

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BRENDA MOORE
Claimant

APPEAL NO: 10A-UI-11116-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OPTIMAE LIFESERVICES INC
Employer

OC: 05/09/10
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

Optimae Lifeservices, Inc. (employer) appealed an unemployment insurance decision dated July 30, 2010, reference 02, which held that Brenda Moore (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on September 27, 2010. The claimant participated in the hearing. The employer participated through Connie Dusek, Administrative Assistant and Tammy Hudson, Program Coordinator. Employer's Exhibits One through Eight 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 part-time community support staff from June 18, 2008 through July 6, 2010 when she was discharged. The employer provides services to clients with mental illness in order to assist them function in society. The claimant was discharged for repeatedly crossing boundaries with clients. She received a written warning on May 18, 2009 for talking with other staff members while billing a client. This occurred two times on May 14, 2009 and again on May 16, 2009. The claimant was coached on July 6, 2010 regarding boundaries after a client's apartment was broken into. The employer reminded the claimant during her yearly evaluation on July 29, 2009 not to share personal information with clients.

The employer placed the claimant on a Staff Development Plan on August 18, 2009 for three months. The issues addressed in this plan included the claimant not following the assigned schedule, picking up clients without supervisor approval, talking with staff while on a client's billable time, going to the staff cabinet/office without a client then billing that client, not informing the supervisor of pertinent information regarding a client and improper conduct when meeting

with a supervisor. The claimant's supervisor discussed boundaries with a customer during the monthly coaching on September 18, 2009.

The claimant received a written warning on January 29, 2010 for late paperwork. She was placed on another Staff Development Plan on April 29, 2010 which addressed boundary concerns. The claimant removed a stuffed animal from a client's apartment and another client had her personal phone number, which is prohibited. She attended training on boundaries on June 18, 2008; November 17, 2009; and on May 13, 2010. There was a follow-up discussion on May 18, 2010 with the claimant regarding the new boundaries she set with her clients.

The final incident occurred on July 6, 2010 when the claimant purportedly talked to another staff member in a discount store while the staff member was working. The staff member, who did not participate in the hearing, reported that she told the claimant twice that she was working. The claimant said the staff member was buying personal items so was not working. The client later told the employer she did not want the claimant to be her staff since she believed the claimant would share information about her.

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 had a history of violating necessary boundaries between herself and her clients. However, she denies violating any policies or crossing any boundaries on July 6, 2010. The employer can only offer hearsay evidence that she did violate policies on that day. The administrative law judge concludes that the hearsay evidence provided by the employer is not more persuasive than the claimant's denial of such conduct. The employer has not carried its burden of proof. Inasmuch as the employer has not established a current or final act of misconduct, benefits are allowed.

DECISION:

The unemployment insurance decision dated July 30, 2010, reference 02, is affirmed. The claimant was discharged. Misconduct has not been established. Benefits are allowed, provided the claimant is otherwise eligible.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/css