IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

HAROLD W MCELDERRY Claimant **HCM INC** Employer	**APPEAL 16A-UI-05442-DB-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 03/27/16** **Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant/appellant filed an appeal from the April 27, 2016 (reference 02) unemployment insurance decision that denied benefits based upon his discharge from employment for job-related misconduct. The parties were properly notified of the hearing. A telephone hearing was held on May 26, 2016. The claimant, Harold W. McElderry, participated personally. The employer, HCM, Inc., participated through Provisional Administrator and Admissions Director Carly Lippert and Regional Consultant Amy Wright. Employer's Exhibit One was admitted.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Did claimant voluntarily quit the employment with good cause attributable to employer?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as an Administrator. This company is a nursing home facility. He was employed from October 12, 2015 until March 30, 2016. His direct supervisor was Adam Braden. Claimant's job duties included managing staff and ensuring compliance with federal and state regulations.

The employer has a written policy regarding discipline. See Exhibit One. Claimant was discharged for his interactions with staff and residents that were found to be inappropriate. Claimant was told by Mr. Braden that he was being discharged because his demeanor was too gruff and abrupt with staff. Employer also alleged that claimant yelled at residents and at staff.

On March 28, 2016, it came to the employer's attention that allegations had been made against claimant yelling and making inappropriate comments to residents and staff. Use of profanity was not one of the allegations but rather claimant's tone of voice. An investigation team was formed which included Adam Braden, Amy Wright and Kelli Rokusk. Ms. Wright does not work for this employer but works for the consulting agency that the facility uses from time to time.

This investigation team took statements of residents and staff members. No statements from any residents or staff members were offered as exhibits during the hearing. Ms. Wright testified that the team interviewed 20 to 30 staff members and approximately 75 to 80 percent of those persons noted an occasion when they felt that claimant had spoken inappropriately or yelled at residents or staff members.

There was a specific occasion when claimant accused a resident of stealing and threatened to call the police. The resident became upset and threw water at him. Claimant was instructed to speak to this resident about this issue by Mr. Braden.

There was another specific incident alleged that claimant was yelling at a resident while bending over close to them in their wheelchair and stated "listen here buddy." Claimant did raise his voice to this resident because this resident is hard of hearing and cannot hear unless you are close to him and use a loud voice when speaking to him.

Claimant was suspended on March 28, 2016, pending the investigation. He was told on March 29, 2016 to come in to work for a meeting that would occur on March 30, 2016. He did so and during the meeting Mr. Braden told claimant that he was being discharged. The conclusion of the investigation found that the complaints about the negative treatment of staff were validated but that the investigation team did not substantiate the allegations of mistreatment of residents. See Exhibit One.

Claimant was never given any previous verbal or written discipline during his employment. Exhibit One Page Two states that "the investigation must include having the associate meet with management and have an opportunity to give his/her side of the story". Exhibit One. Claimant was not asked to make a statement nor shown copies of the statements that the investigation team compiled. Ms. Lippert had never personally witnessed any inappropriate behavior by claimant towards staff or residents.

REASONING AND CONCLUSIONS OF LAW:

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

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 and (4) provides:

> Discharge for misconduct.
>
> (1) Definition.
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> 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.
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> 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).
>
> (4) Report required. The claimant's statement and the 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 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). Misconduct "must be substantial" to justify the denial of unemployment benefits. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000). "Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of benefits." *Id.* (citation omitted).

When the record is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. *Schmitz v. Iowa Dep't Human Servs.*, 461 N.W.2d 603, 607 (Iowa Ct. App. 1990). Both the quality and the quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See Iowa Code § 17A.14 (1). In making the evaluation, the fact-finder should conduct a common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be fulfilled. *Schmitz*, 461 N.W.2d at 608. The Iowa Supreme Court has ruled that if a party has the power to produce more explicit and direct evidence than it chooses to present, the administrative law judge may infer that evidence not presented would reveal deficiencies in the party's case. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976). It is permissible to infer that the statements from staff and residents were not submitted because they would not have been supportive of employer's position. See *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976).

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*. After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own

common sense and experience, the administrative law judge finds claimant's direct testimony of events more credible than the employer's reliance on hearsay statements from residents and staff.

Further the employer did not present a witness with direct knowledge of the situation except Ms. Wright, who was neither a staff member nor resident. No request to continue the hearing was made and no written statements of the individuals that were part of the investigation were offered. Given the serious nature of the proceeding and the employer's allegations resulting in claimant's discharge from employment, the employer's nearly complete reliance on hearsay statements is unsettling.

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.

Claimant was never given any previous discipline prior to the investigation into his treatment of staff and residents. Claimant did not yell at staff or residents and did not interact inappropriately with them. Employer 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.

An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct prior to discharge. 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. Benefits are allowed.

DECISION:

The April 27, 2016 (reference 02) unemployment insurance decision denying benefits is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible.

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Dawn R. Boucher
Administrative Law Judge

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Decision Dated and Mailed

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