IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

SHKURTE AJETI SEJDIU Claimant **GOOD SAMARITAN SOCIETY INC** Employer	**APPEAL 17A-UI-02518-JC-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 02/05/17** **Claimant: Respondent (1R)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the February 22, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on May 16, 2017. The claimant participated personally. The employer participated through Paula Clarke, director of clinical services. Holly Lantz Gushanas, director of nursing, also testified for the employer. KD Kalber, human resources, attended the hearing as an observer only. Employer Exhibits 1 (cd) through 5 were received into evidence, after a brief recess to allow the claimant to receive and review the proposed exhibits.

The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can any charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed part-time as a CNA beginning in 2014 and was separated from employment on February 3, 2017, when she was discharged for "harassment/bullying/insubordination" (Employer Exhibit 5).

The employer has a policy that categorizes offenses as group I, II or III. Group two offenses include insubordination and use of profanity (Employer Exhibit 2) and are subject to progressive discipline. Group III offenses include threats of violence and are subject to immediate discharge (Employer Exhibit 2). The claimant was made aware of the employer's policy at hire and

throughout employment (Employer Exhibit 3 and 4). The claimant had no prior warnings in her almost three years of employment.

The decision to discharge the claimant was made based on a single incident which occurred on January 31, 2017. The claimant's shift ended at 10:30 p.m. The claimant had gathered her coat in advance, and acknowledged other employees often do as well, in light of it not being a best practice. The claimant was confronted by two rounding CNAs who had discovered a soiled resident. The claimant asked the nurse on duty, Kersten, if she had to change the resident. She was advised to ask LaTonya Whitfield, who was the nurse in charge. The claimant asked Ms. Whitfield, who stated she did need to and threatened to write the claimant up if she did not. The claimant did not like that Ms. Whitfield had threatened to write her up over changing the resident, as she walked away, she gave a hand gesture (not middle finger) reflecting "whatever." Unhappy, she "threw down" her purse in a common area, and her jacket, as she went to tend to the resident.

Upon changing the resident, she confronted her peers, saying "you could have changed her." The claimant was mad that the CNA who had discovered the soiled resident had not simply changed her. The employer witnesses did not see the incident unfold but reviewed video footage of the claimant "pointing" at her peers. Ms. Whitfield told the claimant to go clock out. After clocking out, the claimant returned to the nurses' station to check the schedule for an upcoming meeting. Conflict ensued between Ms. Whitfield and the claimant, with both parties raising their voices.

The undisputed evidence is the Ms. Whitfield, who was in a supervisory role, said to the claimant, "get the fuck out", "you need to fucking leave" and "I don't fucking care." The claimant denied using profanity but admitted to yelling. The employer asserted the comment that triggered the claimant's discharge was a perceived threat in which the claimant said the words, "You're gonna get it." The claimant denied threatening Ms. Whitfield but acknowledged saying she would be reporting Ms. Whitfield to the DON/Paula for the way she was acting unprofessionally and that "she would get it" (as in trouble, after the claimant told on her). Neither Ms. Whitfield nor any first-hand witness who observed the altercation participated in the hearing. The claimant stated at no time did she get physically close to Ms. Whitfield, raise her hands, or make any gesture, stating she was six months pregnant at the time of the incident. (The claimant had her child on May 11, 2017.) Ms. Whitfield was disciplined but allowed to keep her employment, and the claimant was discharged.

The administrative record reflects that claimant has received unemployment benefits in the amount of $4,615.00, since filing a claim with an effective date of February 5, 2017. The administrative record also establishes that the employer did participate in the fact-finding interview on February 22, 2017 by way of Ms. Clarke, Ms. Kalber and Ms.Lantz-Gushanas.

REASONINGS 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.
>
> 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 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. 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." *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

This case rests on the credibility of the parties. It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*,

548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.*. In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id*. Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. It is true that "[t]he use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct, even in the case of isolated incidents or situations in which the target of abusive name-calling is not present when the vulgar statements are initially made." *Myers v. Emp't Appeal Bd.*, 462 N.W.2d 734 (Iowa Ct. App. 1990). However, the claimant's use of one instance of profanity, when not used in front of customers, accompanied by threats or in a confrontational manner does not rise to the level of misconduct. See *Nolan v. Emp't Appeal Bd.*, 797 N.W.2d 623 (Iowa Ct. App. 2011), distinguishing *Myers* (Mansfiled, J., dissenting) (finding the matter to be an issue of fact "entrusted to the agency.").

In this case, Ms. Whitfield retained her employment after profanity and yelling at the claimant, in light of being a member of management, and reasonably expected to abide by the employer's policies. The claimant denied profanity use, and yet the employer discharged the claimant, based on an alleged threat of "you're going to get it." It cannot be ignored that the claimant appeared to have been subject to disparate treatment, which does not support a finding of misconduct.

The administrative law judge recognizes an employer has a responsibility to protect the safety of its employees, from potentially unsafe, or violent conduct in the workplace, in an era where violence in the workplace is real. However, the employer has failed to establish by a preponderance of the evidence that the claimant made a threat of physical harm on January 31, 2017. 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).

In this case, the claimant denied making any physical threats but stated to Ms. Whitfield, (who was yelling at her and using profanity) that she would get (in trouble) after the claimant reported her conduct to the director of nursing. This is not the same as a threat of physical violence. Ms. Whitfield nor any first-hand witness to the confrontation leading to the claimant's discharge participated in the hearing, was any written statements of those individuals were offered. Given the serious nature of the proceeding and the employer's allegations resulting in the 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 solely 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 did not make a threat to Ms. Whitfield when she told her she would get in trouble once the claimant reported her unprofessional conduct from January 31, 2017.

At most, the claimant's conduct on January 31, 2017, was unprofessional and an isolated instance of poor communication. Inasmuch as the employer had not previously warned the claimant about the issue leading to the separation, it has not met the burden of proof to establish that the claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Training or general notice to staff about a policy is not considered a disciplinary warning. The employer has not met its burden of proof to establish a current or final act of misconduct, and, without such, the history of other incidents need not be examined. While the employer may have had good business reasons to discharge the claimant, misconduct under Iowa law has not been established.

Nothing in this decision should be interpreted as a condemnation of the employer's right to terminate the claimant for violating its policies and procedures. The employer had a right to follow its policies and procedures. The analysis of unemployment insurance eligibility, however, does not end there. This ruling simply holds that the employer did not meet its burden of proof to establish the claimant's conduct leading separation was misconduct under Iowa law.

Because the claimant is eligible for benefits, the issues of overpayment and relief of charges for the employer are moot.

DECISION:

The February 22, 2017 (reference 01) decision is **AFFIRMED**. The claimant was discharged for no disqualifying reason. Benefits are allowed provided she is otherwise eligible. The claimant has not been overpaid benefits. The employer is not relieved of charges associated with this claim.

REMAND: The issue of whether the claimant is able to and available for work beginning May 11, 2017, is remanded to Benefits Bureau for an initial investigation and decision.

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Jennifer L. Beckman
Administrative Law Judge

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Decision Dated and Mailed

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