

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

Claimant

APPEAL 18A-UI-02155-DB-T

Employer

**ADMINISTRATIVE LAW JUDGE
PUBLIC DECISION**

**OC: 01/07/18
Claimant: Appellant (1)**

Iowa Code § 235B.6(2)(d)(4) - Dependent Adult Abuse – access to confidential information
Iowa Code § 235B.8 - Dependent Adult Abuse – redissemination of confidential information
Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant/appellant filed an appeal from the February 6, 2018 (reference 01) unemployment insurance decision that found claimant was ineligible for benefits because claimant was placed on disciplinary suspension for violation of company rules. The parties were properly notified of the hearing and a telephone hearing was held on March 16, 2018. The claimant participated personally. Two co-workers of the claimant participated as witnesses on behalf of the claimant. The employer participated through one witness. Claimant's Exhibit A was admitted. Employer's Exhibit 1 was admitted.

ISSUES:

Shall the hearing record and decision be publicly disclosed?
Was the claimant suspended 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 an assistant. This employer operates facilities that assist residents who have developmental disabilities with their daily living tasks. Claimant began employment on October 11, 2017. Claimant was suspended without pay effective January 7, 2018. See Exhibit 1. Claimant's job duties included providing direct care for residents and assisting residents with daily living tasks.

This employer has a written policy in place that provides the residents have a right to dignity and privacy. Claimant received training regarding the residents' right to dignity and privacy when hired. The written policy specifically states that the resident's bedroom is a place that is private. This employer has a written disciplinary policy in place that provides severe behavior can lead to discharge of an employee.

On January 7, 2018, claimant was working with a resident trying to get the resident to go to take a shower. Claimant used her cellular telephone to video record the resident in the resident's bedroom. The resident was only wearing Depends underwear (which is intended to be

protective and not clothing per se) and no other clothing. The resident had a blanket; however, the blanket did not cover the resident's body completely. It was apparent in the video that the resident was only wearing the underwear and no other clothing. One of the supervisors at the facility is the resident's guardian.

The video showed the claimant re-directing the resident in an attempt to get the resident to take a shower. The resident then was playing "peek-a-boo" and dancing after claimant finished re-directing the resident. The resident asked claimant to send the video to another co-worker who took care of the resident during a different work shift. Claimant believed the video was being forwarded to the co-worker via Snap chat; however, the claimant accidentally posted the video to the claimant's personal Snap chat story rather than sending the video directly to the co-worker. When the claimant posted the video to the claimant's Snap chat story, all other persons who were linked to the claimant's account as friends on Snap chat were allowed access to the video. Upon realization that the claimant had posted the video to the claimant's story instead of sending the video directly to the co-worker, claimant removed the video. However, by this time another co-worker had viewed the video online. This other co-worker reported the incident to management as potential dependent adult abuse. The matter came to the supervisor's attention and the claimant was interviewed the following day. Claimant was placed on suspension without pay pending an investigation by the employer and other agencies.

Claimant and other co-workers were allowed by management to live video chat with each other if they were unable to get a resident to comply with their directives. The purpose of the live video chat with other co-workers would be so that the resident can see another familiar face in order to be calmed down.

The employer has a Facebook page on social media where it posts pictures of residents. The employer has a policy in place wherein the pictures are vetted and residents grant permission prior to the pictures being placed on social media for access to the public.

REASONING AND CONCLUSIONS OF LAW:

The first issue to be addressed in this case is the effect of the confidentiality requirements of Iowa Code § 235B.6(2)(d)(4) and Iowa Code § 235B.8. Iowa Code § 235B.8 prohibits the redissemination of dependent adult abuse information. Iowa Code § 235B.8 must be followed despite conflicting provisions of the Iowa Open Records Act (Iowa Code chapter 22), the Iowa Administrative Procedure Act (APA) (Iowa Code chapter 17A), and Iowa Employment Security Law (Iowa Code chapter 96). Iowa Code § 22.2(1) provides: "Every person shall have the right to examine and copy a public record and to publish or otherwise disseminate a public record or the information contained in a public record."

The appeal documents, exhibits, decision, and audio recording in an unemployment insurance case would meet the definition of "public record" under Iowa Code § 22.1-3. Iowa Code § 17A.12(7) provides that contested case hearings "shall be open to the public." Under Iowa Code § 96.6(3), unemployment insurance appeals hearings are to be conducted pursuant to the provisions of chapter 17A. The unemployment insurance rules provide that copies of all presiding officer decisions shall be kept on file for public inspection at the administrative office of the department of workforce development. Iowa Admin. Code r. 871-26.17(3).

In this case, it would defeat the purpose of Iowa Code § 235B.8 of restricting redissemination to permit the confidential information to be disclosed to the general public. Therefore, the public decision in this case is issued without identifying information. A decision with identifying

information will be issued to the parties; but that decision, the audio record, the appeal and all documents in the administrative file shall be sealed and not publicly disclosed.

The second issue is whether the claimant was suspended for job-related misconduct. For purposes of unemployment insurance benefits, a suspension or disciplinary layoff shall be considered as a discharge and the issue of misconduct is resolved as such.

Iowa Admin. Code r. 871-24.32(9) provides:

(9) Suspension or disciplinary layoff. Whenever a claim is filed and the reason for the claimant's unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as discharged, and the issue of misconduct must be resolved. Alleged misconduct or dishonesty without corroboration is not sufficient to result in disqualification.

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.

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.

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.* After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the Administrative Law Judge finds that the employer's witness testimony is more credible than claimant's testimony.

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 (or placing her on a disciplinary suspension), 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 (or disciplinary suspension) 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).

The focus of the administrative code definition of misconduct is on deliberate, intentional or culpable acts by the employee. *Id.* When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* 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). Further, poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000).

Claimant accidentally posted the video to Snapchat, where others had access to the video. This was in violation of the employer's policies requiring vetting and permission from the resident prior to posting to social media. However, claimant's actions in posting the video to the claimant's Snap chat story were unintentional and a mistake. As such, the posting of the video is not considered job-related misconduct because it was not deliberate.

However, claimant's actions in videotaping the resident in his private bedroom knowing that he only had underwear covering his body was clearly an intentional act which violated the employer's resident privacy and dignity policies. Claimant's argument that permission was

granted to live chat another co-worker in order to calm down a resident is unpersuasive, as she did not live chat another co-worker in this incident and the video was not made in order to calm down the resident. Claimant should have known that the videotaping of the resident while only wearing underwear was a violation of the resident's privacy and dignity. This was a deliberate disregard of the employer's interests.

Claimant's job duties included following the necessary and required policies and guidelines that were in place for each resident's health and safety. Claimant was aware of these policies. An employer has a right to expect that an employee will not jeopardize the safety and privacy of others, especially where the claimant's job duties require them to keep the residents they are supervising safe. There is substantial evidence in the record to support the conclusion that claimant deliberately violated these rightful expectations in this case. Claimant's actions constitute an intentional and substantial disregard of the employer's interest. Accordingly, the employer has proven claimant committed job related misconduct. Benefits are denied.

DECISION:

The February 6, 2018 (reference 01) unemployment insurance decision is affirmed. Claimant was placed on a disciplinary suspension for violation of the company rules. Unemployment insurance benefits are denied until claimant has worked in and earned wages for insured work equal to ten times the weekly benefit amount, provided claimant is otherwise eligible.

Dawn Boucher
Administrative Law Judge

Decision Dated and Mailed

db/rvs