IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ROXANNE JOHNSON
Claimant

HEALTHY CONNECTIONS INC
Employer

APPEAL NO. 11A-UI-07857-L

ADMINISTRATIVE LAW JUDGE DECISION

OC: 02/27/11
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the June 6, 2011 (reference 01) decision that denied benefits. After due notice was issued, a hearing was held on July 13, 2011 in Des Moines, Iowa. Claimant participated. Employer participated through Assistant Executive Director Rachael Owens and was represented by Matthew Hemphill, Attorney at Law. Employer's Exhibits A through C were admitted to the record. Claimant's Exhibit 1 was admitted to the record.

ISSUE:

The issue is whether claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed as a full-time direct care provider (DCP) from August 1, 2010 through March 3, 2011 when she was discharged. At hire, claimant was untrained, uneducated, and inexperienced in consumer care techniques and issues. Executive Director Valerie Owens made the decision to discharge. During the week of February 21, 2011 DCP Olivia Tuttle reported that she had heard that claimant giving and ordering cold showers for a consumer who wet his pants or if he splashed in the bathtub. She did not say she witnessed it. Claimant did not order or give cold showers to consumers and did not have the authority to give directives to other employees. The employer called staff on February 23 and interviewed Tuttle, DCPs Sarah Harvey, Ethan Farrell, Michelle Wessell, and Austin Watson, and house manager Holly Snyder on February 24. No one could remember exact dates or times for allegations. Only Tuttle accused claimant of giving cold showers. Harvey reported the hearsay allegation. Farrell, Wessell, and Watson did not know about the shower issue but allegedly recalled that claimant required time outs for consumers rather than following the care plan guidelines. Claimant did not order others to or alter care plans herself. Owens and case managers told claimant time outs were appropriate for both consumers as an effective means to modify their behavior. The consumers are verbal and have cognitive skills but were not interviewed. Claimant was interviewed and suspended on February 24, 2011. She denied all allegations.

The employer did not take notes during the meeting. Former DCP Sandra Mullins alleged on March 1 that claimant and Snyder had told her to remove a consumer's shirt when he was eating so he did not get dirty and to remove his pants if he wiped his hands on his pants resulting in the consumer becoming cold. She did not remove a consumer's shirt or pants but observed Harvey do that. When interviewed, Snyder said nothing about the claimant and denied all allegations against her, but was discharged as well. Employer alleged that claimant had been warned about inappropriately restraining residents on September 25 and October 15, 2010. (Employer's Exhibits B and C) Employer did not give claimant the warning letters marked and admitted as Employer's Exhibits B and C but claimant acknowledged a verbal training reminder from her supervisor rather than a verbal or written warning from Executive Director Valerie Owens, who does not work on-site. (Employer's Exhibit B) There was no verbal or written warning on October 15, 2010 and the letter is curiously dated "10/15/11" with a handwritten correction to "10/15/10." Valerie Owens, Tuttle, Harvey, Farrell, Wessell, Watson, and Snyder did not participate in the hearing.

REASONING AND CONCLUSIONS OF LAW:

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

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 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." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). When the record is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. *Schmitz v. IDHS*, 461 N.W.2d 603, 607 (Iowa 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.

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, employer incurs potential liability for unemployment insurance benefits related to that separation. The conduct for which claimant was discharged was based entirely on hearsay allegations. The employer did not interview cognitively capable residents, provide testimony or sworn statements of purported witnesses or complainants, or present them as witnesses at hearing. The date credibility of Employer's Exhibit C is questionable, especially since the claimant recalls no such conversation and did not receive a copy of the letter. The claimant credibly and adequately rebutted the hearsay allegations that she did not order or give cold showers, did not order or give time outs contrary to consumer care plans, and did not order or remove a consumer's clothing while eating. Benefits are allowed.

DECISION:

The June 6, 2011 (reference 01) decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed. The benefits withheld shall be paid, provided the claimant is otherwise eligible.

_____
Dévon M. Lewis
Administrative Law Judge

_____
Decision Dated and Mailed

dml/css