

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

SAMANTHA J SCHARES
Claimant

APPEAL 17A-UI-01949-NM-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

ALLEN MEMORIAL HOSPITAL
Employer

**OC: 01/15/17
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the February 13, 2017, (reference 02) unemployment insurance decision that denied benefits based upon her discharge for violation of a known company rule. The parties were properly notified of the hearing. A telephone hearing was held on March 14, 2017. The claimant participated and testified. The employer participated through its attorney Kami Petitgoue and witnesses Steve Seesterhann and Kim Lodge. Employer's Exhibits 1 through 8 were received into evidence.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a registered nurse from March 28, 2016, until this employment ended on September 27, 2016, when she was discharged.

On September 18, 2016, claimant was observed to be violating several of the employer's policies. According to Seesterhann claimant left the building without notifying a supervisor or clocking out, and got into her car, which she parked in the visitor parking lot. Leaving the building without notifying a supervisor, parking outside employee designated lots, and failing to clock out for off-campus breaks are all violations of the employer's policies. Seesterhann testified claimant was trained on all of these policies upon hire. (Exhibit 8). Seesterhann went on to explain that any time an employee is leaving the premises, even for a break, they need to notify a supervisor in case there is an emergency. He also explained that employees are expected to clock in and out for time off the premises, though they are not required to do this for breaks on the premises. If there is something that the employee needs corrected on their time sheet, such as a missed punch, they are to notify their supervisor.

Lodge testified that on July 13 and August 9 and 19 she spoke to claimant about the proper procedures for taking an off-premises break. Lodge testified she warned claimant each time

that if she continued to violate the employer's policies regarding leaving the building she would be terminated, though this is not reflected in any of her notes. (Exhibits 5 and 6). According to Lodge's notes, on July 13, it was discovered that claimant was on a break off-premise and did not clock out. Lodge testified she spoke to claimant about this and advised her that further violations would result in termination, though neither is reflected in her notes. Lodge also testified that she warned claimant about parking in the appropriate lot on August 19 and advised her that further violations would lead to termination, though this warning is not reflected in her notes. Claimant denies she was ever warned her job was in jeopardy.

On September 18, 2016, claimant left the hospital and got into her car. Claimant drove around the hospital premises and onto neighboring roads that were off-premise. Claimant also parked for a short while in the visitor parking lot. Claimant explained she was doing this because she is a smoker and smoking is not allowed on hospital premises. Claimant testified she told her nurse supervisor that she was going to go smoke before leaving. Claimant did not clock out and testified this was because she forgot. Upon returning from her break, claimant was immediately approached by a supervisor and told she was being suspended pending an investigation on an unrelated matter. Claimant did not realize until later that she had not clocked out for her break.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

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). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

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. A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

The decision in this case rests, at least in part, on the credibility of the witnesses. 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.*

Lodge testified she warned claimant that her job was in jeopardy after coaching her on various dates regarding issues related to breaks and parking. Claimant denied she was ever told her job was in jeopardy. After assessing the credibility of the witnesses who testified during the hearing, reviewing the exhibits submitted by the parties, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the claimant's version of events to be more credible than the Lodge's recollection of those events. Two of the employer's exhibits are notes from Lodge about various policy violations committed by the claimant. Both documents contain information about the dates and nature of the policy violations, as well as Lodge's conversations with claimant. None of the documents make any notation of claimant being warned her job was in jeopardy.

The employer has not furnished sufficient evidence to show claimant deliberately chose not to clock out for her break on September 18. At best, the claimant was careless in forgetting to clock out, something she had only been spoken to about once before. The conduct for which claimant was discharged was merely an isolated incident of poor judgment. Claimant was careless, but the carelessness does not indicate "such degree of recurrence as to manifest

equal culpability, wrongful intent or evil design” such that it could accurately be called misconduct. Iowa Admin. Code r. 871-24.32(1)(a); *Greenwell v. Emp’t Appeal Bd.*, No. 15-0154 (Iowa Ct. App. Mar. 23, 2016). 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. Training or general notice to staff about a policy is not considered a disciplinary warning. The employer has provided insufficient evidence that claimant was put on notice that future problems with following the break procedure or parking could lead to separation. Inasmuch as employer had not previously warned claimant that the issues could lead to 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.

DECISION:

The February 13, 2017, (reference 02) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

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