IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

PAULA J NAGLE
Claimant

WESLEYLIFE
Employer

APPEAL NO: 14A-UI-05229-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 04/27/14
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Paula J. Nagle (claimant) appealed a representative's May 20, 2014 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment with Wesleylife (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on June 19, 2014. The claimant participated in the hearing. Marcy Schneider of Equifax/TALX Employer Services appeared on the employer's behalf and presented testimony from three witnesses, Betty Stone, Mark Yingling, and Sherry Velasco. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

OUTCOME:

Reversed. Benefits allowed.

FINDINGS OF FACT:

The claimant started working for the employer on April 19, 2012. She worked full time as a housekeeping assistant at the employer's Des Moines, Iowa retirement community. Her last day of work was April 29, 2014. The employer discharged her on that date. The reason asserted for the discharge was unacceptable job performance.

The employer's discipline procedure normally provides for a verbal warning, a written warning, and a final warning prior to discharge for a particular issue. The claimant had been given a final warning on May 16, 2014 for an integrity issue of eating food without paying. She had been given a written warning on November 15, 2013 for a job performance issue of leaving a can of furniture polish on top of her cleaning cart. She had been verbally counseled about some issues regarding stocking soap and paper towels on April 10 and April 16, but she was not advised that her job was in some jeopardy until she was verbally so advised on April 21; she

was never given a final warning advising her that her job performance was so unacceptable that a further incident would result in discharge.

The final incident occurred on April 18, which was why the claimant was verbally advised that her job was in jeopardy if she continued to have job performance issues. There is no evidence she had a further unsatisfactory job performance problem between April 21 and April 29. The employer asserted that on April 18 the claimant had failed to stock toilet paper and had failed to take out the trash in a bathroom in the adult day center. The claimant believed that she had stocked the toilet paper, but that some of the toilet paper could have been stolen between April 18 and April 21, as that had happened in the past. She acknowledged that while she had pulled the trash from the bathroom, she had forgotten to take it out before finishing for the night.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. Rule 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. Rule 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, 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. Rule 871 IAC 24.32(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). The gravity of the incident and the number of prior violations and prior warnings are factors considered when analyzing misconduct. The lack of a current or effective warning may detract from a finding of an intentional policy violation.

The reason cited by the employer for discharging the claimant is unsatisfactory job performance. The mere fact that an employee might have various incidents of unsatisfactory job performance does not establish the necessary element of intent; misconduct connotes volition. A failure in job performance is not misconduct unless it is intentional. *Huntoon*, supra; *Lee v. Employment Appeal Board*, 616 N.W.2d 661 (Iowa 2000). There is no evidence the claimant intentionally failed to properly complete her duties realizing that her job was in jeopardy because of her prior omissions. The claimant had not previously been effectively warned that

future incidents could result in her termination. *Higgins v. IDJS*, 350 N.W.2d 187 (Iowa 1984). The employer has not met its burden to show disqualifying misconduct. *Cosper*, supra. Based upon the evidence provided, the claimant's actions on April 18, 2014 were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's May 20, 2014 decision (reference 01) is reversed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

ld/pjs