IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ANISSA DEAY
Claimant

BRIGHT HORIZONS CHILDRENS
Employer

APPEAL NO: 14A-UI-05111-ET

ADMINISTRATIVE LAW JUDGE DECISION

OC: 04/27/14
Claimant: Appellant (2)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the May 15, 2014, reference 01, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on June 5 and continued July 1, 2014. The claimant participated in the hearing with Attorney Jacob Van Cleaf. Melanie Rivas, Director, and Carol Weidinger, Employer Representative, participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time educational coordinator for Bright Horizons from April 28, 1997 to April 28, 2014. She was discharged for failing to meet the employer's expectations.

On October 31, 2013 the employer held a first counseling session with the claimant and put the conversation in writing. It was concerned about the claimant's relationships with other employees and her work product; and because it was not seeing the work results it needed from the claimant's position, with regard to the classroom documentation boards and follow through and correction after classroom observations.

On February 21, 2014 the claimant received a written warning after a phone call with Director Melanie Rivas regarding a snowstorm situation. Ms. Rivas sent the claimant home early so she could open the next day because she lived closed to the center. The evening shift was unable to report for work due to the weather and Ms. Rivas stayed overnight at the facility. She called the claimant that night and asked if she could open instead of the claimant because she was going to be there anyway after spending the night. The claimant became very "agitated" and stated, "I'm tired of all these things. I can't believe you would do this." Ms. Rivas agreed to let the claimant come in and open but issued her a written warning because she

raised her voice and yelled at Ms. Rivas on the phone and was negative and resistant to making the change Ms. Rivas asked her to make. Later the claimant explained to Ms. Rivas she had a flat tire that night and consequently her family was down to one vehicle. She had arranged a ride early in the morning with her husband who was upset about having to change his routine and that was the reason she was reluctant to change the schedule after it was arranged she would open.

On February 27, 2014 Ms. Rivas placed the claimant on a 30-day action plan. During the 30-day period Ms. Rivas would counsel and mentor the claimant and help her work through the employer's expectations for her position, step by step, to insure the employer provided the claimant with every opportunity to be successful. The action plan listed the employer's expectations and Ms. Rivas met with the claimant every week to discuss the action plan and to check on whether the claimant had followed through with all of the items they discussed the week before.

On March 28, 2014 Ms. Rivas placed the claimant on an extension of the action plan for another 30 days because "she could not get a feeling of where (the claimant) was" in the process. Ms. Rivas noted the claimant was making a great effort and putting a great deal of time in to her work but Ms. Rivas could not see that the claimant was completing her job duties successfully. Ms. Rivas was also concerned because there were inconsistencies in what the claimant was telling Ms. Rivas was being done and what was actually being done.

On April 11, 2014 an employee approached Ms. Rivas and told her she was in the infant room and observed another employee change a baby's diaper without using gloves. During a weekly action plan meeting with the claimant April 17, 2014, Ms. Rivas asked the claimant if she had addressed the issue and the claimant stated she had not. Ms. Rivas told her to make sure she did so and also made the decision to follow up with the employees involved to ask if the claimant talked to them about the issue. On April 21, 2014 Ms. Rivas asked the teacher in the infant room if the claimant had talked to the employee in question or talked about the issue in a classroom meeting and when she learned the claimant had not done so, Ms. Rivas held a classroom meeting herself.

On April 22, 2014 Ms. Rivas gave the claimant a list of five inconsistencies she found between what the claimant was telling Ms. Rivas she addressed when other employees were stating she did not speak to them about the issues in question. The first issue was the use of infant gloves. The claimant stated she had talked to a different classroom in a meeting about gloves and Ms. Rivas indicated the claimant did not talk to the correct employees who experienced the issue. The second issue concerned the claimant being instructed to hold classroom meetings to ascertain the needs and issues of the classrooms and follow up on those items. On April 8, 2014 the claimant was two hours late for a classroom meeting because she was counseling a teacher who was crying and upset. When she eventually arrived she conducted a short meeting and stated she would return the following day but did not do so. The third issue concerned an incident that occurred April 9, 2014, when teachers in the Toddler Two room expressed concern that they would not be able to get all the children in to the basement during a tornado drill. The claimant told the teachers she would give them a "heads up" prior to the tornado drill. Ms. Rivas told the claimant she had to give the teachers all of the tools necessary and the claimant indicated she had talked to the cook about assisting the Toddler Twos during tornado drills but Ms. Rivas learned the claimant had not talked to the cook again after the teachers expressed concern. The fourth issue occurred during the April 3, 2014 Infant Three team meeting. When Ms. Rivas asked the claimant during their weekly meeting how the team meeting went, the claimant stated she was not present that day so the meeting was not held. Ms. Rivas asked the claimant if she let the class know and the claimant said they did not know

of the meeting ahead of time which was not true as the claimant listed it in the Monday memo. The fifth issue involved the teaching strategies gold developmental program for staff on the computer. There was a problem with one staff member failing to provide documentations for one child in particular and the claimant did follow-up with that staff member about completing that process and not trying to talk the parents out of a family conference. The staff member did not appreciate the claimant's comments as she thought the situation had been resolved. The fifth issue occurred when the claimant told Ms. Rivas she did not know if something had been taken care of when Ms. Rivas learned she was clearly aware it had not been handled.

Ms. Rivas talked to the legal department and human resources to discuss the steps she should take at the completion of the claimant's second 30-day action plan. They decided to get together again to talk about the situation after Ms. Rivas indicated she was "90 percent sure (the claimant) had proven she could not be successful in her role" as educational coordinator.

The proverbial last straw for the employer occurred April 24, 2014 when the claimant approached Ms. Rivas and told her she had not completed the slide show for the preschool graduation scheduled for May 2, 2014. The claimant was given that assignment three to four months earlier and did not leave Ms. Rivas enough time to get it done by someone else. The claimant stated it was not done because she did not have enough information from the classrooms and because she did not have the computer functions required to complete the project. Ms. Rivas told her if that was true she should have notified her much earlier but believed the claimant did not have the computer functions or knowledge to do it. The employer placed the claimant on administrative leave to give the claimant the opportunity to provide a response to the 30-day action plan and each issue and why she had not been successful. After reading the claimant's response, Ms. Rivas participated in a teleconference with her supervisor, legal department and human resources, and the decision was made to terminate the claimant's employment.

Ms. Rivas testified she found the claimant's performance inconsistent and did not believe the claimant was capable of performing her job duties. She did not find the claimant's actions intentional or willful.

REASONING AND CONCLUSIONS OF LAW:

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

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.
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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).

The employer has the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000). Misconduct connotes volition. A failure in job performance which results from inability or incapacity is not volitional and therefore not misconduct. Huntoon v. Iowa Department of Job Services, 275 N.W.2d 445 (Iowa 1979).

While the claimant tried to perform the duties of her position to the employer's expectations, she was not capable of doing so. The employer stated she worked hard and put in the hours necessary to be successful but simply did not have the ability to perform the job to the employer's expectations. Even though the employer has the right to discharge the claimant, and the termination may be justified, that does not necessarily mean the claimant is not eligible to receive unemployment insurance benefits. In the employer's estimation, the claimant's failure to meet the employer's expectation of her position was not willful or intentional. In order for a claimant's performance to be disqualifying job misconduct, the claimant must possess the ability to do the job and her actions must be considered intentional misconduct. Under these circumstances, the administrative law judge must conclude the employer has not met its burden of proving disqualifying job misconduct as that term is defined by Iowa law. Therefore, benefits must be allowed.

DECISION:

The May 15, 2014, reference 01, decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

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Julie Elder
Administrative Law Judge

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Decision Dated and Mailed

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