

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

SARAH FRITZ
Claimant

APPEAL NO. 18A-UI-11718-S1-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARE INITIATIVES
Employer

OC: 10/28/18
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

Care Initiatives (employer) appealed a representative's November 30, 2018, decision (reference 01) that concluded Sarah Fritz (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for December 19, 2018. The claimant did not provide a telephone number for the hearing and, therefore, did not participate. The employer was represented by Lucie Hengen-Reed, Hearings Representative, and participated by Heather Michalec, Human Resources Coordinator; Melissa Schwierjohann, Director of Nursing; and Amanda Rivera, Unemployment Insurance Consultant. Exhibit D-1 was received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on May 14, 2018, as a full-time registered nurse. The claimant signed for receipt of the employer's handbook on May 14, 2018. The handbook lists Critical/Type A Violations and states, "Substantiated violations will result in termination for the first occurrence." One Critical/Type A Violation is "[i]nsubordinate acts or statements or willful failure to carry out orders."

On August 1, 2018, the claimant signed a document regarding not completing treatments and assessments. The document did not warn her of further action for noncompliance.

On August 25, 2018, the claimant was working a shift when Assistant Director of Nursing (ADON) Linda Norman called her. The ADON asked the claimant to move from Station Four to Station Three. The claimant told the ADON she did not feel as comfortable at Station Three. The claimant was told it did not matter and she should work at Station Three. Station Three had more residents and the residents were there for a longer period. Station Four served fewer residents who were at the facility for a short time before returning home.

After concluding the call with the ADON, the claimant's co-worker said she would take the claimant's spot at Station Three. The claimant was behind on her paperwork and agreed to the swap. The co-worker was a contract licensed practical nurse (LPN) who was assigned to work at Station Four by the ADON. (Contract employees must also follow the handbook rules.) The exchange of locations caused no harm to the employer. The employer did not warn the claimant she would be terminated if she did not work at Station Three.

On August 27, 2018, the employer investigated the claimant, the LPN, and the ADON. On August 28, 2018, the employer terminated the claimant. The LPN continued to work for the employer when work was available.

The claimant filed for unemployment insurance benefits with an effective date of October 28, 2018. The employer participated personally at the fact finding interview on November 28, 2018, by Amanda Rivera, a representative for Talx.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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 misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. *Crosser v. Iowa Department of Public Safety*, 240 N.W.2d 682 (Iowa 1976). The employer had the power to present testimony but chose not to do so. The only eye-witness statement is the one given by the claimant to the fact-finder. The employer did not provide first-hand testimony at the hearing to rebut the claimant's denial of intent in her statement. This appears to be a good faith error in judgment.

In addition, the employer treated two employees with the same error in judgment differently. There was disparate treatment between employees and the employer selected the claimant for discharge. The employer did not provide sufficient evidence of job-related misconduct. It did not meet its burden of proof to show misconduct. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The representative's November 30, 2018, decision (reference 01) is affirmed. The employer has not met its burden of proof to establish job-related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/rvs