

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

BILLY M DODD
Claimant

PINNACLE HEALTH FACILITIES XVII L
Employer

APPEAL 15A-UI-13130-JP-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 11/01/15
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the November 19, 2015, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on December 16, 2015. Claimant participated. Employer participated through human resources/payroll, Virginia Kirkpatrick. Employer Exhibit One was admitted into evidence with no objection.

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 dietary cook from April 14, 2014, and was separated from employment on October 1, 2015, when he was discharged.

The employer's disciplinary policy allows management discretion on discipline based on the severity of the misconduct. When a new resident comes to the employer, a dietary manager meets with residents to go over food preferences and food allergies. A dietary ticket is then created for the resident. Residents can update their tickets. Meals are resident specific. Each tray has the resident's dietary ticket on it. The plates are built one at a time for each resident. Claimant was responsible for cooking the food and preparing the plates. If the resident tells claimant to ignore their dietary ticket, then it would have to be documented. There was no documentation from the September 25, 2015 incident.

A resident noted on their dietary ticket that pork was a dislike/allergy. On September 25, 2015, claimant served that resident pork riblets and baked beans that had bacon in it. A nurse noticed that the resident was eating pork riblets and baked beans with bacon in it. The resident had consumed part of the food. In this instance, it was just a dislike, but the dietary ticket showed the category as dislike/allergy. There was a dietary card for the resident on September 25, 2015. Ms. Kirkpatrick testified the incident was on September 25, 2015, because the calendar shows that it was Friday's dinner and the 25th was a Friday. The resident was admitted to the

employer on September 9, 2015, and it usually only takes a couple of days to get a dietary ticket. If there is no dietary ticket, then there is usually a handwritten note. On September 30, 2015, claimant also did not follow a resident's dietary ticket.

On July 31, 2015, claimant received a written warning for safe food handling concern. An open can of food was put in the fridge, eggs were under cooked, and dietary tickets were not being followed. Employer Exhibit One. Claimant signed for the warning. Claimant was warned that his job was in jeopardy. Claimant testified he had no prior warnings for not following meal tickets. On August 5, 2014, claimant received a written warning for not properly cleaning dishes. Claimant did not sign for the warning.

The decision was made to discharge claimant as opposed to some lesser punishment because there were concerns for the health and safety of the residents. If dietary tickets are not followed, it may cause harm to the resident, including death.

REASONING AND CONCLUSIONS OF LAW:

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

It is the duty of an administrative law judge and 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, as the finder of fact, 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. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). 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 evidence you believe; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. This administrative law judge reviewed the exhibit. This administrative law judge finds the employer's version of events to be more credible than claimant's recollection of those events.

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).

Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *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). 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).

While the employer did not present the resident that was served pork on September 25, 2015 to provide sworn testimony or submit to cross-examination, the combination of Ms. Kirkpatrick's testimony and employer exhibit one, when compared to claimant's recollection of the event, establish the employer's evidence as credible. The employer is entitled to establish reasonable work rules and expect employees to abide by them. Workers in food preparation and production reasonably have a higher standard of care required in the performance of their job duties to ensure public safety and health. If a resident receives food that they are allergic to or not able to properly process, injury, including death, could result. Claimant was aware of the dangers if a resident was served food that they were allergic to.

On September 25, 2015, claimant failed to properly follow a resident's dietary ticket and caused the resident to be served pork. Employer Exhibit One. The resident's dietary ticket listed pork under allergies/dislikes. Employer Exhibit One. Claimant's argument that there was no dietary ticket for this resident is not persuasive. Ms. Kirkpatrick testified this resident was admitted to the employer on September 9, 2015 and it usually only takes a couple of days to get a dietary ticket made. Furthermore, claimant also argued that the incident occurred on September 28, 2015; however, Ms. Kirkpatrick testified the menu for the meal that was served was for a Friday, and September 25, 2015 was a Friday. Claimant also testified he had no prior warnings for not

following dietary tickets, yet claimant was clearly warned in writing on July 31, 2015 for not following a dietary ticket. Employer Exhibit One. For these reasons, this administrative law judge found the employer's evidence to be more credible and claimant failed to follow the resident's dietary ticket on September 25, 2015 when he served the resident pork.

The employer has presented substantial and credible evidence that claimant did not follow a resident's dietary ticket after having been warned. Claimant's failure to follow a resident's dietary ticket was contrary to the best interests of the employer and the safety of its residents. Because of the potential harm and prior warning for similar conduct, this is disqualifying misconduct. Benefits are denied.

DECISION:

The November 19, 2015, (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

jp/pjs