IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

BRENDA S BREWINGTON
Claimant

SUNNYBROOK LIVING CARE CENTER
Employer

APPEAL NO. 12A-UI-05859-S2T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 04/08/12
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Sunnybrook Living Care Center (employer) appealed a representative's May 10, 2012 decision (reference 04) that concluded Brenda Brewington (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for June 12, 2012. The claimant participated personally. The employer participated by Sheri Lowe, Administrator. Interns Ashley Brown and Andy Giller observed the hearing.

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 October 31, 2011, as a full-time dietary supervisor working 6:00 a.m. to 2:00 p.m. The claimant signed for receipt of the employer's handbook on October 31, 2011. On December 13, 2011, the employer issued the claimant a written warning for using inappropriate language and tone in front of staff and residents. The claimant denied the allegations.

The claimant returned from workers compensation absence on April 4, 2012. The claimant notified the employer that her subordinate was defiant and hostile. The subordinate told the employer that the claimant used inappropriate language. The employer believed the subordinate and not the claimant. On April 5, 2012, the employer issued the claimant a warning and three day suspension. The employer told the claimant that when she returned, the subordinate would be the claimant's supervisor and the claimant would have to work from noon until 8:00 p.m. The claimant told the claimant that she could not work those hours due to custody issues with her son.

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:
>
> 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 claimant did not voluntarily separate herself from her position as dietary supervisor. The employer terminated that position on April 5, 2012, and offered the claimant a position as cook. 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 employer must prove that the claimant's actions rose to the level of discharge but the employer chose to demote rather than terminate. If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. Crosser v. Iowa Department of Public Safety, 240 N.W.2d 682 (Iowa 1976). The employer had the power to present testimony but chose not to do so. The employer did not provide first-hand testimony at the hearing and, therefore, did not provide sufficient eye witness evidence of job-related misconduct to rebut the claimant's denial of said conduct. The employer did not meet its burden of proof to show misconduct as the reason for the demotion. Benefits are allowed.

DECISION:

The representative's May 10, 2012 decision (reference 04) is affirmed. The employer has not met its proof to establish job-related misconduct. Benefits are allowed.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/css