IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

SAMANTHA A SHONDEL
Claimant

CARE INITIATIVES
Employer

APPEAL NO. 17A-UI-02838-TNT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 02/05/17
Claimant: Respondent (1)

Iowa Code § 96.5(2)a -- Discharge

STATEMENT OF THE CASE:

Care Initiatives, the employer, filed a timely appeal from a representative's decision dated March 1, 2017, reference 01, which held claimant eligible to receive unemployment insurance benefits, finding that the claimant was dismissed from work on February 9, 2017 under non-disqualifying conditions. After due notice was provided, a telephone hearing was held on April 5, 2017. Claimant participated. Employer participated by Ms. Alyce Smolsky, Hearing Representatives, Equifax Company and witnesses Phyllis Farrell, Unemployment Insurance Consultant, Equifax and witnesses on behalf of the employer, Ms. Tentinawendt, Administrator and Ms. Judi Jenkins, Administrator. Exhibits D1 and Employer's Exhibits 1, 2 and 3 were admitted into the hearing record.

ISSUE:

The issue is whether the evidence in the record establishes misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

Having considered all of the evidence in the record, the administrative law judge finds: Samantha Shondel was employed by Care Initiatives from October 28, 2015 until February 9, 2017, when she was discharged from employment. Ms. Shondel was employed as a full-time certified nursing assistant and was paid by the hour. Her immediate supervisor was Judi Jenkins, Administrator.

Ms. Shondel was discharged on February 9, 2017, based upon the employer's belief that she had verbally abused residents on two occasions by using inappropriate language in the presence of the residents in violation of the Employer's business facility policy and in violation of a previous verbal warning that had been served upon Ms. Shondel on August 22, 2016.

On or about February 5, 2017, a CNA who worked at the facility intermittently reported that Ms. Shondel had used the "f word" in reference to, and in the presence of a resident. The facility's Director of Nursing and the Administrator investigated and interviewed the resident. The resident did not confirm the allegation. The Employer further investigated and interviewed six

unidentified residents in the part of the facility where Ms. Shondel usually worked. In response to generalized questions about whether the claimant had used inappropriate language in their presence, two residents agreed that she had, one stating that the claimant had used the “f word” a lot. Two other residents generally confirmed that those things had taken place and the remaining two residents offered no information.

During the course of the investigation, the employer also learned of an incident during which the claimant had stated “she won’t stop shitting” in the presence of a resident. The claimant had made that statement in response to a nurse questioning the claimant and another aid as to why their care of a resident was taking so long. In determining whether to discharge, Ms. Shondel, the employer also considered the fact that the claimant had been verbally warned in the past. The claimant denied the allegations of using the “f word”, but was discharged from employment.

Ms. Shondel specifically denies using the “f word” while caring for the residents identified by the employer. One of the resident’s daughters, at the request of Ms. Shondel, questioned her mother about the allegations and then submitted a letter verifying that there was no use of inappropriate language.

Ms. Shondel admits that the other statement attributed to her had been made, but only in response to unexpected questioning about why the care of that resident was taking so long.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record is sufficient to establish intentional misconduct sufficient to warrant the denial of unemployment insurance benefits. It is not.

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).

The claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. See Iowa Code § 96.5(2)a. Before a claimant can be denied unemployment insurance benefits the employer has the burden to establish that the claimant was discharged for work-connected misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982), Iowa Code § 96.5(2)a. Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See *Lee v. Employment Appeal Board*, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8).

Allegations of misconduct without additional evidence shall not be sufficient to resolve disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See *Crosser v. Iowa Dept. of Public Safety*, 240 N.W. 2d 682 (Iowa 1976).

An employer may discharge an employee for any number of reasons or no reason at all, but if it fails to meet its burden of proof to establish job-related misconduct as the reason for the separation, the employer incurs potential liability for unemployment insurance benefits related to that separation.

In the case at hand, the claimant was discharged based upon the employer's belief that the claimant had used inappropriate language in the presence of the residents or had directed inappropriate language towards the residents in violation of the employer's policy that prohibited conduct of that nature.

In one instance, another CNA reported that Ms. Shondel had used the "f word" while directing a resident to listen to her as she gave the resident instructions. When the employer attempted to verify that this had taken place by questioning the resident, the resident did not agree that the incident had taken place. The care home investigated further by posing generalized questions about the use of swear words by CNA's to six unidentified residents in the portion the facility where the claimant and other CNA's worked. In support of their position, the employer asserts that two other unidentified witnesses had stated the claimant liked to use "f word" a lot and that two more anonymous witnesses had agreed with those statements and that the final two had made no comments. The employer had concluded that it was in the best interest of Care Initiatives to discharge Ms. Shondel from employment. The claimant had been previously

warned about the words she used and about her manner. The employer concluded it was in their best interest to separate Ms. Shondel from her employment because of verbal or other allegations. The evidence of the employer is primarily hearsay in nature.

In contrast, Ms. Shondel appeared in-person and provided first-hand sworn testimony denying the use of the "f word" while caring for a patient. The claimant requested and received a letter from the resident's daughter specifically indicating that her mother had stated that the incident had not taken place. The administrative law judge notes that, although the claimant had requested the statement from the resident and was on friendly terms with her daughter, the daughter had also complained to the employer in the past when she thought Ms. Shondel's service had not met her expectations. This factor adds to the credibility of the statement provided by the resident's daughter.

Hearsay evidence is admissible in administrative proceedings, but it is not accorded the same weight as first-hand sworn testimony providing that the first-hand testimony is credible and is not inherently improbable. The administrative law judge gives more weight to the claimant's sworn testimony denying using the "f word" in the presence of the resident.

Although the administrative law judge does not approve or condone the used inappropriate language in the work place, the evidence in the record establishes the claimant's statement "she won't stop shitting" was in the nature of an excited utterance, made in response to a nurse repeatedly questioning why she had not quickly finished duties working with a resident who was suffering with diarrhea.

This administrative law judge concludes that although the decision to terminate Ms. Shondel from her employment may have been of sound decision from her management viewpoint, the evidence in the record is not sufficient to establish intentional disqualifying misconduct on the part of the claimant sufficient to warrant a denial of unemployment insurance benefits. Benefits are allowed providing claimant is otherwise eligible.

DECISION:

The representative's decision dated March 1, 2017, reference 01, is affirmed. Claimant was discharged under non-disqualifying conditions. Unemployment insurance benefits are allowed providing claimant is otherwise eligible.

_____
Terry P. Nice
Administrative Law Judge

_____
Decision Dated and Mailed

scn/scn