

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CRYSTAL VOSHELL
Claimant

APPEAL NO. 12A-UI-13431-W

**ADMINISTRATIVE LAW JUDGE
DECISION**

DIERCKS SENIOR CARE LLC
Employer

**OC: 10/7/12
Claimant: Claimant (2)**

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a fact-finding decision dated November 1, 2012, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on January 24, 2013. Claimant participated personally. Employer participated by owner, Candy Diercks. Exhibits A through E were admitted into evidence.

ISSUE:

The issue in this matter is whether claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds:

Claimant was employed as home caregiver beginning in June 2011. She provided non-medical care to individuals in their home. She was discharged on October 11, 2012 by employer for insubordination.

Claimant had been assigned to work with a male client. In early October 2012, the client complained to the employer that the claimant was making personal phone calls when she was supposed to be caring for him and that she had discussed her personal life with him which made him feel uncomfortable. The claimant was given a verbal warning for this behavior on October 5, 2012.

The client contacted the employer on October 9, 2012, stating Crystal confronted him about her using her phone in his home and that made him feel uncomfortable. He requested her not to come back in his home. The employer terminated the claimant on October 11, 2012.

REASONING AND CONCLUSIONS OF LAW:

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.

871 IAC 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.

871 IAC 24.32(4) provides:

(4) Report required. The claimant's statement and the 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.

The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an

intentional policy violation. The employer has the burden to prove, by a preponderance of evidence, that the claimant engaged in an act of work-related misconduct.

In this matter, the evidence fails to establish that claimant was discharged for an act of misconduct.

Needless to say, the employer is in a difficult situation. I find Ms. Dierks to be credible in that the client did contact her and make allegations against the claimant. The fundamental problem with the employer's case is that it is impossible in this record to establish the client's credibility. The claimant has alleged that the client in question was manipulative with her. Specifically she alleged that he initiated inappropriate advancements toward her and when she refused he became frustrated and therefore motivated to retaliate against her. I must therefore assess the claimant's sworn, live testimony against the employer's unsworn, hearsay testimony from the client. Under these circumstances, absent any damage to the claimant's credibility, it is virtually impossible for the employer to meet its burden of proof.

When all the evidence is viewed as a whole, the employer has failed to meet its burden of proof. The claimant is eligible for benefits.

DECISION:

The fact-finding decision dated November 1, 2012, reference 01, is reversed. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements.

Joseph L. Walsh
Administrative Law Judge

Decision Dated and Mailed

jlw/tll