persuasive that claimant was distracted after a different client had eloped when he was gathering the clients to leave and he had to chase down the client. The employer entrusted claimant with the responsibility of safeguarding its clients. There had been other incidents of clients eloping on claimant prior to July 7, 2016, thus, this elopement was not an unfamiliar situation for claimant. Claimant also had the ability to request help from the other staff member or contact the employer for help, but he did not request help.

Approximately five minutes after claimant left the State Capital, he noticed the client was missing. When claimant noticed the client was missing, he turned the vehicle around to go look for the client. Despite a known company rule, claimant never contacted the employer or 911 to report the client was missing. The only reason the employer was notified a client was missing was because the employer initiated communication with claimant.

Claimant's desire to return to the State Capital is reasonable, but once he arrived at the State Capital, he put the other four clients at risk when he left them alone in the vehicle on two separate occasions. Claimant's argument that on each occasion the clients were only alone for a short period of time is not persuasive. The clients rely on claimant for direct care and he had accepted responsibility for them.

The employer has presented substantial and credible evidence that claimant violated multiple work rules on July 7, 2016. The employer has a duty to protect the safety of its clients. Claimant's conduct of leaving the State Capital without one client and then leaving four clients alone on two separate occasions was contrary to the best interests of the employer and its clients. This is disqualifying misconduct even without prior warning. Benefits are denied.

DECISION:

The August 3, 2016, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

jp/pjs