IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

GINA M SIMON Claimant **DAC INC** Employer	**APPEAL 15A-UI-07766-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 06/14/15** **Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the July 1, 2015, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on August 4, 2015. Claimant participated. Employer participated through Human Resources Generalist Maggy Muhlhausen and Regional Director Brian Wallace. Employer Exhibits One through Four were admitted into evidence without objection.

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 direct support professional from December 16, 2013, and was separated from employment on June 18, 2015, when she was discharged.

Claimant started working as a direct support professional. As a direct support professional, claimant would provide support and daily living skills to the employer's consumers. The consumers relied on the direct support professionals for some of their basic needs. On June 16, 2014, claimant was promoted to team lead. As a team lead, claimant gained additional responsibilities. On September 11, 2014, claimant received a written warning for job performance. Claimant was struggling with documentation and leading her staff. Claimant was not told that her job was in jeopardy. On September 30, 2014, claimant was demoted from team lead back to a direct support professional. Claimant continued to work for the employer after the demotion.

On October 6, 2014, there was a record of discussion between claimant and her supervisor about her job duties. Claimant was exhibiting poor work and not following the chain of command. Ms. Muhlhausen also testified claimant was upset with her demotion. The employer considered the record of discussion a verbal warning. On October 16, 2014, claimant was given a final notice of employment for job performance. Employer Exhibit Four. The employer also suspended claimant, unpaid, for three days. Claimant was told her job was in jeopardy and the

next violation would result in termination. On May 26, 2015, claimant and her supervisor had a meeting regarding claimant's job duties and what it means to be a direct support professional. The meeting was because of claimant's overall poor job performance. On June 1, 2015, claimant's supervisor job shadowed claimant. This gave claimant's supervisor the opportunity to provide claimant with additional training.

On June 13, 2015, claimant was outside in a vehicle with three consumers. Consumer A needed a wheelchair to get from the vehicle into the house. Consumer B did not need any assistance to get into the house. Consumer C needed a walker to get around. Claimant got out of the vehicle and started getting consumer C's walker ready. Consumer A wanted to go inside the house. Claimant told consumer A not to try to go up the ramp without assistance from the staff. Consumer A ignored claimant and tried to get up the ramp by himself, but fell out of his wheelchair. Claimant went over and checked on consumer A to see if he was ok. Consumer B went into the house and got a chair to help transition consumer A back into the wheelchair. Claimant tried to assist consumer A into the wheelchair, but consumer A wanted consumer B to help him get into the wheelchair. Claimant gave instructions to consumer A and B on how to get into the chair and then into the wheelchair. Claimant assisted the transition by holding the wheelchair in place. Consumer B gave consumer A his arms to guide him. This was not proper procedure; consumers are supposed to try on their own or have staff assist with lifting. Claimant testified that consumer A was refusing staff assistance. Claimant knew it is a safety risk to have a consumer help another consumer in lifting. Ms. Muhlhausen testified that claimant received lifting training in January 2014 and December 2014. During lifting training, employees are taught not to let a consumer assist another consumer with lifting. They are also taught that the procedure for a direct support professional is to help the consumer or if they refuse the help to contact the on call person. Claimant did not call the on call person to address consumer A's refusal of her help. Once they got inside, claimant checked consumer A more thoroughly; consumer A did not need to leave the house for medical treatment. Claimant reported the incident right away and did an incident report per the employer's procedure.

On June 15, 2015, Mr. Wallace, claimant, and her supervisor met to discuss what happened on June 13, 2015. Mr. Wallace did not think claimant was giving direct answers to some of his questions. Claimant was placed on unpaid suspension until the investigation was completed. On June 18, 2015, Mr. Wallace, claimant, and her supervisor met again to discuss the investigation. Mr. Wallace testified he did not think claimant was cooperating with the investigation. Mr. Wallace testified claimant danced around the issue of whether she helped consumer A back into the wheelchair. At this time, claimant was discharged.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct. Benefits are denied.

Iowa Code § 96.5(2)a provides:

> An individual shall be disqualified for benefits:
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> 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 provides:

> 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.

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).

Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). 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). Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.,* 391 N.W.2d 731 (Iowa Ct. App. 1986).

The decision in this case rests, at least in part, upon the credibility of the parties. It is the duty of an administrative law judge and 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, as the finder of fact, 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. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). 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 evidence you believe; 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. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. This administrative law judge reviewed the exhibits submitted. This administrative law judge finds the employer's version of events to be more credible than claimant's recollection of those events.

Workers in the medical or dependent care profession, reasonably have a higher standard of care required in the performance of their job duties. That duty is evident by the reliance of the people they serve on the direct support professionals for their basic needs. Although claimant did not need a special license to be a direct support professional, she was responsible for some of the basic needs of her consumers. Prior to September 2014, claimant had successfully worked as a direct support professional, as evident by her promotion to team lead. However, she received a written warning for poor job performance on September 11, 2014 and was subsequently demoted back to direct support professional on September 30, 2014. Claimant received a verbal warning for poor performance on October 6, 2014. Then on October 16, 2014, claimant received a final notice of employment and a three day unpaid suspension for poor job performance, putting claimant on notice her job was in jeopardy. Employer Exhibit Four. Claimant did not receive any more warnings until the incident on June 13, 2015. Claimant's argument that there was no misconduct because consumer A did not want her help, but instead wanted consumer B to help him into his wheelchair is not persuasive. Claimant knew that it is a safety risk to have a consumer help another consumer with lifting. Claimant's job was to provide for some of the basic needs of these consumers, including protecting them from bad decisions. Claimant had received multiple trainings in the past two years on the procedures for lifting a consumer. The employer has a duty to protect the safety of its consumers. Claimant willfully ignored the procedures and allowed consumer B to help consumer A back into his wheelchair. It is also not persuasive that claimant was present and given them directions. This would be misconduct without a prior warning.

Claimant's repeated failure to accurately perform her job duties after having been warned and ignoring her lifting training is evidence of negligence or carelessness to such a degree of recurrence as to rise to the level of disqualifying job-related misconduct. See Iowa Admin. Code r. 871-24.32(1)a. Benefits are denied.

DECISION:

The July 1, 2015, (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

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Jeremy Peterson
Administrative Law Judge

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Decision Dated and Mailed

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