

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

DEBRA S SAMPSON
Claimant

APPEAL 19A-UI-00185-AW-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**TAPESTRY SENIOR LIVING OF MARION
VILLAGE RIDGE**
Employer

OC: 12/02/18
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Debra Sampson, Claimant, filed an appeal from the December 28, 2018 (reference 01) unemployment insurance decision that denied benefits because she was discharged from work with Tapestry Senior Living of Marion Village Ridge due to violation of a known company rule. The parties were properly notified of the hearing. A telephone hearing was held on January 28, 2019 at 3:00 p.m. Claimant participated. Employer participated through Diana Niemeier, Executive Director; Sabrina Tippy, Life Enrichment Manager; and Angie Thomas, Human Resources. Employer's Exhibits 1 – 10 were admitted.

ISSUE:

Whether claimant's separation was a discharge due to 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 a Life Enrichment Coordinator from October 30, 2006 until her employment with Tapestry Senior Living of Marion Village Ridge ended on November 26, 2018. (Claimant Testimony) Claimant's direct supervisor was Sabrina Tippy. (Claimant Testimony) Claimant's schedule was Monday through Friday from 8:00 a.m. until 4:30 p.m. (Claimant Testimony)

Employer has a code of conduct, which prohibits discourteous conduct toward any resident, staff member, guest or doctor. (Exhibit 6) The policy states that a violation may result in disciplinary action up to and including immediate dismissal. (Exhibit 6) The policy is included in the employee handbook, of which claimant received a copy. (Exhibit 7, 8)

On May 8, 2018, claimant received a written warning for discourteous conduct and negative attitude in violation of the employee code of conduct. (Exhibit 5) On September 11, 2018, claimant received a written warning for attitude and rudeness with coworkers and tenants in violation of the employee code of conduct. (Exhibit 4) Both warnings state that future violations

of company rules or unsatisfactory performance may lead to further discipline including but not limited to immediate dismissal without further notice. (Exhibit 4) Claimant signed both warnings. (Exhibit 3)

On November 20, 2018, claimant received a final warning for, among other things, negative attitude, rudeness and argumentativeness. (Exhibit 3) The warning states that claimant will be on a 90-day probation period and that lack of improvement during that time would result in termination of claimant's employment. (Tippy Testimony) Claimant signed the final warning. (Exhibit 3) Claimant received a copy of the code of conduct along with the final warning. (Tippy Testimony)

On November 21, 2018, claimant was talking to an aide about a tenant's family issues in the presence of the tenant in question and other tenants. (Tippy Testimony) The tenant asked claimant to stop talking about her. (Tippy Testimony) Claimant told tenant at least she was talking about tenant to her face, as opposed to behind her back. (Tippy Testimony) The exchange was witnessed by two of claimant's coworkers who reported it to employer on November 23, 2018. (Tippy Testimony) Claimant was given an opportunity to explain her conduct; claimant admitted to making the statements but did not believe they were rude or discourteous. (Tippy Testimony) On November 26, 2018, claimant was discharged for violation of company policy while on probation. (Tippy Testimony) Claimant alleges that she did not know her job was in jeopardy. (Claimant Testimony)

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged for disqualifying, job-related misconduct. Benefits are denied.

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 disqualification shall continue 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:

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 of misconduct has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Reigelsberger v. Emp't Appeal Bd.*, 500 N.W.2d 64, 66 (Iowa 1993); *accord Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000). Further, 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).

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.

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.

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. 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). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. 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 Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). 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).

It is the duty of the administrative law judge, as the trier of fact, 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. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). 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 evidence you believe; 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. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

The findings of fact show how I have resolved the disputed factual issues in this case. I assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using my own common sense and experience. I find the employer's version of events to be more credible than the claimant's version of those events.

Claimant was warned several times about her negative attitude and rudeness to her coworkers and tenants. Claimant's last incident of rudeness with a tenant occurred just one day after claimant received a final written warning and was placed on probation. Claimant knew, or should have known, that her job was in jeopardy. Employer has met its burden of proof. Claimant was discharged for a current act of disqualifying, job-related misconduct. Benefits are denied.

DECISION:

The December 28, 2018 (reference 01) unemployment insurance decision is affirmed. Benefits are denied until such time as the claimant works in and has been paid wages for insured work equal to ten times claimant's weekly benefit amount.

Adrienne C. Williamson
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Decision Dated and Mailed

acw/rvs