IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

SHERYL M CASTILLO Claimant **IA DEPT OF HUMAN SVCS/GLENWOOD** Employer	**APPEAL 14A-UI-12186-LT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 10/26/14** **Claimant: Respondent (1)**

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

STATEMENT OF THE CASE:

The employer filed an appeal from the November 17, 2014, (reference 01) unemployment insurance decision that allowed benefits based upon a discharge from employment. The parties were properly notified about the hearing. A telephone hearing was held on December 15, 2014. Claimant participated with Mike Crouse, Union Representative. Employer participated through treatment program administrator, Karen Rosenfeld, investigator, Jason Sell, and human resources clerk, Pam Stipe. Kathy King observed. Debra Campbell of Employers Edge represented the employer.

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 resident treatment worker (RTW) at Glenwood Resource Center and was separated from employment on October 30, 2014, when she was discharged. Her last day of work was September 25, 2014, when she was suspended with pay pending investigation results. On September 21, claimant worked the 8:00 a.m. to 10:30 p.m. shift and was assigned to work with Pam who did not want to eat her vegetables and took her plate to the sink but was upset so threw the plate on the floor. Claimant asked her to participate in the clean-up process. Pam became loud and aggressive towards another resident in a wheelchair. Claimant told Pam she would intervene and touch her. Pam has scoliosis and was sitting on the floor so claimant put her hands under Pam's arms, hugged her and scooted her back away from the resident in the wheelchair. Pam did not complain, indicate she was in pain, and did not resist or assist claimant in moving her. Pam leaned back but due to her scoliosis, she was not lying on and the top part of her back was not touching the floor. Claimant assisted Pam in getting up. Pam went to her bedroom to relax and later apologized for her earlier behavior. No marks on her back were observed that day. Pam is communicative about her needs. No one else in the room, staff or residents, said anything to claimant about what happened or indicated a concern about how the situation was handled. Employees Erica King, Susan Klaudt, Ray Hansen, and Brad Beers, who were present in the room or observed Pam's back, did not participate in the hearing.

On September 22 Tim Stanek, morning shift RTW, noticed that intellectually disabled resident Pam had skin abrasions on the bony part of the top of her spine. His report to nurse Courtney and office staffing supervisor Duncan Evans, prompted an investigation. Sell became involved on September 22 and conducted the investigation. On September 22, Pam said Beers had shoved her down causing injury after supper on an unknown date. She made no reference to being dragged or pulled. Pam's roommate KS was present in the dining area but only relayed to Sell what Pam told her about what happened as related to Beers. Beers and Klaudt were assigned to one-on-one with other residents during that time. Hansen was farthest away from table and King was on other side of table and not able to observe how far claimant moved Pam. Claimant had worked two shifts in a row and estimated she moved Pam six to eight feet but when reenacting with Sell, he measured the distance at 18 feet. Claimant acknowledged training that calls for redirecting behavior and blocking the physical aggression or moving another person out of the way as the least restrictive ways of handling similar situations, outlined in the termination letter. (Employer's Exhibit 1) Sell also interviewed Karen Anglin, Sarah Wray, Mike Evans, resident KS, and claimant. Sell and reported his results to Rosenfeld and the instant review committee (IRC) on September 29.

The employer did not offer or present witness statements gathered in the investigation. The employer did not provide a complete copy of the investigation report to claimant, the union or at the unemployment insurance appeal hearing.

REASONING AND CONCLUSIONS OF LAW:

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

When the record is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. *Schmitz v. Iowa Dep't Human Servs.*, 461 N.W.2d 603, 607 (Iowa Ct. App. 1990). Both the quality and the quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See, Iowa Code § 17A.14 (1). In making the evaluation, the fact-finder should conduct a common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be fulfilled. *Schmitz*, 461 N.W.2d at 608. 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). Given the serious nature of the proceeding and the employer's allegations resulting in claimant's discharge from employment, the employer's nearly complete reliance on hearsay statements is unsettling. Mindful of the ruling in *Crosser*, *id.,* and noting that the claimant presented direct, first-hand testimony while the employer relied entirely upon second-hand statements without so much as a copy of the investigation report of the statements, the administrative law judge concludes that the claimant's recollection of the events is more credible than that of the employer.

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.

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).

Iowa Admin. Code r. 871-24.32(4) provides:

> (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.

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. The claimant credibly testified that the part of Pam's back that showed abrasions the next day did not touch the floor when she was helping her move away from the resident in the wheelchair. There is no credible evidence to the contrary and no one present at the time said anything to claimant that they had a concern about how she was handling the situation. Thus, while claimant might have handled the situation differently, her conduct was reasonable given the circumstances and the employer has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning.

DECISION:

The November 17, 2014, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

dml/css