

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

TASHA K STEEVE
Claimant

APPEAL 17A-UI-00496-NM-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

NURSEFINDERS OF DES MOINES
Employer

**OC: 12/04/16
Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(1)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The employer filed an appeal from the January 10, 2017, (reference 02) unemployment insurance decision that allowed benefits. The parties were properly notified of the hearing. A telephone hearing was held on February 3, 2017. The claimant Tasha Steeve participated and testified. The employer Nursefinders of Des Moines participated through Staffing Manager Brandon Weber.

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?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed part time as a certified nursing assistant from April 1, 2016, until this employment ended on June 29, 2016, when she was discharged.

On June 27, 2016, the employer received a complaint from one of its work sites regarding claimant. The complaint alleged that claimant was not following direction and that she had engaged in time card fraud on June 25. The complaint claimed that claimant was an hour late to work on June 25, but had put that she was only 20 minutes late on her time card. The employer attempted to contact claimant to get her version of events. According to Weber the employer called claimant three times and left voice messages asking her to call them back and sent one email asking her to contact them. Weber testified they did not hear back from claimant, so on June 29 she was terminated. According to Weber claimant had received two prior coachings regarding her productivity, though he was unsure as to whether she had been advised that her job was in jeopardy if she did not improve.

Claimant admitted to receiving the email asking her to contact the employer and testified she did contact the employer the same day it was sent. Claimant testified she spoke to Staffing Manager Dawn Kennedy. Claimant admitted to being an hour late to work on June 25, but also maintained that she did not indicate otherwise on her time card. Weber had not viewed claimant's time card and could not say for certain whether she wrote down that she was 20 minutes late or an hour late. According to claimant, after Kennedy heard her explanation, she told her she did not want to hear of another situation like this one and that she should return to work. Weber had no knowledge of this conversation. Claimant denied that she was ever warned her employment was in jeopardy prior to being terminated.

The claimant filed a new claim for unemployment insurance benefits with an effective date of December 4, 2016. The claimant filed for and received a total of \$3,840.00 in unemployment insurance benefits for the weeks between December 4, 2016 and January 28, 2017. Both the employer and the claimant participated in a fact finding interview regarding the separation on January 9, 2017. The fact finder determined claimant qualified for benefits.

REASONING AND CONCLUSIONS OF LAW:

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

Iowa Code section 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.

871 IAC 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 Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in establishing disqualifying job 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 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).

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. 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.

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).

The decision in this case rests, at least in part, upon the credibility of the parties. The employer contends claimant was discharged for committing time card fraud and based on multiple reports that she was unproductive while at work. The employer also contends claimant was unresponsive when it tried to reach her to talk about the allegations made against her. Claimant denied engaging in time card fraud, testified she did speak to the employer, and denied ever being warned that her job was in jeopardy.

The employer did not present a witness with direct knowledge of the situation. No request to continue the hearing was made and no written statement of the individual was offered. No exhibits supporting the employer's allegations were submitted. 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 upon second-hand reports, the administrative law judge concludes that the claimant's recollection of the events is more credible than that of the employer.

Claimant testified she did not engage in time card fraud and that her time card accurately reflected the amount of time she was late to work. Accordingly, the administrative law judge

concludes the employer has failed to meet its burden in showing misconduct for time card fraud. Claimant was also discharged from employment following multiple reports of being unproductive while at work. The employer testified claimant was coached on her productivity on two occasions, but could not say whether she was every warned that her job was in jeopardy. Claimant testified she was never warned of discharge.

An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Training or general notice to staff about a policy is not considered a disciplinary warning. Inasmuch as employer had not previously warned claimant that her job was in jeopardy, it 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. Accordingly, benefits are allowed. Because benefits are allowed the issues of overpayment and participation are moot and will not be further analyzed.

DECISION:

The January 10, 2017, (reference 02) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid. The issues of overpayment and participation are moot as benefits are allowed.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

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