

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**CARYL A LEYH**  
Claimant

**APPEAL 17A-UI-02362-JP-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**GOOD SAMARITAN SOCIETY INC**  
Employer

**OC: 01/22/17  
Claimant: Respondent (1)**

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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 March 27, 2017. Claimant participated. Attorney Jill Dillon participated on claimant's behalf. Employer participated through administrator Debra Vondersitt. Employer exhibit one and two were admitted into evidence with no objection. Official notice was taken of the administrative record of the fact-finding documents for purpose of the employer's participation, with no objection. Official notice was taken of the administrative record of claimant's benefit payment history, with no objection.

**ISSUES:**

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can 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: Claimant was employed full-time as a certified nursing assistant (CNA) from June 2, 2009, and was separated from employment on January 18, 2017, when she was discharged.

The employer has a written code of ethics that requires employees to treat all residents with respect and care. Under the employer's policy, a group three violation results in immediate termination. Under the policy, verbal abuse of a resident is considered a group three violation. Claimant was aware of the written code of ethics.

The employer provides its employees with two hours of dependent adult abuse training within six months of hire. Claimant successfully completed the employer's training. Every four years employees retake the dependent adult abuse training. Employees also have an annual online in-service training on dependent adult abuse.

On January 14, 2017, a resident (hereinafter "resident") made a complaint to the employer that the resident had witnessed claimant verbally abuse other residents, including the resident's roommate (hereinafter "roommate"), on multiple occasions. Employer Exhibit Two.

On January 14, 2017, claimant was working her scheduled shift. During claimant's shift, another CNA asked claimant to assist her with a lift of the roommate. Claimant needed to help the other CNA, because there are to be two people to help with the lift. The roommate was swearing and being uncooperative during the lift. The roommate called the other CNA a "son of a bitch". The roommate would also say other things. Claimant testified she did raise her voice with the roommate because she hoped the roommate would listen. Eventually the roommate did listen. After claimant finished helping the other CNA with the lift, she told the roommate that the other CNA and her were going to have to chart the roommate's behavior. After they got the roommate into a wheelchair, the roommate started to cry. The resident told claimant that claimant should have her behavior charted. Claimant then left because she was not assigned to that room. Claimant denied being "verbally abusive" to the roommate. Claimant denied being "verbally abusive", shaming, or chastising other residents. After this incident, claimant assisted with the resident on two more occasions on January 14, 2017 and there were no issues. After this incident, claimant also interacted with the other CNA on multiple occasions on January 14, 2017 and the other CNA did not say anything about claimant's early interaction with the roommate being inappropriate. Around 1:30 p.m., claimant met with Ms. Vondersitt. Ms. Vondersitt told claimant that someone had made a complaint. Claimant was not aware of who made the complaint. Claimant explained to Ms. Vondersitt her interaction with the roommate. Ms. Vondersitt then suspended claimant pending an investigation. Ms. Vondersitt then commenced an investigation for the employer, including interviewing the resident, the roommate, and other staff that were working on January 14, 2017. Ms. Vondersitt interviewed the roommate, but the roommate has cognitive difficulties and did not remember the incident. The resident and the other CNA did not testify during the appeal hearing.

On January 18, 2017, claimant met with Ms. Vondersitt. Employer Exhibit One. Ms. Vondersitt gave claimant a corrective action notice finding that she had violated the employer's code of ethics on January 14, 2017 and she was discharged. Employer Exhibit One. Claimant did not have any prior disciplinary warnings.

#### **REASONING AND CONCLUSIONS OF LAW:**

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

It is the duty of an administrative law judge and 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, as the finder of fact, 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. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). 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 evidence you believe; whether a

witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

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. This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. This administrative law judge reviewed the exhibits submitted. The employer did not present a witness with direct knowledge of the situation to testify. 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:

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.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 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. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. 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. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. 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 Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

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). If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. *Crosser v. Iowa Department of Public Safety*, 240 N.W.2d 682 (Iowa 1976). The employer had the power to present testimony but chose to provide a written statement of the resident instead. The statement does not carry as much weight as live testimony because the testimony is under oath and the witness can be questioned. It is noted that the employer did not present a written statement from the other CNA that was helping the roommate on January 14, 2017. Claimant denied being verbally abusive to the roommate and other residents.

The employer did not provide first-hand testimony at the hearing and, therefore, did not provide sufficient eye witness evidence of job-related misconduct to rebut the claimant's denial of said conduct. The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

As benefits are allowed, the issues of overpayment, repayment, and the chargeability of the employer's account are moot.

**DECISION:**

The February 22, 2017, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

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Jeremy Peterson  
Administrative Law Judge

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Decision Dated and Mailed

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