

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DIANNE S CURRIE
Claimant

APPEAL NO. 12A-UI-12494-LT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MOSAIC
Employer

OC: 09/16/12
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed an appeal from the October 10, 2012 (reference 01) decision that allowed benefits. After due notice was issued, a hearing was held by telephone conference call on November 14, 2012. Claimant participated. Employer participated through Human Resources Manager Teresa TeKolste, Supported Living Coordinator and Immediate Supervisor Mike Carlson, Direct Support Coordinator Casie Belzung, and Executive Director Carol Mau, and was represented by Tom Kuiper of TALX. Employer's Exhibits 1 through 5 were received.

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: Claimant was employed full-time as a direct support associate for intellectually disabled adults from August 3, 2011 and was separated from employment on September 18, 2012. On September 10 claimant was taking an intellectually disabled adult, Neil, and two other clients to a social meeting at a church. She was working with them alone even though Neil had a history of violence. His medications had been changed the week before and she was skeptical of taking him, especially when she was also responsible for two other clients. On the way, interstate traffic was heavy and she asked them to "quiet down." Neil repeated in and out of the vehicle, "You don't tell me to be quiet." He hit her in the back of the head twice. Claimant told Neil not to hit people and he replied, "My mom wants me to hit you." She put the other clients in the van while she called Belzung and allowed Neil to cool down. They all went into the building and Neil pulled her to him by her biceps and said he was sorry. She said, "Okay," and he hit her again on the left side of her head. She asked other care personnel from other companies in the room to call the police. They laughed and said, "Call the police." Other support personnel had their backs to them. Neil went in and sat down. Claimant called Belzung again and reported he hit her again, explaining she thought it was the medication change and she planned to stay out of his way to the extent possible. On the way home Neil spoke to himself repeatedly saying, "I thought you were not going to hit anymore." When they got to the house, Neil went inside while claimant was talking to other residents at the van. Neil was in the kitchen when claimant went in

the house and he pinned her against the refrigerator. She told coworker Moses Mwae twice, "Get this man off me." Neil hit her again and Mwae asked him what he was doing. Claimant does not recall what happened before she heard Mwae asking, "Dianne, what are you doing, what are you doing?" She was distraught and asked Mwae if she "messed him up" mentally any more than he already was. She got her bag and left. She called and reported the incident to Belzung. Later, she surmised she "went at him" but does not remember touching him. The employer showed her a picture of the marks on Neil's face. Mwae did not participate and the employer did not offer a written statement from him.

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 § 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.

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). 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).

When the record is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. *Schmitz v. IDHS*, 461 N.W.2d 603, 607 (Iowa 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).

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, employer incurs potential liability for unemployment insurance benefits related to that separation. The conduct for which claimant was discharged could not have been deliberate or intentional, as she could not recall what specifically happened when she “went off” on the resident. Although it is clear that claimant is not suited to working with violent intellectually disabled adults alone, the employer was complicit by placing her in an untenable situation of being the sole direct support worker caring for the known violent disabled adult in addition to other disabled adults. In spite of claimant’s lack of recollection, her testimony of what she can recall is credible, as the employer failed to present the testimony or statement of Mwae, the only other competent witness to the incident. Benefits are allowed.

DECISION:

The October 10, 2012 (reference 01) decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/kjw