IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

DONALD R SCHNEIDER
Claimant

FINLEY HOSPITAL
Employer

APPEAL 15A-UI-03965-KC-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 03/08/15
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the March 23, 2015 (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on May 8, 2015. The claimant participated. The employer participated through Karla Waldbillig, Human Resources Director. Exhibits A and B were received into evidence.

ISSUE:

Was the claimant discharged for work-related, disqualifying misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed 32 hours per week as a floor finisher in the environmental services department beginning on December 2, 2003 and was separated from employment on March 4, 2015; when his employment was terminated.

On February 15, 2015, the claimant was admitted to the employer's hospital with chest pains and was diagnosed with bronchitis. He was released from work by the examining physician's assistant for two days. He returned to work on February 16, 2015, even though he felt unable to work because he had previously received a written warning for unexcused absences. He was unable to work more than approximately two and one-half hours on that date. Environmental Services Manager Steve Smith permitted him to leave early.

On Friday, February 20, 2015, the claimant requested assistance from the lead cleaning staff-person, Mrs. Otting, because he felt sick and light-headed. Smith previously told cleaning staff to help each other if that was possible without affecting the other workers' productivity. The practice was to call the lead staff-person if assistance was needed. Mrs. Otting told the claimant to sit down for a few minutes while she and another employee cleaned the room. A video recording was made of the claimant in a hospital room, usually reserved for sleep studies, which he was charged with cleaning. The video recording showed the claimant performing some cleaning activities and then being assisted by other cleaning staff as he rested

for approximately 7 minutes. The rest period he took was not during his scheduled break. Otting and another hospital employee cleaned the room. Waldbillig indicated the video showed the room was not completely cleaned. Waldbillig did not watch the video of the room for the claimant's entire shift on that date. The claimant testified the room was cleaned.

On February 24, 2015, Smith called the claimant into his office and told him that he was aware the claimant and two co-workers had been in the sleep study room. The claimant agreed. Smith did not permit him to explain what had occurred. Smith asked the claimant no questions about cleaning that particular room and dismissed him from the meeting.

Smith and Waldbillig met with the claimant on March 4, 2015 and informed him that they had a video recording that showed the statements he made to Smith about his work activities in one room on February 20, 2015 were inaccurate. Smith and Waldbillig discharged the claimant because they found him to be dishonest. The claimant had not provided a statement about the cleaning performed in the sleep lab on the date in question. Nobody completed an in-person check of the sleep lab to see if it had been appropriately cleaned on February 20, 2015.

Before March 4, 2015, the claimant received no warnings that his job was in jeopardy due to taking a break or the quality of his cleaning. In December 2014, he had been warned about attendance issues.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

The Iowa Supreme Court has ruled that if a party has the power to produce more explicit and direct evidence than it chooses to present, the administrative law judge may infer that evidence not presented would reveal deficiencies in the party's case. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976). In this case, the employer chose not to present the claimant's direct supervisor to provide testimony or the video which purportedly demonstrates the claimant did not clean the room completely.

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:
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> 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, (4), and (8) provide:

> Discharge for misconduct.
>
> (1) Definition.
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> 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.
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> 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).
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> (4) Report required. The claimant's statement and the 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.
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> (8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

Twelve days elapsed from the date the claimant and other cleaning staff cleaned a sleep lab until the date the employer terminated the claimant's employment. During that period, the claimant was not told his job was in jeopardy and he did not have an opportunity to explain his conduct. Thereafter, he was accused of lying about the room being cleaned; one of the bases for termination. The employer provided no proof or eye-witness testimony that the room was not cleaned. The related assertion that he lied about cleaning the room is not supported. Consequently, the claimant's testimony is found to be more credible than that of the employer's witness.

Failure in job performance due to inability or incapacity is not considered misconduct because the actions were not volitional. *Huntoon v. Iowa Dep't of Job Serv*., 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. Iowa Dep't of Job Serv*., 386 N.W.2d 552 (Iowa Ct. App. 1986). The claimant's temporary inability to complete the required cleaning tasks without assistance arose from a medical condition.

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.

Training or general notice to staff about a policy is not considered a disciplinary warning. The employer's warning regarding attendance is not similar to the reasons for which his employment was terminated.

Inasmuch as the employer had not previously warned the claimant about the issue leading to the separation, it has not met the burden of proof to establish that the 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. Benefits are allowed.

DECISION:

The March 23, 2015 (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible.

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Kristin A. Collinson
Administrative Law Judge

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Decision Dated and Mailed

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