IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

TAMMIE L LEFF
Claimant

SUNRISE MANOR
Employer

APPEAL NO. 06A-UI-09958-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 09/10/06 R: 01
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Sunrise Manor (employer) appealed a representative's October 3, 2006 decision (reference 01) that concluded Tammie L. Leff (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on October 25, 2006. The claimant participated in the hearing. Chris Shinkelberg appeared on the employer's behalf and presented testimony from one other witness, Julie Peterson. One other witness, Donna Baker, was available on behalf of the employer but did not testify. During the hearing, Employer's Exhibits One, Two and Three were entered 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:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on March 17, 2003. She worked full time as lead cook at the employer's long-term care nursing facility. In October 2005 the title of "roundsman" was added to her job description, with additional duties of generally supervising the dietary staff. In about October 2005 the employer embarked on a plan to transform the dietary program from simply offering a single entrée with no choices to a menu offering residents a variety of choices each day.

As part of the changeover, the claimant was supposed to receive instruction in how to parcook small batches of multiple entrées so that there could be menu choices without undue preparation delay. However, the person who was supposed to train her in these methods left prior to performing that training. Therefore, when the changeover was supposed to begin on or about June 14, 2006, the claimant was unprepared.

The employer began to have concern whether the claimant was able to perform the new duties of the job. A meeting was held on August 7 in which certain deficiencies were discussed, such as adequate supervision of staff, good food quality, and food presentation, and the employer advised the claimant that if there was not improvement within two weeks or the employer would have to make arrangements for someone else to take over the position. The claimant contacted the

consultant who was assisting the employer with the changeover, and that person attempted to instruct the claimant over the phone how to do the parcooking and batch cooking procedures. The claimant did not begin implementing those procedures at that time, however, as she wished to practice them before attempting to use them in full meal production. She had requested additional work time to do this practicing but was declined, as the dietary area was generally short-staffed at that time.

On August 30 the consultant visited the facility but did not meet with or provide further training to the claimant. Rather, the employer met with the consultant and a decision was made to replace the claimant. The employer determined not to inform the claimant of this decision until she returned from a period of vacation from September 7 through September 10, and thus did not inform her of the termination decision until her return on September 11. The employer could not identify a specific example of a performance failure that most immediately led to the decision on August 30 to discharge the claimant other than that she was not fulfilling the needs of the job and that she lacked the necessary experience and knowledge.

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).

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 focus of the definition of misconduct is on acts or omissions by a claimant that "rise to the level of being deliberate, intentional or culpable." Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer's interest, such as found in:
   a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
   b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:
   a. Manifest equal culpability, wrongful intent or evil design; or
   b. Show an intentional and substantial disregard of:
      1. The employer's interest, or
      2. The employee's duties and obligations to the employer.

Henry, supra. The reason cited by the employer for discharging the claimant is her failing to satisfactorily fulfill the employer's expectations of the job. The employer has not identified a current act of misconduct as required to establish work-connected misconduct. 871 IAC 24.32(8); Greene v. Employment Appeal Board, 426 N.W.2d 659 (Iowa App. 1988). Even the decision to discharge the claimant occurred almost two weeks prior to the employer's discharge of the claimant. Misconduct connotes volition. A failure in job performance is not misconduct unless it is intentional. Huntoon, supra. There is no evidence the claimant intentionally failed to perform the job to the best of her abilities. The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's October 3, 2006 decision (reference 01) is affirmed. 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.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

ld/kjw