IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

AMY L PEYTON Claimant **CEDAR VALLEY HOSPICE INC** Employer	**APPEAL 15A-UI-14150-DL-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 11/22/15** **Claimant: Respondent (1)**

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

STATEMENT OF THE CASE:

The employer filed an appeal from the December 15, 2015, (reference 01) unemployment insurance decision that allowed benefits based upon a discharge from employment. The parties were properly notified about the hearing. A telephone hearing was held on January 14, 2016. Claimant participated with former clinical services manager for the Independence office, Connie Hansen. Employer participated through clinical services director, Stacy Weinke, and client services manager and supervisor, Nathan Schutt. Employer's Exhibits 1 through 3 were received.

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 hospice social worker for the Independence office from December 17, 2007, and was separated from employment on October 7, 2015, when she was discharged. Grief support services were also added to her job duties when the grief support counselor position was not active or filled. On February 12, 2015, Fox sent an e-mail to all RNs, social workers, home health aides and chaplains reminding employees that the company policy requires all clinical documentation be completed within 24 hours and outlined a new framework for implementing that policy. He explained that at the beginning of the month he would run a report for each employee's prior month's documentation. He further explained that if any staff member had more than ten percent incomplete within 24 hours, they would enter the disciplinary process with a counseling session, verbal, written, suspension and termination steps. (Employer's Exhibit 2) The ten percent compliance policy was not uniformly enforced while Hansen was employed through her voluntary separation in January 2015. At some point the company transitioned from paper to electronic charting. The Waterloo office had fewer staff to fill in for lunch breaks and absences than did other offices so claimant also had that responsibility. Hansen opined claimant tried her best to get and keep caught up with her documentation.

Claimant had a counseling session on September 11, 2009, about documentation being out of compliance. (Employer's Exhibit 1, p. 14) She had been warned in writing on January 3, 2014, about having 80 percent of her documentation submitted more than 24 hours after the service was provided. (Employer's Exhibit 1, pp. 9-11) She was suspended on February 12, 2015, the same day as the e-mail, for documentation 35 percent out of compliance. (Employer's Exhibit 1, p. 6) In a performance evaluation also the same, she failed to meet expectations for documentation compliance. (Employer's Exhibit 3, p. 1, parag. 3; p. 2, parag. 8, p. 5, Goal 2, p. 8, parag. 8, p. 10, New Goal 2) She did not hear anything further until Katie Unland told her on May 13, 2015, that her April report was 9.3 percent and to keep working at it. (Employer's Exhibit 1, p. 4) She had no feedback about her compliance performance between May 13, 2015, and the termination date. Fox had told her if she were not doing well, he would let her know. She was told to ask for help if she had trouble getting her reports done. When she did ask, often no one was available to help her get time in the office. The grief counselor was resigning and would not be able to take grief services back from claimant.

The employer discharged her upon the quality and compliance manager John Fox's report report for the month of September 2015, that she was 11 percent out-of-compliance. Claimant believed she had completed the assessments in a timely manner and suggested to the employer there may have been a computer error. The employer did not show claimant or submit the report with redacted details about how the 11 percent rate was calculated.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

When the record is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. *Schmitz v. Iowa Dep't Human Servs.*, 461 N.W.2d 603, 607 (Iowa Ct. App. 1990). Both the quality and the quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See, Iowa Code § 17A.14 (1). In making the evaluation, the fact-finder should conduct a common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be fulfilled. *Schmitz*, 461 N.W.2d at 608. The Iowa Supreme Court has ruled that if a party has the power to produce more explicit and direct evidence than it chooses to present, the administrative law judge may infer that evidence not presented would reveal deficiencies in the party's case. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976).

The decision in this case rests, at least in part, upon the credibility of the parties. The employer did not present a witness (Fox) with direct knowledge of the situation or a redacted copy of his report. Given the serious nature of the proceeding and the employer's allegations resulting in claimant's discharge from employment, the employer's nearly complete reliance on hearsay statements is unsettling. Mindful of the ruling in *Crosser*, *id.,* and noting that the claimant presented direct, first-hand testimony while the employer relied upon second-hand reports, the administrative law judge concludes that the claimant's recollection of the events is more credible than that of the employer.

Iowa Code § 96.5-2-a provides:

> An individual shall be disqualified for benefits:
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> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
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> 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.
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> 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).

Iowa Admin. Code r. 871-24.32(4) provides:

> (4) Report required. The claimant's statement and the employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

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. First, claimant disputed the report results and the employer did not show her the report or offer a copy at hearing or provide testimony from Fox, who compiled the report. Thus, the employer has not established a prima facie case of policy violation. Even if the report is accurate, claimant had other duties assigned and was not granted additional assistance, even when requested. This alone could account for the slight one percent variance from the standard, especially when considering the improvement she made since January and February 2015. Finally, Hansen's testimony was credible that the policy had not been uniformly enforced through her tenure there, ending in January 2015. Since Fox's policy implementation e-mail of February 12, 2015, coincided with claimant's suspension, which was the only discipline from then until her termination, it is clear that the progressive discipline did not restart for all employees at that point. The suspension the same day as the policy reminder hints as disparate application or enforcement of the policy that Hansen testified about. Training or general notice to staff about a policy is not considered a disciplinary warning. Finally, the employer did not provide monthly feedback as expected, making it difficult for claimant to gauge her progress or lack thereof. The employer has failed to establish conduct rising to the level of unemployment insurance benefit disqualification, even though it had the right to discharge for the one percent policy violation on its face.

DECISION:

The December 15, 2015, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

dml/pjs