

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JANE E KUBERSKI

Claimant

APPEAL NO. 13A-UI-01426-H2

**ADMINISTRATIVE LAW JUDGE
DECISION**

GOOD SAMARITAN SOCIETY INC

Employer

OC: 01-/06/13

Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the February 4, 2013, reference 01, decision that denied benefits. After due notice was issued, an in-person hearing was held on March 27 and April 8, 2013 at Ottumwa, Iowa. The claimant did participate and was represented by Ashley M. Leyda, Attorney at Law. The employer did participate through Anne Reese, Administrator. Claimant's Exhibits 6, 11, 13, 15, 16, 17, 25 and 30 were entered and received into the record.

ISSUE:

Was the claimant discharged due to job-connected misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed at Good Samaritan Society as the Director of Social Services full time beginning in 2003 through January 7, 2013 when she was discharged. The claimant was discharged in large part based upon a report issued by a consultant (Gail Dierks) and the director of nursing personally dislike of her. As the director of social services the claimant had voluminous job duties to accomplish; including tours, admission paperwork, discharge planning and one-on-one meetings and minimum data sets that assured the employer received federal funds for services provided. The claimant had an exemplary work history prior to late 2012. The facility hired a new director, Ms. Reese in late 2012. Ms. Reese instituted some changes. All of the employees, including the claimant were 'on board' with the changes made by Ms. Reese to address what she thought were problems that needed to be remedied. The previous administrator indicated the claimant was an exemplary employee. The business manager provided credible information to the employer in October 2012 long before the claimant was discharged indicating that both the director of nursing and the consultant were bullying the claimant in an apparent attempt to have her discharged. Ms. Reese ceded her authority while she was away on her honeymoon to the consultant and to the director of nursing. When she returned from her vacation Ms. Reese did not perform an independent evaluation of the consultant's report, she merely followed the biased recommendation that the claimant be suspended then discharged. The claimant was admittedly less organized than she should have been, but had always managed to accomplish her tasks. The evidence establishes that the

claimant was over-worked and was increasingly asked to perform more and more tasks in a shorter period of time. The claimant performed the tasks to the best of her ability. The employer had sent the claimant to shadow another social worker at another facility they owned for a few days. The other social worker employee thought the claimant had more to do than she did and the claimant was doing all that the other social worker was expected to do plus some. The warning given to the claimant in October 2012 is specifically referenced by the business manager as a bullying event by the consultant and the director of nursing. The claimant was never given an opportunity to explain to the administrator her side of the story prior to the discharge. The administrative law judge is persuaded that both the consultant and the director of nursing each wanted the claimant discharged for personal reasons, not really due to her job performance and used the employer's absence from the facility to accomplish their goals. Ms. Reese accepted a biased report without even offering the claimant the opportunity to refute the contents.

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 § 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.

Failure in job performance due to inability or incapacity is not considered misconduct because the actions were not volitional. *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445,

448 (Iowa 1979). Where an individual is discharged due to a failure in job performance, proof of that individual's ability to do the job is required to justify disqualification, rather than accepting the employer's subjective view. To do so is to impermissibly shift the burden of proof to the claimant. *Kelly v. IDJS*, 386 N.W.2d 552 (Iowa App. 1986). The claimant was able to meet the employer's expectations after a new administrator was hired. The a new director of nursing and an outside consultant clearly engaged in bullying of the claimant in order to get her discharged. The employer's own employee who was witness to their conduct labeled it as offensive. Under these circumstances the administrative law judge cannot conclude that the employer has established intentional misconduct, as is the employer's burden of proof. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). Accordingly, no disqualification pursuant to Iowa Code § 96.5(2)a is imposed. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The February 4, 2013 (reference 01) decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/css