IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

HEATHER A KLEINSCHRODT Claimant **AREA RESIDENTIAL CARE INC** Employer	**APPEAL 19A-UI-05631-JC** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 06/02/19** **Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer/appellant, Area Residential Care Inc., filed an appeal from the July 3, 2019 (reference 02) Iowa Workforce Development ("IWD") unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A first hearing was scheduled for August 7, 2019 with Administrative Law Judge, Teresa Hillary. The hearing was postponed at the employer's request, and the employer requested an in-person hearing.

After proper notice, an in-person hearing was conducted on September 11, 2019 in Dubuque, Iowa. The claimant, Heather Kleinschrodt, participated personally and was represented by Emilie Roth Richardson, attorney at law. Rachel Naderman, day program coordinator, was subpoenaed by the claimant and testified. Holly Tracy was subpoenaed to appear but did not respond or appear for the hearing. The employer was represented by Davin C. Curtiss, attorney at law. Susan Freeman and Cindy Leifker testified for the employer.

The administrative law judge took official notice of the administrative records including the fact-finding documents. Claimant Exhibit A and Employer Exhibits 1-4 were admitted into evidence over objection. Employer's proposed Exhibit 5 was not admitted. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can any charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as an Instructor II until June 4, 2019 when she was discharged

(Employer Exhibit 1). The employer stated the claimant was discharged for insubordination. The employer operates a day habilitation program with dependent adults who have varying levels of disabilities. The adults are referred to as consumers. Consumers are placed in teams of 5-7 individuals and have an assigned instructor, who provides integrative activities at the employer premises and through outings to help teach social and life skills (Freeman testimony). There is no set requirement or written policy of how many outings an instructor must do with the consumers each week, and there are variables related to weather, transportation, and money that sometimes influence the outings as well.

The employer also trains employees, including the claimant, how to handle and redirect consumers, as well as has a plan for each consumer to assist staff with interactions and potential behavioral issues with the consumer. The claimant was retrained on various policies and procedures in response to discipline she received prior to separation (Employer Exhibit 4).

The claimant's prior history included various infractions as it related to passing medications, interactions with consumers, calling off when denied PTO use and being argumentative/insubordinate (Employer Exhibit 1). The most recent warning prior to the final incident was a final written warning on April 23, 2019, in response to multiple incidents between March 29 and April 17, 2019 in which the claimant argued with her manager or refused to follow directives (Employer Exhibit 1). She was made aware that her job was in jeopardy (Employer Exhibit 1).

The employer stated the claimant was discharged for being insubordinate to her manager, Lisa Sommer based upon Ms. Sommer's report to Ms. Naderman on June 4, 2019. Ms. Freeman cited that the claimant had planned to take her consumers to the dog park on June 4, 2019 but did not, and that one of the claimant's assigned consumers, "L", appeared unattended in the "big room" playing Wii (Freeman testimony). The employer provided an unsigned written statement by Ms. Sommer which stated the claimant became argumentative with her when she directed the claimant to remove Consumer L from the Wii and questioned her for not going on an outing that day (Employer Exhibit 2).

The claimant's account of her final two days of employment differed from the employer. On June 3rd, (not June 4th) the claimant had planned to go to a dog park. She had wanted L to be moved to another group so she could visit the dog park, and discussed it with Ms. Naderman prior to June 3, 2019. The reason she did not want L to go to the dog park was for his own and safety of animals. When Ms. Naderman forgot to move L, the claimant decided not to go to the dog park after all.

On June 4, 2019, the claimant intended to take her consumers to the art supply store to buy new supplies. This required the claimant obtaining money the day of the outing from Ms. Sommer or Ms. Naderman. The claimant acknowledged that by this time, communications between her and Ms. Sommer were strained so she intended to go directly to Ms. Naderman, but was unable to find her. Consequently, she did not go to the art store as planned. Instead, the claimant and her consumers engaged in a newspaper activity, did exercises and decorated their new classroom. The claimant had tried to engage the group together that day. It was known that Consumer L preferred to engage in physical activities and the consumer did not participate in the decorating. Rather, he ripped up some of the pictures before leaving the classroom and going to the big room to play the Wii with another consumer. He remained there, with the claimant checking on him every fifteen minutes or so, and the claimant checked in with the instructor of the other consumer playing the Wii with L. The claimant said she had twice tried redirect him back to the classroom and asked him to return to no avail.

The employer stated the claimant had left L unsupervised and had failed to take her consumers on an outing. Prior to discharge, the claimant had not been counseled based upon not completing required outings, for leaving consumers unsupervised or how she engaged with L.

Ms. Sommer did not attend the hearing and was not subpoenaed by the employer. The other instructor who had a consumer play Wii with the claimant's consumer was not disciplined. The claimant was not interviewed or given an opportunity to provide an explanation of what occurred before being discharged (Freeman testimony).

The administrative record reflects that claimant has received unemployment benefits in the amount of $5,968.00 (through the week ending September 7, 2019), since filing a claim with an effective date of June 2, 2019. The administrative record also establishes that the employer did participate in the July 2, 2019, fact-finding interview or make a witness with direct knowledge available for rebuttal. Katherine Kutka, human resources director, participated.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged, but not for disqualifying job-related misconduct. Benefits are allowed.

Iowa unemployment insurance law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id*.

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 employer has the burden of proof in establishing disqualifying job related misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). 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). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990).

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*. In this case, the administrative law judge also had the opportunity to observe the parties in person as they participated in the hearing. Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

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.

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.

The question of whether the refusal to perform a specific task constitutes misconduct must be determined by evaluating both the reasonableness of the employer's request in light of all circumstances and the employee's reason for noncompliance. *Endicott v. Iowa Dep't of Job Serv.*, 367 N.W.2d 300 (Iowa Ct. App. 1985).

There is no question that the claimant had a history of insubordination and also a strong personality, based upon her prior disciplinary history and her conduct during the hearing. Prior to discharge, the claimant had most recently been argumentative and insubordinate, which resulted in her being placed on a final written warning on April 23, 2019. The claimant reasonably knew or should have known her job was in jeopardy.

The claimant credibly established that she intended to take her consumers on outings on June 3, 2019 and June 4, 2019 but did not do so. She did not complete the June 3 outing due to Consumer L not being reassigned as planned, and the claimant in her discretion, deciding it was unsafe to continue with the outing. She did not complete her June 4, 2019 outing to the art store because she was unable to secure the money from management. On June 4, 2019, she reorganized her day plans to include exercising and redecorating the classroom instead. When Consumer L refused to engage and ripped up pictures, she allowed him to play the Wii, while being monitored by her and another co-worker.

The crux of this case is not whether the claimant had been insubordinate to her manager in the past, but whether on June 4, 2019, she engaged in a final, current act of insubordination. The employer witnesses who participated were not present during the final incident and had only hearsay evidence. The claimant's former supervisor, Lisa Sommer, did not participate and was not subpoenaed to attend. The employer presented an unsigned statement of Ms. Sommer to support its position. There was no written rule or policy to support the directive the claimant allegedly failed to comply with on June 4, 2019, and the employer witnesses were inconsistent as to the heart of what the claimant refused or failed to do on June 4, 2019 as directed by Lisa Sommer: Was it that she allowed Consumer L to play the Wii without her direct supervision for a period of time, or was it that she did not take her consumers on an outing as she had planned? There was no specific requirement that supported the claimant was required to take her group on an outing on June 4, 2019, nor was her co-worker disciplined for allowing her consumer to play Wii with the claimant's consumer.

Administrative agencies are not bound by the technical rules of evidence. *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 630 (Iowa 2000). A decision may be based upon evidence that would ordinarily be deemed inadmissible under the rules of evidence, as long as the evidence is not immaterial or irrelevant. *Clark v. Iowa Dep't of Revenue*, 644 N.W.2d 310, 320 (Iowa 2002). Hearsay evidence is admissible at administrative hearings and may constitute substantial evidence. *Gaskey v. Iowa Dep't of Transp.*, 537 N.W.2d 695, 698 (Iowa 1995).

In the case at hand, the claimant appeared personally, provided sworn testimony, answered questions, and subjected herself to the possibility of cross-examination. In contrast, the only evidence in support of the employer was hearsay testimony and an unsworn statement. The case turns on the communications between the claimant and Lisa Sommer. The employer had the ability to compel the testimony of Lisa Sommer, which would have been the best evidence to decipher whether the claimant did in fact engage in an insubordinate act on June 4, 2019. For unknown reasons, the employer did not submit the evidence for the hearing.

The employer's evidence was inconsistent as to whether the claimant was discharged for failing to execute a specific directive from Ms. Sommer, for failing to take her team on a required outing, or for failing to adequately supervise Consumer L. The employer could not provide sufficient, specific details about the claimant's insubordinate conduct and even cited the dog park incident occurring on June 4, 2019 when it was actually June 3rd. In the absence of any other evidence of equal weight either explaining or contradicting the claimant's testimony, it is held that the weight of evidence is established in favor of the claimant. The employer has failed to establish by a preponderance of the evidence that the claimant engaged in a final act of insubordination on June 4, 2019.

The question before the administrative law judge in this case is not whether the employer has the right to discharge this employee, but whether the claimant's discharge is disqualifying under the provisions of the Iowa Employment Security Law. While the decision to terminate the claimant may have been a sound decision from a management viewpoint, for the above stated

reasons, the administrative law judge concludes that the employer has not sustained its burden of proof in establishing that the claimant's discharge was due to a final or current act of job related misconduct. Accordingly, benefits are allowed, provided the claimant is otherwise eligible.

Because the claimant is eligible for benefits, the issues of overpayment and relief of charges are moot.

The parties are reminded that under Iowa Code § 96.6-4, a finding of fact or law, judgment, conclusion, or final order made in an unemployment insurance proceeding is binding only on the parties in this proceeding and is not binding in any other agency or judicial proceeding. This provision makes clear that unemployment findings and conclusions are only binding on unemployment issues, and have no effect otherwise.

DECISION:

The July 3, 2019 (reference 02) initial decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

_____
Jennifer L. Beckman
Administrative Law Judge

_____
Decision Dated and Mailed

jlb/scn