

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

DEBORAH K SMITH
Claimant

GOOD SAMARITAN SOCIETY INC
Employer

APPEAL 16A-UI-07561-DB-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 06/12/16
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

The claimant/appellant filed an appeal from the July 5, 2016 (reference 01) unemployment insurance decision that disallowed benefits based upon claimant's discharge from employment for job-related misconduct. The parties were properly notified of the hearing. A telephone hearing was held on July 28, 2016. The claimant, Deborah K. Smith, participated personally. The employer, Good Samaritan Society Inc., participated through Dietary Supervisor Stephanie Hudson and Director of Culinary Services Deborah Hood. Employer's Exhibits 1 – 4 were admitted.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Did claimant voluntarily quit the employment with good cause attributable to employer?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a dietary aide from March 14, 2001 until June 16, 2016. Claimant's immediate supervisor was Ms. Hudson. This employer operates a nursing home and cares for elderly residents. Claimant's job duties consisted of cleaning and putting away dishes, serving food, and other general cleaning duties.

The employer has written policies and a code of ethics which states that the employer's highest priorities are the health and safety of the residents, clients and themselves. See Exhibit 4. The employer also has a progressive disciplinary policy wherein an employee receives a written counseling, a written warning, a final warning, and then termination. See Exhibit 4. Claimant received the employer's written policies. See Exhibit 3.

On October 13, 2015 claimant received a written counseling for not thoroughly inspecting dishes to ensure they were clean prior to storing them. See Exhibit 1. This written counseling stated that it was claimant's job duty to check all dishes after they have been washed to ensure cleanliness prior to storing. See Exhibit 1.

On February 17, 2016 claimant received a written warning for failing to properly organize the silverware and properly clean and sanitize the silverware. See Exhibit 1. Claimant was instructed that she needed to ensure that the silverware was properly cleaned prior to allowing it to be re-used. See Exhibit 1.

On February 19, 2016 claimant received a final warning for not cleaning and sanitizing the dining room tables before resetting them for meals. See Exhibit 1. Claimant was informed that this needed to be completed prior to resetting tables for meals. See Exhibit 1.

On March 31, 2016 claimant was put on a performance improvement plan. See Exhibit 2. Claimant was retrained on how to check for food debris on dishes prior to storing them away. See Exhibit 2.

On June 16, 2016 claimant was discharged from employment for putting away dishes that were not clean and were still wet. Claimant had not checked the dishes to ensure they were clean and sanitary when they came out of the dishwasher. They were put on the rack for drying and were not re-washed. Claimant was capable of performing her job tasks correctly as she had done so on several occasions.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged for job-related misconduct. Benefits are denied.

As a preliminary matter, I find that the Claimant did not quit. Claimant was discharged from employment.

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.

Iowa Admin. Code r.871-24.32(8) provides:

(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.

Further, 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). The focus of the administrative code definition of misconduct is on deliberate, intentional or culpable acts by the employee. *Id.* 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). Further, 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). 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 Bd.*, 616 N.W.2d 661 (Iowa 2000).

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.* After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the Administrative Law Judge finds that Ms. Hudson's testimony is more credible than claimant's version of events.

This was not one single act of misconduct. Prior to her discharge claimant had committed three sanitary violations and had been re-trained on how to inspect dishes for food debris prior to allowing them to dry. Claimant's job duties included following the necessary and required guidelines that were in place for sanitation and safety purposes. Claimant understood that she needed to follow these rules and she did so from time to time.

Even with this awareness claimant did not ensure that the dishes were clean and sanitary after the washing process. Claimant admitted that she did not check the dishes and assumed that they were clean when speaking to Ms. Hudson. Claimant's continued actions of failing to properly inspect the dishes after the washing process constitutes an intentional and substantial disregard of the employer's interest. Claimant's actions in knowing her job expectation to inspect the dishes and intentionally refusing to follow this process rises to the level of willful misconduct. Benefits are denied.

DECISION:

The July 5, 2016, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for job-related misconduct. Unemployment insurance benefits are withheld in regards to this employer until such time as claimant is deemed eligible.

Dawn Boucher
Administrative Law Judge

Decision Dated and Mailed

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