IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

KAREN S HAMILTON-LOHNER
Claimant

CARE INITIATIVES
Employer

APPEAL NO. 07A-UI-06834-LT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 06/10/07 R: 02
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the July 2, 2007, reference 01, decision that denied benefits. After due notice was issued, a telephone conference hearing was held on July 30, 2007. Claimant participated. Employer participated through Annissa Tyner, Karen Daniel, Lindsey Boertje, and Shawn Mikles, and was represented by Alice Smolsky of Johnson & Associates. Employer's Exhibits 1 through 4 were received. Claimant's Exhibit A was received.

ISSUE:

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

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant was employed as a full-time LPN from October 23, 2002 until June 5, 2007, when she was discharged. On June 3 witnesses (Lindsey Boertje and Annissa Tyner) believed claimant to be sleeping on the job for approximately 20 minutes during a church service (eyes closed, head to the side, arms crossed, feet on the floor). Neither approached claimant. She was not doing nursing duties, since she had work-related bilateral carpal tunnel syndrome surgery on May 3, but she was at the desk answering the phone as assigned according to light duty work restrictions. Her shifts were changed recently so that she worked both day and night shifts during the same week. She was not feeling well (neck and back pain) and had her eyes closed during the prayer portions of the service only. Carla Mahaffey was also sitting at the desk with claimant with her feet on the desk and eyes open and reported to employer that claimant was not sleeping (Claimant's Exhibit A). Dusty Gardner declined to write a statement for employer.

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.

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). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Employment Appeal Board*, 423 N.W.2d 211 (Iowa App. 1988).

An employer may discharge an employee for any number of reasons or no reason at all, with or without warning, 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. Given the employer witness' failure to approach claimant, Mahaffey's statement disputing employer's allegation and hearsay representation of her observation, and another witness' refusal to give a written statement, claimant's recollection of the incident is more credible than that of employer. Employer has not established that claimant was actually sleeping, as opposed to closing her

eyes during the church service prayers. Even if claimant were actually sleeping, the conduct would be considered merely an isolated incident of poor judgment; and inasmuch as employer had not previously warned claimant about any of the issues leading to the separation, it would not have met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. The claimant was entitled to fair warning that the employer was no longer going to tolerate her performance and conduct. Without fair warning, the claimant had no way of knowing that there were changes she needed to make 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. Benefits are allowed.

DECISION:

The July 2, 2007, reference 01, decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

dml/kjw