

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CHIQUITA AUSTIN
Claimant

APPEAL NO: 15A-UI-13665-JE-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

SKYLINE CENTER INC
Employer

OC: 01/11/15
Claimant: Appellant (2)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the December 10, 2015, reference 03, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on January 5, 2016. The claimant participated in the hearing. Lisa Hammond, Human Resources Director and Lynne Hilgendorf, Community Living Director, participated in the hearing on behalf of the employer. Employer's Exhibit One and Claimant's Exhibits A, B and C were admitted into evidence.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time direct support professional for Skyline Center from July 21, 2008 to November 18, 2015. She was discharged after being accused of using profanity in front of and directed at a client.

The employer provides services for intellectually challenged individuals who live in residential homes with the assistance of direct support professionals and other health care providers. On November 6, 2015, Home Health Aide Sara Cox came to the house around 5:30 a.m. and while she was there one of the clients got up and started coming down the stairs. Ms. Cox reported the claimant said, "Why the fuck is he up. He's not fucking supposed to be up." She then told the client, "You need to fucking go back upstairs." The employer conducted an investigation and spoke to other staff who worked at the house and was told by another staff member she recalled hearing the claimant tell another client he needed to "get his ass going." Other staff members reported they did not come forward prior to being asked because they were intimidated by the claimant because she has a dominant personality and was often critical of other employees.

The claimant received a written warning March 21, 2014, after the employer's outside pharmacy reported that when the claimant came in to pick up prescriptions for clients she was rude. The

pharmacy contacted the employer to report the incident resulting in the claimant's written warning and one-day suspension.

The employer has a progressive disciplinary policy but felt the charges against the claimant November 6, 2015, were so severe in nature that termination was warranted. It did not feel that incident was an isolated situation because during the investigation several employees reported they felt the claimant created an intimidating environment and felt the claimant harassed them by telling them what they did wrong even though she did not hold a supervisory position. There were also complaints during the investigation that the claimant used profanity when talking to staff members. The claimant denies using profanity when speaking to Ms. Cox or to any clients at any time.

REASONING AND CONCLUSIONS OF LAW:

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

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).

The employer has the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. 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 Board, 616 N.W.2d 661, 665 (Iowa 2000).

The employer's witnesses were not present during the November 6, 2015, situation that Ms. Cox reported and Ms. Cox was not made available to testify about the events of that day. If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. Crosser v. Iowa Department of Public Safety, 240 N.W.2d 682 (Iowa 1976).

While the claimant's testimony was not particularly credible, she was the only first-hand witness present during the hearing. Because Ms. Cox did not testify, the administrative law judge cannot compare her credibility with that of the claimant and consequently, reluctantly, must accept the claimant's version of the events of November 6, 2015. The other employees involved had other, seemingly legitimate, issues with the claimant's dominant personality and criticism, and while they may have felt intimidated by the claimant that was not listed as a reason for the claimant's termination but could have played a role in their statements against the claimant. The claimant did receive a written warning and one-day suspension for her behavior at the pharmacy but that occurred in March 2014, one year and eight months prior to her discharge.

Under these circumstances, the administrative law judge must conclude the employer has not met its burden of proving disqualifying job misconduct as that term is defined by Iowa law. Therefore, benefits must be allowed.

DECISION:

The December 10, 2015, reference 03, decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

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