

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

BARBARA A KEAN
Claimant

MCNEAL ENTERPRISES LLC SERIES 1
Employer

APPEAL 16A-UI-11664-DB-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 10/02/16
Claimant: Appellant (1)

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 October 24, 2016 (reference 01) unemployment insurance decision that disallowed benefits based upon claimant's discharge from employment. The parties were properly notified of the hearing. A telephone hearing was held on November 29, 2016. The claimant, Barbara A. Kean, participated personally and was represented by Attorney J. Richard Johnson. The employer, McNeal Enterprises LLC Series 1, participated through witnesses Becky McNeal, Callie O'Brien, and Jessica Montgomery. Employer's Exhibits 1 – 3 were 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 associate. This employer operates a child care facility. Claimant was employed from December 17, 2007 until October 4, 2016 when she was discharged from employment. Claimant's job duties involved caring for and supervising children as well as cleaning the facility.

This employer has a progressive disciplinary policy. It consists of three steps. The written policy states that the employer can impose verbal warnings, written warnings, and then termination of employment. The employer also reserves the right to immediately terminate an employee based upon the sole discretion of the employer. Claimant received a copy of this written policy when she began her employment as well as in September of 2016 when the policies were updated.

The final incident occurred on September 30, 2016. Claimant was observed by co-worker named Shania Stewart to have left the children she was supervising alone for more than three minutes. Claimant had left the little two-year old room and went into the big two-year old room

to ask a co-worker for a mop. During this time claimant could not see the children she was supposed to be supervising as she was no longer in the same room. Claimant was the only employee assigned to the little two-year old room at that time. The required ratio for adult to child in that room was one to four. Claimant was required to be supervising the children at all times during her shift, even during nap time.

Claimant had received previous discipline during the course of her employment. She received a verbal and written warning on October 22, 2014 regarding her actions in leaving a child unattended at the playground. She was reminded at this time that she needed to make sure that she was aware of the whereabouts of all children at all times. See Exhibit 3. Claimant received a second written warning on February 16, 2016 regarding her actions in vacuuming at a time when she was supposed to be supervising the children in her room and not cleaning.

Ms. O'Brien discussed this final incident with claimant on Friday, September 30, 2016 after she became aware of it. Claimant admitted to Ms. O'Brien during this meeting that she had left the room with the children unattended. Ms. O'Brien documented what had happened on an employee compliance agreement form. See Exhibit 2. Ms. O'Brien needed to confirm with Ms. McNeal whether claimant would be discharged from employment based upon her actions on September 30, 2016 so claimant was not discharged on September 30, 2016.

The next day that claimant was scheduled to work was Tuesday, October 4, 2016. Claimant was called into the office by Ms. McNeal and was discharged from employment that day regarding the incident that occurred on September 30, 2016.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged for job-related misconduct. Benefits are denied.

As a preliminary matter, I find that the Claimant did not quit. Claimant was discharged from employment.

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 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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and 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.

Iowa Admin. Code r.871-24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

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 that Ms. McNeal's and Ms. O'Brien's testimony is more credible than claimant's testimony.

Further, even though Exhibit 2 contains hearsay statements, administrative agencies are not bound by the technical rules of evidence. *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 630 (Iowa 2000). A decision may be based upon evidence that would ordinarily be deemed inadmissible under the rules of evidence, as long as the evidence is not immaterial or irrelevant. *Clark v. Iowa Dep't of Revenue*, 644 N.W.2d 310, 320 (Iowa 2002). Hearsay evidence is admissible at administrative hearings and may constitute substantial evidence. *Gaskey v. Iowa Dep't of*

Transp., 537 N.W.2d 695, 698 (Iowa 1995). In considering whether specific hearsay testimony is “the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs” there are five factors to be considered. *Schmitz v. Iowa Dep’t of Human Servs.*, 461 N.W.2d 603, 607-08 (Iowa Ct. App. 1990)(citing Iowa Code § 17A.14(1)). Those factors include: (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. *Id.* at 608. In this case the employee compliance agreement was used to document the incident that occurred on September 30, 2016. The form notes that there was no plan for improvement because this was the claimant’s third infraction. Further, there was no indication on this form that claimant disagreed with any of the statements written under the description of the infraction. As such, I find this statement regarding the incident and Ms. O’Brien’s testimony that claimant admitted to her on September 30, 2016 that she left the children unattended when she went into the big two-year old room persuasive.

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 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). The focus of the administrative code definition of misconduct is on deliberate, intentional or culpable acts by the employee. *Id.* 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). Further, poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp’t Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000). A lapse of 11 days from final act until discharge when claimant was notified on fourth day that his conduct was grounds for dismissal did not make final act a “past act”. *Greene v. Emp’t Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct. App. 1988).

Prior to this discharge claimant had received two previous warnings for failing to appropriately supervise the children she was assigned to supervise. Claimant’s job duties included following the policies and procedures regarding ratios and supervision of children that were in place for safety purposes. Claimant was aware that she was not able to leave children unattended at any time, including nap time.

The employer has a right to expect that an employee will not jeopardize the safety of the children they are to be supervising by leaving them unattended. There is substantial evidence in the record to support the conclusion that claimant deliberately violated these rightful expectations in this case. Accordingly, the employer has met its burden of proof in establishing that the claimant’s conduct consisted of deliberate acts which constituted an intentional and substantial disregard of the employer’s interests. These actions rise to the level of willful misconduct. As such, benefits are denied.

DECISION:

The October 24, 2016 (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for job-related misconduct. Benefits are withheld in regards to this employer until such time as claimant is deemed eligible.

Dawn Boucher
Administrative Law Judge

Decision Dated and Mailed

db/