IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

CATHERINE A AKIN Claimant **COUNTRY VIEW MANOR INC** Employer	**APPEAL 14A-UI-13169-KCT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 11/23/14** **Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant filed an appeal from the December 12, 2014 (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on January 15, 2015 at 1:00 p.m. The claimant participated individually. The employer participated through Laura Preheim, Administrator, and Sara Strouth, Dietary Supervisor. No documents were admitted into evidence as exhibits at the hearing. The preferred documents were redundant to undisputed testimony and would not resolve the issues that are disputed by the parties.

ISSUE:

Whether the claimant was discharged for employment-related misconduct?

FINDINGS OF FACT:

The claimant worked as a full-time cook at the employer's care facility for elderly persons. On June 5, 2014 the claimant's supervisor removed her from cooking duties for the day. The claimant received counseling and a written warning from her supervisor Sara Strouth and facility administrator Laura Preheim. The supervisory staff told her that due to recent incidents involving her language, interactions with co-workers, attitude, and professionalism; she must change her behavior in those areas or she would be terminated at the next incident of such behavior. The claimant was also required to complete an online course regarding dealing with difficult people in a healthcare setting. She completed the online course in June 2014.

On November 23, 2014 the claimant prepared a meal at the facility. A certified nursing assistant (CNA), Christy Voss, approached the serving area and asked the claimant for a substitute food item for a resident. The resident did not want to eat the ham on her plate after it was served to her. The claimant expressed annoyance to Voss about the resident's request for a different entree. She asked Voss about the identity of the resident and indicated that she had experienced issues in the past with that resident changing her mind about food choices.

The claimant put the substitute meat entree on a plate in an abrupt manner, gave it to Voss, and indicated she would place the resident on a list of people with dietary restrictions. People in the dining room could hear the interaction. The CNA who witnessed the events of November 23, 2014 reported the events to supervisory staff on the next day that managerial staff-members were present. That employee did not testify and documents of any written statement from the CNA were not submitted.

Stroth and Preheim testified that the claimant used profanity and said she wanted to "kill" or "off" the resident. The claimant denied the assertion that she used profanity or said she wanted to "kill" or "off" the resident. She acknowledged being frustrated.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was not discharged from employment for a work-related 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). 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.

The claimant acknowledged that she was frustrated with a resident's repeated requests for dietary substitutions. In June 2014 Ms. Akin was advised that she need to change her conduct towards others and language in interpersonal interactions. She was told that she would not receive an additional opportunity to change her behavior. In the same month, and at the direction of management, she completed an online class to learn how to address issues with difficult people in healthcare settings.

The employer's supervisory staff Preheim and Strouth did not identify the profane words the claimant reportedly used and they were not present during the alleged incident. There is no direct testimony from anyone other than the claimant about her behavior at the serving counter. The employer provided no witnesses to testify to first-hand knowledge of the claimant's statements or behavior on the date at issue.

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:
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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, (4), (8), and (9) 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.
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> 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).
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> (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.
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> (8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.
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> (9) Suspension or disciplinary layoff. Whenever a claim is filed and the reason for the claimant's unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as discharged, and the issue of misconduct must be resolved. Alleged misconduct or dishonesty without corroboration is not sufficient to result in disqualification.

In reviewing past acts as influencing a current act of misconduct, the ALJ should look at the course of conduct in general, not whether each such past act would constitute disqualifying job misconduct in and of itself. *Attwood v. Iowa Dep't of Job Serv.*, No. _-__, (Iowa Ct. App. filed __, 1986).

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 assess points or impose discipline up to or including discharge for the incident under its policy.

The individuals with direct personal knowledge of the event in question were not called as witnesses by the employer. 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.

DECISION:

The December 12, 2014 (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

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Kristin A. Collinson
Administrative Law Judge

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Decision Dated and Mailed

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