

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

SARAH L CHRISTENSEN
Claimant

ACCURA HEALTHCARE OF POMEROY LLC
Employer

APPEAL 16A-UI-13143-JCT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 11/13/16
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the December 6, 2016, (reference 01) unemployment insurance decision that denied benefits based upon separation. The parties were properly notified about the hearing. A telephone hearing was held on January 3, 2017. The claimant participated personally. Bliss Habben, current employee, also testified for the claimant. The employer participated through Kay Jessen, administrator. Robin Thompson, director of nursing, also testified for the employer. No exhibits were offered by either party. 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.

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: The claimant was employed full-time as a CNA and was separated from employment on November 7, 2016, when she was discharged based on an employee report of abuse.

The claimant has been a CNA for over fifteen years, and throughout her employment has been trained on the employer's policies, including its abuse and neglect policy. The employer serves a dependent adult population and therefore is subject to mandatorily reporting and taking action upon allegations of abuse. The employer defines verbal abuse to include disparaging, threatening or intimidating comments made in the presence of a resident, regardless of whether the resident hears or comprehends the comment. The employer most recently in October 2016 had an in-service training on abuse, which the claimant did not attend but did review the materials. The claimant had no prior warnings before discharge.

The undisputed evidence presented is that on the claimant's last physical day of work, November 4, 2016, she was working with a wheelchair bound resident that has a history of being aggressive and combative with staff. On November 4, 2016, Bliss Habben, who is also a

CNA, witnessed this resident attempting to hit the claimant in the head. As a result of missing, his arm caught a fingernail on his other hand, causing a skin tear. Later, the claimant was advised to take him back to the dining room for his breakfast, and while wheeling him down to the dining room, the resident grabbed the claimant and attempted to bite her. She acknowledged she raised her voice at him to "let go" and that he was not wearing his hearing aids that day. When the claimant had him secured in the dining room, she went to take a break from him. She acknowledged when she walked into the break room, she said aloud, "I cannot handle him."

The employer initially received a report of possible abuse about the claimant from nurse, Jessica Pearson, who asserted the claimant's actions may have caused the skin tear, and that she had observed the claimant using a "tone" with the resident, and yelling at him in the hallway on November 4, 2016. However, the employer ultimately discharged the claimant, not based on those allegations but a report from two housekeepers, Crystal Souza and Pam DeBoer, who offered written statements to the employer during the investigation. According to the employer, Ms. Boer and Ms. Souza asserted that from the nurses' station, they heard the claimant tell the resident in the dining room that she hoped he was in pain all day. The claimant denied ever making any comment to the resident when she left or aloud about his pain. She further testified that she was told at separation that the comment triggering her discharge was about her reportedly saying she didn't care if the resident lived or died, a comment which she also denied. Upon the report received, the employer requested statements from the claimant, other employees, and the resident. The claimant was suspended pending investigation, and ultimately discharged. The employer did not provide any written statements or present Crystal Souza, Pam DeBoer or Jessica Pearson as witnesses for the hearing.

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).

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.

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(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

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 employer did not present the testimony of Crystal Souza, Pam DeBoer or Jessica Pearson for the hearing. These individuals reported to the employer conduct for which the employer relied upon in initiating its investigation against the claimant, and for which she was ultimately discharged. No request to continue the hearing was made for their participation, and no written statements of those individuals were offered. 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.

In this case, the employer discharged the claimant based on an allegation of verbal abuse on November 4, 2016 in which the claimant reportedly stated in the vicinity of or to a resident that she hoped he was in pain for the day. This resident had tried to bite her in protest to returning to the dining room and had previously attempted to hit her earlier in her shift. The claimant denied making any comments to the resident or in earshot of the resident about him, or pain or dying. Rather, the claimant stated she went to the break room upon securing him, and said aloud, "I cannot handle him." Given the circumstances of the resident attempting to bite and hit her, the administrative law judge is not persuaded this isolated comment, in a break room, would violate the employer's policy regarding verbal abuse of residents, regardless of whether a staff member or even a resident heard the comment.

The administrative law judge recognizes the importance of safety to the dependent adults for whom the employer served, as well as the possible consequences for abuse or neglect in such a facility. However, the employer has the burden of proof to establish misconduct in a discharge situation, and the employer did not rebut the claimant's credible testimony, including denial of the conduct for which she was discharged. 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. The employer has not established a current or final act of misconduct, and, without such, the history of other incidents need not be examined. Accordingly, benefits are allowed.

Nothing in this decision should be interpreted as a condemnation of the employer's right to terminate the claimant for violating its policies and procedures. The employer had a right to

follow its policies and procedures. The analysis of unemployment insurance eligibility, however, does not end there. This ruling simply holds that the employer did not meet its burden of proof to establish the claimant's conduct leading separation was misconduct under Iowa law.

DECISION:

The December 6, 2016, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. The benefits claimed and withheld shall be paid, provided she is otherwise eligible.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/ref