

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

CLAIMANT

APPEAL 18A-UI-10699-AW-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

EMPLOYER

**OC: 10/07/18
Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the October 24, 2018 (reference 01) unemployment insurance decision that denied benefits because she was discharged from work with employer due to violation of a known company rule. The parties were properly notified of the hearing. A telephone hearing was held on November 27, 2018 at 3:00 p.m. Claimant participated. Employer participated. Employer's Exhibits 1 – 6 were admitted.

The reasoning and conclusions of law section of this decision explain my decision regarding the confidentiality issues involved in this case. By my signature on this decision, I hereby order that the dependent adult abuse information submitted in this case will only be made available to the parties to the proceeding and others legally authorized to have access to such information under Iowa Code section 235B.6.

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 support staff from January 15, 2017 until her employment ended on October 18, 2018. In claimant's role as support staff, she provided care for dependent adults, which employer refers to as "consumers."

On August 28, 2018, one of claimant's coworkers reported to employer that claimant spoke to and treated a consumer disrespectfully when beginning her shift on August 27, 2018. The consumer is a 36-year-old, wheelchair bound male who is dependent upon others for his basic needs as a result of cerebral palsy. It was reported that claimant verbally berated the consumer and used profanity. On August 28, 2018, another of claimant's coworkers reported to employer that when claimant was ending her shift on August 28, 2018, claimant stated that she had placed a bag of frozen vegetables on consumer's groin area because the consumer had an erection.

On September 6, 2018, employer reported the incidents to the Department of Human Services ("Department"); employer is a mandatory reporter of dependent adult abuse. The Department conducted an investigation wherein the witnesses and claimant were interviewed. Claimant was suspended with pay from September 7, 2018 until October 18, 2018 while the Department's investigation was pending. As a result of the investigation, the Department determined that the dependent adult abuse allegation was founded. As a result of the founded allegation, claimant was placed on the abuse registry and was ineligible to work for employer. Employer has a policy regarding abuse registry checks, which states that the result of the check may result in disciplinary action up to and including termination. The policy is contained in the employee handbook. Claimant received a copy of the handbook. On October 18, 2018, claimant's employment was terminated due to the founded allegation of dependent adult abuse.

Claimant denies that she spoke to the consumer disrespectfully and maintained that she does not use profanity. However, claimant's supervisor observed claimant using profanity to consumers in the past when she was claimant's co-worker, before she became claimant's supervisor. In December 2017, claimant placed frozen vegetables on this consumer's groin area in an attempt to reduce consumer's erection. At that time claimant was told never to take this action again. The consumer has no ability to consent or object to such treatment, communicate possible pain from the frozen item being placed on his groin or remove the item. Claimant admits to placing the frozen vegetables on the consumer's groin in December 2017 and that she was warned not to do it again; however, claimant denies that she placed frozen vegetables on consumer's groin a second time.

Claimant's act of speaking to the consumer disrespectfully and using profanity and her act of placing the frozen item on the consumer's groin violate the employer's policy regarding employee conduct and work rules and the code of ethics. The policy and code of ethics are included in the employee handbook. The policy regarding employee conduct and work rules lists examples of behavior that may result in disciplinary action, up to and including termination. The examples include a violation of the code of ethics, consumer abuse and/or failure to give adequate care, failure to maintain professional relationships with consumers, and insubordination or other disrespectful conduct. The code of ethics mandates that employees take care to avoid harming, in any way, the people they serve and treat consumers with dignity and respect.

When asked why claimant's coworkers would make such a false accusation, claimant stated that a coworker may have wanted claimant's shift. Employer had second shift positions available.

REASONING AND CONCLUSIONS OF LAW:

The confidentiality provisions of Iowa Code section 235B.6 apply to this case.

A court or administrative agency making a determination regarding an unemployment compensation claimant pursuant to Iowa Code section 96.6 may access dependent adult abuse information in a case where the abuse is founded. Iowa Code § 235B.6(2)(d)(4). However, a person who has access to such information can only redisseminate it to a person who would have independent access to the same information pursuant to Iowa Code section 235B.6. *Id* at § 235B.8. Dissemination or redissemination in violation of the law subjects the violator to civil and criminal penalties. *Id* at §§ 235B.11, 235B.12.

The prohibition against dissemination of founded dependent adult abuse information creates a conflict when the employer's primary reason for discharging a claimant is the confidential determination of founded dependent adult abuse. This is because unemployment insurance appeal proceedings and records are considered public proceedings and records under the Iowa Open Records Act (Iowa Code chapter 22), the Iowa Administrative Procedure Act (APA)(Iowa Code chapter 17A) , and Iowa Employment Security Law (Iowa Code chapter 96). The Iowa Open Records Act provides that "every person shall have the right to examine and copy a public record and to publish or otherwise disseminate a public record or the information contained in a public record." *Id.* at § 22.2(1). The exhibits, decision and audio recording in an unemployment insurance case meet the definition of "public record." *Id.* at § 22.1(3). Iowa Code chapter 17A provides that contested case hearings "shall be open to the public." *Id.* at § 17A.12(7A). Pursuant to the Iowa Employment Security Law, unemployment insurance appeals hearings are to be conducted pursuant to the provisions of Iowa Code chapter 17A. *Id.* at § 96.6(3). The unemployment insurance rules provide the copies of all presiding officer decisions shall be kept on file for public inspection at the administrative office of the department of workforce development. Iowa Admin. r. 871-26.17(3).

Since the decision to discharge the claimant was due to the founded allegation of dependent adult abuse, it is impossible to issue a public decision identifying the claimant without redisseminating confidential information to the general public in violation of Iowa Code section 235B.8. Therefore, a public decision in this case will be issued without identifying information. A decision with identifying information will be issued to the parties; however, that decision, the exhibits and the audio recording (all of which contain confidential and identifying information) shall be sealed and not publicly disclosed.

For the reasons that follow, the administrative law judge concludes the claimant was discharged for 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. (emphasis added)

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).

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. (emphasis added)

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.* (emphasis added)

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). 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. Misconduct must be substantial in nature to support a disqualification from unemployment benefits. *Gimbel v. Emp't Appeal Bd.*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992). The focus is on deliberate, intentional, or culpable acts by the employee. *Id.*

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. *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 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. *Id.*

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. Two separate co-workers reported incidents of misconduct; claimant did not provide a credible reason as to why both of these co-workers would falsely report what they witnessed.

Claimant's actions on August 27, 2018 and August 28, 2018 not only violated known company policies and were found to be dependent adult abuse, but are also substantial acts of misconduct. Claimant's actions illustrate a disregard for the standards that the employer has a right to expect from its employees. Claimant knew or should have known that her actions would make her ineligible for employment and thus result in her termination. Claimant was discharged for disqualifying, job-related misconduct. Benefits are denied.

DECISION:

The October 24, 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
Administrative Law Judge
Unemployment Insurance Appeals Bureau
Iowa Workforce Development
1000 East Grand Avenue
Des Moines, IA 50319-0209
Fax: 515-478-3528

Decision Dated and Mailed

acw/rvs