IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MARISA J WALLER
Claimant

THE EASTER SEAL SOCIETY OF IOWA INC
Employer

APPEAL NO. 11A-UI-12146-LT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 08/14/11
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The employer filed an appeal from the September 13, 2011 (reference 01) decision that allowed benefits. After due notice was issued, a hearing was held by telephone conference call on October 10, 2011. Claimant participated. Employer participated through AIM Team Leader Jacque College, Director of AIM Program Mindy Burr, and Human Resources Generalist Sara Hardy. Employer's Exhibit 1 (fax pages 3 – 21) was admitted to the record. The client name at fax page 20 was redacted by the administrative law judge.

ISSUE:

The issue is whether claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a program coordinator from April 18, 2011 and was separated from employment on August 17, 2011, two and a half weeks into an extension of her probationary period. Most recently, on Tuesday, August 16 claimant recorded information about a client meeting incorrectly and the employer found out when the claimant submitted her time card. The employer considered the documentation of services minimal and considered incomplete. (Employer's Exhibit 1, fax pages 19 - 21) She had suffered heat stroke and was hospitalized the weekend of August 13 and 14 and missed work on Monday, August 15 when the timecard and report was due so she rushed to complete the information on Tuesday, August 16. (Employer's Exhibit 1, fax page 16) The employer had counseled her verbally on June 1, 2011 about client communication, productivity and time reporting for the month of May. (Employer's Exhibit 1, fax pages 3 - 7) The employer did not warn her in writing that her job was in jeopardy for any reason and noted some improvement in other areas at her July 27, 2011 performance review; but indicated the need for improvement with the same three issues. In spite of the employer's dissatisfaction in those areas, it extended the probationary period for 60 days. (Employer's Exhibit 1, fax pages 8 - 12) The employer had other verbal discussions about the same issues on June 27, 28, July 5, August 4 (about issues on July 21, 27, and 29), and August 9 (about an issue on July 6). (Employer's Exhibit 1, fax pages 13 - 15) There was not

an extended period of time in her employment when she consistently met the employer's expectations about productivity and time reporting.

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 § 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.

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. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. IDJS,* 391 N.W.2d 731 (Iowa App. 1986). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Employment Appeal Board*, 423 N.W.2d 211 (Iowa App. 1988). Failure in job

performance due to inability or incapacity is not considered misconduct because the actions were not volitional. *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979). Where an individual is discharged due to a failure in job performance, proof of that individual's ability to do the job is required to justify disqualification, rather than accepting the employer's subjective view. To do so is to impermissibly shift the burden of proof to the claimant. *Kelly v. IDJS*, 386 N.W.2d 552 (Iowa App. 1986).

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job-related misconduct as the reason for the separation, employer incurs potential liability for unemployment insurance benefits related to that separation. Although there were references to some improvement in performance, primarily in areas other than client communication, productivity and time reporting, the claimant never had a sustained period of time in either probationary period during which she performed job duties to the employer's satisfaction. Inasmuch as she was unable to do so and did attempt to perform the job to the best of her ability but was unable to meet the employer's expectations, no intentional misconduct has been established, as is the employer's burden of proof. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). Accordingly, no disqualification pursuant to Iowa Code § 96.5(2)a is imposed.

DECISION:

The September 13, 2011 (reference 01) decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

dml/css