IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

KORI L MARCH
Claimant

RECOVER HEALTH SERVICES LLC
Employer

APPEAL NO. 12A-UI-13190-LT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/07/12
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed an appeal from the October 24, 2012 (reference 01) decision that allowed benefits. After due notice was issued, a hearing was held by telephone conference call on December 7, 2012. Claimant participated and was represented by Leif Erickson, Attorney at Law. Employer participated through branch manager, Kathleen Petrie and LPN Jessica Olson. Employer's Exhibit 1 was received.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a LPN and was separated from employment on October 9, 2012 after calling in sick on October 8. She was orienting Olson on October 5. Olson was sitting in a chair near the ventilator client in one room and reported that claimant was in the next room sitting in a recliner chair, curled up with her eyes closed for about 45 minutes. No breaks are allowed on the 8:00 a.m. to 6:00 p.m. awake shift. Olson reported the incident to Petrie who called the client's mother, who was not present during that part of the shift but reportedly said it was not uncommon. The client's mother never expressed concerns with claimant about the care she was providing. Petrie confronted the claimant who said she had allergy issues and put her head down but did not fall asleep. The employer has asked claimant to resign in exchange for settling her workers' compensation claim. She has a 30-pound lifting restriction. The employer had not previously warned claimant her job was in jeopardy for similar reasons.

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 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). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. 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." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* 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. Iowa Dep't of Job Serv.,* 391 N.W.2d 731 (Iowa Ct. App. 1986). Sleeping on the job on two occasions, one year apart, can constitute job misconduct. *Hurtado v. Iowa Dep't of Job Serv.*, 393 N.W.2d 309 (Iowa 1986).

Sleeping on the job can be disqualifying misconduct. An employer can reasonably expect that an employee will be working when scheduled, regardless of the existence of a work rule about sleeping on the job. The analysis in these types of cases focuses on the volitional nature of the employee's conduct. For example, an individual who nods off at work after taking a cold pill

likely has not committed an act of misconduct. Contrast this type of conduct with an individual who has gone to some effort to conceal his or her sleeping from the employer. In this case, the evidence fails to establish that claimant slept on the job. Olson could not see claimant during the entire time period at issue and noted no snoring or similar sounds indicating sleep. Claimant was dealing with allergy issues and did not attempt to conceal her position, which might indicate a deliberate intent to sleep while at the client's house. The employer had not warned claimant about similar issues in the past and there were no complaints from the client's mother about her conduct.

Nothing in this decision should be interpreted as a condemnation of the employer's right to terminate the claimant. The analysis of unemployment insurance eligibility, however, does not end there. This ruling simply holds that the claimant did not have the requisite level of intent or negligence for her conduct to qualify as misconduct under Iowa law. 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. 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. Benefits are allowed.

DECISION:

The October 24, 2012 (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

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