IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

JENNIFER J SWEARINGEN
Claimant

GOOD SAMARITAN SOCIETY INC
Employer

APPEAL NO: 19A-UI-03982-JC-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 04/21/19
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

The claimant, Jennifer J. Swearingen, filed an appeal from the May 8, 2019, (reference 01) unemployment insurance decision that denied benefits based upon the claimant's separation from this employer. A first hearing was scheduled but not conducted on June 10, 2019. The hearing was continued to allow the claimant to receive and review the employer's proposed exhibits. The parties were properly notified about the hearing. A telephone hearing was held on June 19, 2019. The claimant participated personally. The employer, Good Samaritan Society Inc. participated through Jacqueline Jones, hearing representative with Equifax/Talx UCM Services. Monique Holland, HR Coordinator, testified.

The administrative law judge took official notice of the administrative records including the fact-finding documents. Employer Exhibits 1-6 and Claimant Exhibit A were admitted into evidence. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

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: The claimant was employed full-time as a Certified Nursing Assistant (CNA) and was separated from employment on April 8, 2019, when she was discharged for having two no call/no shows in a twelve month period.

When the claimant was hired, she was trained on the employer's policies, including its attendance and notification policies (Employer Exhibits 2, 3). As a nursing home, the employer stated staffing shortages compromise the care of residents and contribute to low morale in the workplace (Employer Exhibit 3). The claimant was expected to call her supervisor two hours prior to her shift if she was unable to work, and was also expected to make three attempts to secure coverage when she called off of work (Holland testimony.) In addition, the employer has

a specific policy pertaining to no call/no shows which states that an employee will be discharged after a second no call/no show in a twelve month period (Employer Exhibit 1).

Prior to discharge, the claimant was given a written warning on September 27, 2018 after throwing her badge and saying she didn't need the job. The claimant was then given a written warning for attendance on February 4, 2019, which included failure to properly report her absence (Employer Exhibit 4). The claimant was placed on a final warning on March 14, 2019 for attitude/disrespectful conduct (Employer Exhibit 5).

In addition, the claimant was a no call/no show on June 18, 2018, and signed a final written warning on June 19, 2018 (Holland testimony). The claimant's second no call/no show within twelve months occurred on April 7, 2019. The claimant was scheduled to work at 6:00 a.m. When she did not arrive to work, the charge nurse tried calling the claimant and she did not respond. The claimant's director of nursing (DON) tried to send a message to the claimant and she did not respond. The claimant replied at 5:00 p.m., eleven hours after her shift had started that she had a migraine headache and had fallen asleep.

At the hearing, the claimant stated she took a Tramadol pill in the morning before her shift because she had a headache. She did not notify the employer before laying back down that she wasn't feeling well. She stated she kept her phone on but did not respond to the call from the employer and slept until she responded to employer message at 5:00 p.m.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged for disqualifying misconduct. Benefits are denied.

Iowa unemployment insurance law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id*.

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).

The employer has the burden of proof in establishing disqualifying job related 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 serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990).

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*. Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

In this case, the claimant had been previously warned twice about not properly reporting her absences to the employer. The first time was after her first no call/no show in June 2018, which fell under the employer's no call/no show provision. The second was on February 4, 2019 as part of the employer's attendance policy. The claimant knew or should have known that her job was in jeopardy.

The claimant was scheduled to work on Sunday, April 7, 2019 and failed to contact the employer prior to her shift, or during her shift but rather eleven hours after the shift had started. The administrative law judge did not find the claimant's explanation for not waking up, responding to the employer call or reporting her absence to be credible. The administrative law judge is persuaded the claimant knew or should have known her conduct was contrary to the best interests of the employer. Therefore, based on the evidence presented, the administrative law judge concludes the employer has met its burden of proof to establish the claimant was discharged for misconduct. Benefits are denied.

DECISION:

The May 8, 2019, (reference 01) 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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Jennifer L. Beckman
Administrative Law Judge

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Decision Dated and Mailed

jlb/rvs