

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

ENRIQUE R HERNANDEZ
Claimant

PINNACLE HEALTH FACILITIES XVII L
Employer

APPEAL 19A-UI-08988-DB-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 10/13/19
Claimant: Respondent (1)**

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/appellant filed an appeal from the November 4, 2019 (reference 01) unemployment insurance decision that allowed unemployment insurance benefits to the claimant based upon his discharge from employment. The parties were properly notified of the hearing. A telephone hearing was held on December 10, 2019. The claimant, Enrique R. Hernandez, participated personally. The employer, Pinnacle Health Facilities XVII L, participated through witnesses Michelle LeGuerrier and Linda Petersen. The administrative law judge took administrative notice of the claimant's unemployment insurance benefits records including the fact-finding documents.

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: Claimant was employed full-time beginning on July 21, 2015 as charge nurse. Claimant's job duties involved caring for patients at the employer's nursing home. He was also responsible for supervision of staff. Ms. LeGuerrier was the claimant's immediate supervisor.

On October 4, 2019, an allegation of claimant harassing staff came to the attention of Ms. LeGuerrier. The employer has a written policy against harassment of co-workers. Ms. LeGuerrier interviewed two Certified Nursing Assistants ("CNAs") named Joselyn and Jo Ann, as well as a medication aide named John. The two CNAs reported that the claimant had asked them to write statements against another nurse named Tara on September 28, 2019.

On September 28, 2019, one of the CNAs had spoken with the claimant about her concerns regarding the state of a resident who appeared lethargic and unresponsive. Claimant attended to the patient and was told by both CNAs that the nurse for the patient, Tara, was aware of the situation but not doing anything about it. The patient needed further treatment at the hospital and was sent to the hospital. Claimant asked both CNAs to write down witness statements about the situation so he could give those statements to Ms. LeGuerrier, which they did. Claimant gave the statements to Ms. LeGuerrier.

During Ms. LeGuerrier's investigation into claimant collecting incident statements, it was reported to her by John that the claimant had harassed him by yelling at him. John reported that claimant said he was not getting his medications correct and was performing job duties outside the scope of his employment as a medication aide. Claimant had previously reported to Ms. LeGuerrier by text message that he believed John was performing duties that were considered nurse duties and not medication aide duties. Claimant had been told by Ms. LeGuerrier to report information to her if incidents occurred which warranted investigation. Ms. LeGuerrier conducted an investigation and later concluded that John was not performing duties outside the scope of his employment as a medication aide.

Jo Ann reported that the claimant yelled at her and called her a slacker. Claimant denied yelling at her but did admit to using a raised tone of voice. Claimant admitted that he called another co-worker named Rose a "slack" because she was failing to complete treatments for patients. The employer did not discharge claimant for comments made to Rose. Claimant had never been disciplined for any inappropriate comments or conduct towards co-workers or subordinates that he was responsible for supervising. Claimant never used any profanity or threats of violence towards any co-workers. Claimant was discharged on October 15, 2019 for harassment of co-workers.

Claimant has received \$481.00 in gross unemployment insurance benefits since filing his claim with an effective date of October 13, 2019. Ms. Petersen participated by telephone in the fact-finding interview by providing information to the interviewer that the claimant was discharged due to a violation of the employer's policy.

REASONING AND CONCLUSIONS OF LAW:

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

The administrative law judge finds 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.

The employer has the burden of proof in establishing disqualifying job-related 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).

Claimant's actions in asking two CNAs to write statements about an incident in order to give the statements to Ms. LeGuerrier is not considered misconduct. Claimant using a raised tone of voice towards a co-worker is not considered misconduct. There was no use of profane

language or threats of violence. If anything, claimant's actions were an isolated incident of poor judgment and claimant is guilty of no more than "good faith errors in judgment." 871 IAC 24.32(1)(a). Instances of poor judgment are not misconduct. *Richers v. Iowa Dept. of Job Services*, 479 N.W.2d 308 (Iowa 1991); *Kelly v. IDJS*, 386 N.W.2d 552, 555 (Iowa App. 1986).

Inasmuch as the employer had not previously warned claimant about the issues leading to the separation, it has not met the burden of proof to establish that 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. The employer has failed to establish any intentional and substantial disregard of the employer's interest which rises to the level of willful misconduct. As such, benefits are allowed, provided the claimant is otherwise eligible. The issue of overpayment is moot. The employer may be charged for benefits paid.

DECISION:

The November 4, 2019 (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. The employer's account may be charged for benefits paid.

Dawn Boucher
Administrative Law Judge

Decision Dated and Mailed

db/scn