

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JAMIE D STARR
Claimant

APPEAL NO: 10A-UI-10030-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

GOOD SAMARITAN SOCIETY INC
Employer

OC: 06/13/10

Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Jamie D. Starr (claimant) appealed a representative's July 14, 2010 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment with Good Samaritan Society, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on September 2, 2010. The claimant participated in the hearing. Billie Jo Gray appeared on the employer's behalf and presented testimony from one other witness, Tonna Twombly. One other witness, Sara Rupkalvis, was available on behalf of the employer but did not testify. During the hearing, Employer's Exhibit One was entered into evidence. Based on the evidence, the arguments of the parties, a review of the law, and assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on or about August 26, 2006. She worked full time as a licensed practical nurse (LPN) in the employer's Fontanelle, Iowa long-term care nursing facility. Her last day of work was June 15, 2010. The employer discharged her on that date. The reason asserted for the discharge was insubordination.

Prior to June 14, the claimant had been given a warning for attendance in April 2010, and also in April had been given a performance evaluation which included mention of concerns regarding the claimant needing to maintain a positive, non-confrontational attitude.

On June 14 the employer implemented a new procedure or philosophy regarding medication administration, designed to make the facility have a more home-like atmosphere. The claimant had some questions on how the new procedure would work, but was trying to work through the process. Toward the end of her shift that day she was passing medications to residents when Ms. Twombly, the director of nursing, instructed two aides to take over some of the medication

administration. This upset the claimant, as she felt she was doing fine without help and wanted to complete the passing herself so as to familiarize herself further with the new procedure. Ms. Twombly had given the instruction because she felt the two aides were standing around and not working. When the claimant objected, indicating that she did not need help, she was instructed to leave for the day, and was told that she needed to follow the instructions of her supervisor.

Toward the end of the claimant's shift on June 15 she spoke with the local pharmacist who filled the employer's orders. The pharmacist voiced concerns regarding some of the changes the employer was implementing as to the medication distribution schedule and indicated she felt that some of the practices were not legal. This caused the claimant significant concern. The administrator, Jen Jacobsen, came into the medication room at about 5:00 p.m., and the claimant shared with her the concerns the pharmacist had expressed, and added her own concerns regarding the risk of allowing diabetic residents to continue to sleep until they woke up on their own to check their blood sugars and receive their medications, rather than monitoring their blood sugar on a set schedule. The claimant expressed that this did not make sense to her, particularly in contrast with the new practice to awaken a resident to give them a stomach medication but allowing them to go back to sleep before giving other medications, when the other medications were to be given within a certain time of the stomach medications.

The claimant expressed her concerns emphatically, and at one point slapped one of her hands against the other hand to stress a point, but was not urging the entire new program was wrong, only that there were certain questions that should be looked at and addressed. However, when she expressed concern that she would not place the residents' health or her nursing license in jeopardy just to comply with the new procedure, Ms. Jacobsen told the claimant that she had "crossed the line," that she should turn in her keys and leave; it was approximately 5:15 p.m. at this point.

The claimant refused to leave, responding that she was the only nurse on the premises at the time, and it would be a violation of code and her license to leave the facility with no nurse on site. Ms. Jacobsen again told the claimant to go or she would call the police. Another nurse did then report to the facility, and the claimant said she would leave after she gave her report, but insisted that she be given her termination paperwork before she left. Ms. Jacobsen may not have initially intended to discharge the claimant when she told her to turn over the keys and leave, but she did not make any statements to clarify her intent when the claimant asked for the termination paperwork. Rather, she gave the claimant some paper and asked her to provide a voluntary quit statement. The claimant refused, indicating that she was not quitting, and would not leave until she was given her termination paperwork. Again Ms. Jacobsen did not clarify she was not discharging the claimant, but rather proceeded to prepare discharge paperwork.

By this time it was about 5:30 p.m., and Ms. Twombly arrived on the site in response to a call from Ms. Jacobsen. Ms. Jacobsen printed out and gave the claimant the discharge paperwork. There was additional conversation between the three of them before the claimant ultimately signed the paperwork and left.

REASONING AND CONCLUSIONS OF LAW:

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 § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct.

Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, 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 is misconduct that warrants denial of unemployment insurance benefits are two separate matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

The reason cited by the employer for discharging the claimant is insubordination in her conduct with the administrator on June 15. There is some initial question as to at what exact point the discharge occurred, whether it was when Ms. Jacobsen told the claimant she had "crossed the line" and needed to turn over her keys and leave, or whether it was at the point where Ms. Jacobsen prepared the discharge paperwork when the claimant refused to leave without another nurse on site and without having been given the paperwork, but it is clear that the termination decision had already been made before Ms. Twombly arrived on the site. Therefore, any concern regarding conduct by the claimant after Ms. Twombly arrived cannot be considered as part of a basis for finding misconduct on the part of the claimant; any concerns which arose from conduct subsequent to the decision to discharge the claimant were not the basis of the employer's decision to discharge the claimant and cannot be used to establish misconduct. Larson v. Employment Appeal Board, 474 N.W.2d 570 (Iowa 1991).

Based upon the evidence provided, the employer has not established by a preponderance of the evidence that the claimant's conduct in her discussion with Ms. Jacobsen was done with yelling or threatening demeanor, or any other overtly insubordinate behavior. Rather, during the conversation the claimant was merely expressing, sometimes emphatically, the depth of her concern regarding the residents' health and her professional responsibilities, as well as a bona fide concern regarding the legalities of the new procedures, reinforced by a similar concern on the part of the local pharmacist. While it may well be that the procedures ultimately were proper, the claimant's expression of a legitimate concern is not insubordination or misconduct; a licensed professional does have an independent obligation to ensure her conduct is in conformity with the law, rather than to unquestionably act lock-step in accordance with instructions she has some good faith belief are incorrect, particularly given the freshness of the new procedures.

Further, to the extent that the discharge decision was affected by the claimant's initial refusal to leave the premises when ordered, it was not misconduct for the claimant to refuse to leave

without another nurse being on the premises, as it is unrefuted that it would have been a violation of her professional license to leave the site with no other nurse on the premises. To the extent the discharge decision was based on the claimant's demand for discharge papers, where Ms. Jacobsen admittedly never told the claimant she had not intended it as a discharge when she told the claimant to leave and turn over her keys, the claimant reasonably believed she had already been discharged, and was it was not unreasonable for her to seek confirmatory paperwork before leaving.

While the employer may have had a good business reason for discharging the claimant, based upon the evidence provided the employer has not met its burden to show disqualifying misconduct. Cosper, supra. Benefits are allowed, if the claimant is otherwise eligible.

DECISION:

The representative's July 14, 2010 decision (reference 01) is reversed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs