IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

CHERYL MORTON Claimant **WINDSOR MANOR ASSISTED** Employer	**APPEAL 20A-UI-14536-SN-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 08/09/20** **Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(1)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The employer filed an appeal from the October 29, 2020, (reference 01) unemployment insurance decision that granted benefits based upon a conclusion the employer did not prove she was terminated for a disqualifying reason. The parties were properly notified of the hearing. A telephone hearing was held on January 12, 2021. The claimant participated. The employer participated through Human Resources Director Cinda Siwach. Exhibits 1, 2, and 3 were admitted into the record.

ISSUE:

Whether the claimant was terminated due a willful misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

The claimant, Cheryl Morton, was employed full time as a Director of Nursing for the employer, Windsor Manor Assisted, from May 17, 2019, until this employment ended on August 11, 2020, when she was discharged. The claimant's immediate supervisor was Regional Nurse Stephanie Neas.

The employer has a corrective action policy which is outlined in its employee handbook. In the corrective action policy in a section listing behavior warranting immediate dismissal. One type of behavior listed is an employee's unwillingness to perform duties.

In August 2019, the claimant received a favorable 90-day performance review. The claimant was performing well during this period in time.

On June 9, 2020, the claimant received her annual performance evaluation written by Regional Nurse Stephanie Neas, which is broken down into positive and negative feedback. The negative feedback coached the claimant on her communication and approach with families, residents,

and staff. The positive feedback labels the claimant as a team player. The claimant was also instructed to improve the retention rate of her residents. The annual performance evaluation determined the claimant would receive a three percent raise. (Exhibit 3)

Over the course of June and July 2020, the claimant had a series of negative interactions with Director of Operations Lynne Popp.

On July 27, 2020, Cinda Siwach began investigating complaints made by staff and residents regarding the claimant's communication style. In particular, several staff alleged they would still be working for the employer, if they had not been required to communicate or interact with the claimant. The employer provided Cinda Siwach's interview notes from interviews with five former employees conducted on August 4, 2020 and August 5, 2020, whom all left due to the claimant's communication style and approach. (Exhibit 2)

On August 6, 2020, Ms. Popp visited the facility because a group of residents had significant weight loss and she wanted to know what claimant was doing to address the situation. The claimant acted in a belligerent manner and did not take responsibility for the residents.

In the week preceding her termination, the claimant was informed of Ms. Siwach's investigation by the Acting Director Terri Tweety.

On August 10, 2020, Ms. Popp visited and Ms. Tweety met with claimant to go over the information gathered during Ms. Siwach's investigation. The conversation with the claimant went over the information given in the termination notice.

The employer provided a copy of the claimant's termination notice dated August 10, 2020, and signed by Ms. Popp on August 11, 2020. The claimant was not given the opportunity to sign. (Exhibit 1) The termination notice is three paragraphs long. The first paragraph describes negative feedback theme from the claimant's annual performance review and references Siwach's investigation into staff and resident complaints. The second paragraph lists the August 6 and August 10 as specific interactions with staff that led to her discharge.

During the hearing, Ms. Siwach had difficulty determining a final incident for the date of discharge. Instead, she concluded the reason for discharge was the culmination of her investigation, which occurred over several weeks.

On October 29, 2020, the claimant participated in the fact finding interview. The deputy told the claimant the employer could participate by calling later that day. Later that day, Ms. Siwach called the deputy back. Ms. Siwach provided a copy of the employer's employee manual and Exhibits 1, 2, and 3 to fact finding.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

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). 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 must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

The conduct for which claimant was discharged was merely an isolated incident of poor judgment. To the extent that the circumstances surrounding each accident were not similar enough to establish a pattern of misbehavior, the employer has only shown that claimant was negligent. "[M]ere negligence is not enough to constitute misconduct." *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 666 (Iowa 2000). A claimant will not be disqualified if the employer shows only "inadvertencies or ordinary negligence in isolated instances." 871 IAC 24.32(1)(a). When looking at an alleged pattern of negligence, previous incidents are considered when deciding whether a "degree of recurrence" indicates culpability. Claimant was careless, but the carelessness does not indicate "such degree of recurrence as to manifest equal culpability, wrongful intent or evil design" such that it could accurately be called misconduct. Iowa Admin. Code r. 871-24.32(1)(a); *Greenwell v. Emp't Appeal Bd.*, No. 15-0154 (Iowa Ct. App. Mar. 23, 2016). The misconduct leading to discharge also must be a current act.

See Green v. Employment Appeal Bd., 426 N.W.2d 659, (Iowa Ct. App. 1988). A current act is measured in days, not weeks or months.

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.

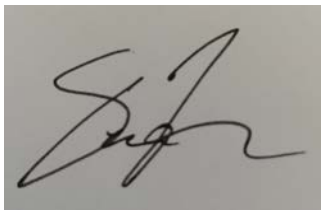
There is a dispute over when the claimant was terminated. The administrative law judge concludes the claimant was terminated on August 10, 2020. The termination notice is dated and the information described in it was presented as such on August 10, 2020. In that context, the administrative law judge rejects Ms. Siwach's allegation that the claimant's conduct on August 10, 2020 was a final incident. Ms. Siwach repeatedly said in the hearing she rested on her investigation findings as the reason. Those findings were presented on August 10, 2020 to the claimant. Those findings are also far too remote from the termination date to be current acts of misconduct. *See Green v. Employment Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct. App. 1988).

Assuming arguendo the claimant's termination is not too remote from the underlying final incident of misconduct; the employer did not sufficiently warn her prior to discharge. The employer contends it gave the claimant a warning regarding her communication on June 9, 2020. The annual performance evaluation she received at that time would not have put her on notice her performance or conduct was an issue. As the claimant pointed out, the performance review acknowledges areas that broadly touch on communication as areas in which she performs well.

An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Training or general notice to staff about a policy is not considered a disciplinary warning. Inasmuch as employer had not previously warned claimant about the issue leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. Benefits are granted.

DECISION:

The October 29, 2020, (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment for no disqualifying misconduct. Benefits are granted. Since benefits are granted, the issue of overpayment is moot.



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Sean M. Nelson
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February 26, 2021
Decision Dated and Mailed

smn/scn