

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

ROSILYN M SMITH

Claimant

WESTERN HOME SERVICES INC

Employer

APPEAL 21A-UI-03574-JC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 11/08/20

Claimant: Respondent (1)

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

Iowa Code § 96.3(7) – Recovery of Benefit Overpayment

Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

PL116-136, Sec. 2104 – Federal Pandemic Unemployment Compensation (FPUC)

STATEMENT OF THE CASE:

The employer/appellant, Western Home Services Inc., filed an appeal from the January 12, 2021 (reference 01) Iowa Workforce Development (“IWD”) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on March 29, 2021. The claimant, Rosilyn M. Smith, participated. The employer participated through Caroline Semer, hearing representative with Talx/Equifax Workforce Development. At the time of hearing, both parties waived proper notice of the issue of whether claimant is eligible for FPUC benefits.

The administrative law judge took official notice of the administrative records. Employer Exhibits 1-10 were admitted. 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.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can any charges to the employer’s account be waived?

Is the claimant eligible for Federal Pandemic Unemployment Compensation?

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 LPN and was separated from employment on August 28, 2020, when she was discharged (Employer Exhibit 1).

When claimant was hired, she was trained on employer rules and procedures (Employer Exhibits 9-10). Employer has written rules prohibiting abusive language and profanity

(Employer Exhibit 7-8). Employer had also updated policies in response to COVID-19, which required employees (claimant) wear a face shield, mask and glasses.

The employer reported claimant had two verbal warnings prior to discharge (Employer Exhibits 5-6), including not wearing a face shield on April 30, 2020 and on August 16, 2020, for not completing required post-fall vitals. Claimant denied knowledge of being warned and did not consider “pull up your mask” to constitute a disciplinary coaching or warning.

The final incident occurred on August 27, 2020. According to employer, claimant was working when a resident fell. Claimant became upset and reportedly said, “this is bullshit” before taking off her face mask. During the same shift, claimant allegedly called her co-workers “a little bitch” and “fat ass.” Employer reported claimant had also falsified information about vitals taken post fall. The employer witness was not present for the final incident and did not discuss the incident with claimant prior to or at the time of discharge. Employer submitted two written statements from claimant’s co-workers (Employer Exhibits 2-4). Neither Martha Rodriguez (Claimant’s manager) nor Tabitha Tjaden (administrator who fired claimant) participated in the hearing or submitted written statements in lieu of participation. No request for continuance was made by the employer to allow any witness to present first-hand testimony.

Claimant acknowledged that a resident did fall and she did become upset with the co-workers, who were on the couch and in the kitchen, rather than supervise the residents. She denied use of profanity or calling them names. She denied throwing down her mask. She also stated that her manager, Ms. Rodriguez, had advised staff to fill out the vitals sheets, placed at the nurses’ station, as they could when they missed them. Claimant denied knowing her job was in jeopardy prior to discharge.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$8,381.00 through the week ending March 20, 2021, since filing a claim with an effective date of November 8, 2021. The claimant also received federal unemployment insurance benefits through Federal Pandemic Unemployment Compensation (FPUC). The administrative record also establishes that the employer did not participate in the fact-finding interview or make a witness with direct knowledge available for rebuttal.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged for reasons other than misconduct, and benefits are allowed, provided she is otherwise eligible.

Iowa 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 Administrative Code rule 871-24.32(1)a provides:

“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).

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. The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 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. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). 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 Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

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 not 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.

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.

Administrative agencies are not bound by the technical rules of evidence. *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 630 (Iowa 2000). A decision may be based upon evidence that would ordinarily be deemed inadmissible under the rules of evidence, as long as the evidence is not immaterial or irrelevant. *Clark v. Iowa Dep't of Revenue*, 644 N.W.2d 310, 320 (Iowa 2002). Hearsay evidence is admissible at administrative hearings and may constitute substantial evidence. *Gaskey v. Iowa Dep't of Transp.*, 537 N.W.2d 695, 698 (Iowa 1995).

Claimant was discharged based for her conduct on August 27, 2020, which employer alleged included removal of and throwing down her face mask, using profanity, calling her co-workers names and allegedly falsifying documentation regarding post-fall vitals. The employer in this case stated claimant had been twice warned, but did not present the witness who warned, and claimant was not required to sign an acknowledgement of a documented verbal warning. Claimant credibly testified she did not interpret her manager's single time of directing her to pull up her mask to be a disciplinary action, which would have put her job in jeopardy.

Employer presented no witness to claimant's behavior on August 27, 2020, which could have included the two co-workers on August 27, 2020 (who were allegedly subject to claimant's name calling), her manager who executed any warnings or the administrator who discussed the final incident with claimant and discharged her. No documentation that was allegedly falsified was presented. The employer had evidence such as first-hand witnesses but instead only presented two written statements. Employer presented no evidence in support of its allegation of falsification of records. For unknown reasons, the employer did not submit the evidence for the hearing. In contrast, the claimant offered detailed, specific testimony about her frustrations of the work day, finding her co-workers loafing, and conducting her job duties as directed, and was subject to cross-examination under oath. When evaluating the claimant's direct testimony versus the employer, which relied upon hearsay only, the administrative law judge found the claimant's account to be more credible than the employer.

The question before the administrative law judge in this case is not whether the employer has the right to discharge this employee, but whether the claimant's discharge is disqualifying under the provisions of the Iowa Employment Security Law. While the decision to terminate the claimant may have been a sound decision from a management viewpoint, for the above stated reasons, the administrative law judge concludes that the employer has not sustained its burden of proof in establishing that the claimant's discharge was due to an act of job related misconduct. Accordingly, benefits are allowed provided the claimant is otherwise eligible.

Because the claimant is eligible for benefits, the issues of overpayment of regular unemployment insurance benefits and relief of charges are moot. Because the claimant is allowed regular unemployment insurance benefits, she is also eligible for FPUC, provided she is otherwise eligible. The employer is not charged for these federal benefits.

The parties are reminded that under Iowa Code § 96.6-4, a finding of fact or law, judgment, conclusion, or final order made in an unemployment insurance proceeding is binding only on the parties in this proceeding and is not binding in any other agency or judicial proceeding. This provision makes clear that unemployment findings and conclusions are only binding on unemployment issues, and have no effect otherwise.

DECISION:

The January 12, 2021, (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. She is not overpaid benefits. The employer's account cannot be relieved of charges associated with the claim for regular unemployment insurance benefits. The claimant is also eligible for FPUC, provided she is otherwise eligible. (Employer will not be charged for FPUC benefits).



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March 30, 2021
Decision Dated and Mailed

jlb/kmj