IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

AUDREY L WRIGHT
Claimant

CARE INITIATIVES
Employer

APPEAL NO. 18A-UI-10182-S1-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 09/16/18
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Audrey Wright (claimant) appealed a representative's October 3, 2018, decision (reference 01) that concluded she was not eligible to receive unemployment insurance benefits after her separation from employment with Care Initiatives (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for October 24, 2018. The claimant was represented by Matthew Denning, Attorney at Law, and participated personally. The employer indicated it had elected not to participate in the hearing. Exhibit 1 was received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on July 2, 2013, as a full-time licensed practical nurse/charge nurse. The claimant signed for receipt of the employer's handbook when she was hired. The claimant understood she was not required to clock out for her lunch breaks if she remained on premises because she was often paged to care for residents. If she left the employer's property, she clocked out. The employer never told her to change her behavior regarding clocking out during the more than five years she worked at Care Initiatives.

In approximately 2015, the employer talked to her about speaking to a family member regarding a topic that was outside her scope of knowledge. The employer felt she should have directed the topic to an administrator or the director of nursing. The employer did not warn the claimant she could be terminated for further infractions or give her a copy of what they discussed.

The claimant notified the employer she had a high risk pregnancy. She notified her direct supervisor that the claimant's doctor ordered her to perform a procedure, fetal kicks, to insure the fetus was active. The claimant was to lie still on her back for ten minutes. If the claimant did not feel fetal movement, then the claimant was to roll to her left side. The claimant was supposed to count the number of movements during the procedure. The employer allowed the

claimant to perform fetal kicks when movements were not detected. The claimant did this procedure five to ten times in the therapy room during her employment.

On September 14, 2018, the claimant notified the employer she was absent due to an upper respiratory infection. She attempted to see her physicians but one doctor was out of town and the other had no available appointments. During the afternoon of Friday, September 14, 2018, the employer called and said the claimant had to report on the weekend because there was no staff to cover her shift.

The claimant appeared for her 6:00 a.m. to 6:00 p.m. shift on Saturday, September 15, 2018. She notified the director of nursing, a coordinator, and the nursing staff that she was ill. She normally took her lunch break at 11:30 a.m. but at 11:10 a.m. a new resident was admitted. The claimant took her lunch break after 2:00 p.m. She notified her fellow workers that she was taking her break in the therapy room. The claimant lay down on the therapy table and initiated her fetal kicks procedure. The claimant did not sleep during the procedure. She watched the clock on the wall in the room and completed her break within the thirty minutes allotted. The claimant did not clock out for her break because she did not leave the premises.

On September 18, 2018, the administrator told the claimant she was terminated because a family member of a resident complained that the claimant was sleeping in a therapy room on September 15, 2018. After she was terminated, at the fact finding interview, the claimant learned the employer has a policy that requires employees to clock out for lunch breaks.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

Iowa Code section 96.5(2)a provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 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:

> 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 proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). An employer may discharge an employee for any number of reasons or no reason at all, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, the employer incurs potential liability for unemployment insurance benefits related to that separation. The employer did not provide any evidence of a policy on clocking out for lunch breaks. It did not provide a witness who saw the claimant sleeping.

The employer had not previously warned the claimant about any of the issues leading to the separation. Without those warnings it cannot meet its burden of proof to establish the claimant acted deliberately or negligently in violation of company policy, procedure, or prior warning. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. The employer did not participate in the hearing and, therefore, provided no evidence of job-related misconduct. The employer did not meet its burden of proof to show misconduct. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The representative's October 3, 2018, decision (reference 01) is reversed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

_____
Beth A. Scheetz
Administrative Law Judge

_____
Decision Dated and Mailed

bas/rvs