

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

WENDY ACOSTA
Claimant

PRIMARY HEALTH CARE INC
Employer

APPEAL 17R-UI-12845-LJ-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 09/17/17
Claimant: Appellant (6)

Iowa Code § 17A.12(3) – Default Decision
Iowa Admin. Code r. 871-26.14(7) – Dismissal of Appeal on Default

STATEMENT OF THE CASE:

The claimant filed an appeal from the October 5, 2017, (reference 01) unemployment insurance decision that denied benefits. A hearing was held on November 7, 2017, for appeal 17A-UI-10291-LJ. Claimant Wendy Acosta participated in the hearing. Employer Primary Health Care, Inc. participated in the hearing through Sherry Gomis, Chief Human Resources Officer; Erica Carrick, Residency Operations Director; and Rachel Adams, Chief Operating Officer. Prior to the hearing, claimant had requested subpoenas for witnesses Nayab H. Syed and Dania Siddiqui Syed. The Appeals Bureau issued these subpoenas. Neither witness appeared for the hearing, as both were completing an external residency rotation in Arizona at the time of the hearing. After Administrative Law Judge Johnson issued a decision, the claimant appealed to the Employment Appeal Board (EAB) stating her witnesses were not allowed to participate. On December 14, 2017, the EAB remanded this matter for further development of the record, to allow claimant's witnesses to participate.

After the EAB remanded, due notice was issued and a hearing was scheduled to be held in Des Moines, Iowa, on January 10, 2018. Claimant Wendy Acosta participated in the hearing, along with representative Frank Carmenate, and witnesses Nayab H. Syed and Dania Siddiqui. Employer Primary Health Care, Inc. participated through Sherry Gomis, Erica Carrick, Rachel Adams, and Dean Moews. Because the EAB did not vacate the original appeal decision for 17A-UI-10291-LJ, that hearing record, including any exhibits, is adopted and incorporated herein. No additional exhibits were offered.

ISSUE:

Should the original appeal decision be adopted?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Inasmuch as the decision was not vacated as a result of the Employment Appeal Board remand, the administrative law judge's findings of fact in appeal 17A-UI-10291-LJ is hereby adopted and

incorporated herein as the findings of fact for appeal 17R-UI-12845-LJ. The administrative law judge adds the following additional information:

Syed and Siddiqui are both second-year family medicine residents at Mercy Medical Center and Primary Health Care. Both knew claimant as one of the front desk employees during their tenure. Neither Syed nor Siddiqui had any supervisory authority over claimant, and neither Syed nor Siddiqui had the authority to direct claimant's job tasks. On one occasion, claimant translated for her family member who had an appointment with Syed. Claimant had accompanied this family member to the appointment. He recalls asking claimant whether she would be interpreting or he would be connecting a telephonic interpreter. Syed has routinely asked certified medical assistants to help translate for patients, as they provide medical care and interpreting may fall within the scope of their job duties. Siddiqui has asked claimant or other Spanish-speaking front desk employees to make scheduling-related telephone calls for her to Spanish-speaking patients.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes that inasmuch as the decision was not vacated as a result of the Employment Appeal Board remand, the administrative law judge's reasoning and conclusions of law in appeal 17A-UI-10291-LJ is hereby adopted and incorporated herein as the reasoning and conclusions of law for appeal 17R-UI-12845-LJ. Benefits are withheld.

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). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

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.*

The employer provided one consistent, reasonable narrative through testimony and exhibits. In contrast, claimant contradicted herself during her testimony. Additionally, while she had explanations for why she took certain actions, she did not refute the employer's evidence that she was away from her work area without proper permission or notification. Claimant's two subpoenaed witnesses did not present any testimony that changed the administrative law judge's assessment of the parties' credibility. After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the employer's testimony more credible than claimant's testimony. The employer is entitled to establish reasonable work rules and expect employees to abide by them. Claimant admits that she was away from her work area on multiple occasions on September 19. She did not have authorization for these absences, and she did not notify her co-workers that she needed to be away. Claimant had been warned for this specific issue as well as for generally misusing her work time. The employer has established that claimant was discharged from employment for disqualifying, job-related misconduct. Benefits are withheld.

As the decision was not vacated as a result of the Employment Appeal Board remand, the administrative law judge's reasoning and conclusions of law in appeal 17A-UI-10291-LJ is hereby adopted and incorporated herein as the reasoning and conclusions of law for appeal 17R-UI-12845-LJ. Benefits are withheld.

DECISION:

Inasmuch as the decision was not vacated as a result of the Employment Appeal Board remand, the administrative law judge's decision in appeal 17A-UI-10291-LJ is hereby adopted and incorporated herein as the decision for appeal 17R-UI-12845-LJ. The October 5, 2017 (reference 01) unemployment insurance decision remains affirmed. Claimant was discharged for disqualifying, job-related misconduct. Benefits are withheld until such time as claimant has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

Elizabeth A. Johnson
Administrative Law Judge

Decision Dated and Mailed

lj/scn