IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

BRENT A TERHARK
Claimant

HOPE HAVEN INC
Employer

APPEAL NO. 10A-UI-05698-HT

ADMINISTRATIVE LAW JUDGE DECISION

Original Claim: 03/14/10
Claimant: Respondent (1)

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The employer, Hope Haven, filed an appeal from a decision dated April 5, 2010, reference 01. The decision allowed benefits to the claimant, Brent Terhark. After due notice was issued, a hearing was held by telephone conference call on June 2, 2010 and concluded on July 7, 2010. The claimant participated on his own behalf and was represented by Al Sturgeon. The employer participated by Manager Jeri Hass and Residential Instructor Becky Van Ommeren and was represented by Gary Fischer. Exhibits One, Two, Three, Four, and Five were admitted into the record.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Brent Terhark was employed by Hope Haven from November 22, 1988 until March 1, 2010 as a full-time residential instructor. At time of hire, and every year thereafter, the claimant received training on behavior management for the clients. The policy specifically provides for "positive reinforcement" and no physical restraint except to save the client, other clients, staff members, or property from injury or harm.

On February 2, 2010, Manager Jeri Hass received a report of an incident involving Mr. Terhark on January 31, 2010, where he had pushed a client against the wall and told her to "knock that crap off." Ms. Hass interviewed Mr. Terhark and he admitted the incident because two clients had been involved in a physical altercation where one client had bitten the other and he had separated the two, pushing the aggressor against the wall. Ms. Hass suspended him with pay pending further investigation.

The manager interviewed both clients and the staff member who was present, Residential Instructor Becky Van Ommeren. All agreed about the course of events and Ms. Hass concluded the investigation on February 9, 2010. Rather than discharge him at that point, the claimant was notified his suspension was being continued, though without pay from that point,

pending a review by the appropriate state agency. The employer decided to refer the matter to a state agency for further investigation because of the claimant's long tenure. She wanted the agency to determine whether or not Mr. Terhark could continue to work for the company, though in another capacity.

On March 3, 2010, the same day the state agency arrived to begin its investigation, Ms. Van Ommeren reported two other incidents involving the claimant that occurred in November and December 2009. She claimed she did not report these earlier, even though she is a mandatory reporter, because she was afraid of Mr. Terhark. This fear was based on rumors she had heard from others about his bad temper and the belief he was being protected by management from consequences of any complaints.

Ms. Hass investigated these incidents where Mr. Terhark allegedly dragged a client down a hallway and the other when he allegedly threw a client on the couch. The investigation consisted of interviewing the clients, another client who was a witness, and a staff member, Ms. Van Ommeren. Mr. Terhark said he did not recall the incidents in November and December but denied he had ever harmed a resident. At the end of that investigation, before the state agency issued any kind of report, Mr. Terhark was fired by Ms. Hass for violation of the adult abuse policy.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 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 only incident to which Mr. Terhark admitted occurred on January 31, 2010. The employer investigated the matter but elected not to discharge him at that time. Instead, it intended to maintain him as an employee if possible. Any decision to discharge based on this incident cannot be disqualifying under 871 IAC 24.32(8) because it was beyond a "current act" when he was fired on March 1, 2010.

In so far as the other incidents reported to the employer much later, the employer has the burden of proof to establish the claimant was discharged for substantial, job-related misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). In the present case, the only testimony was from another residential instructor who, admittedly, did not perform her required duties to report her belief abuse had occurred for over four months. This was based on some vague rumors to the effect the claimant "had a temper" and was "being protected" by the employer from any complaints. The administrative law judge does not find this credible. As a mandatory reporter, Ms. Van Ommeren's sudden "recollection" of alleged incidents of abuse from four months prior is highly suspect.

The administrative law judge understands the employer may have elected to err on the side of caution and discharge the claimant. The issue is not whether the employer made a correct decision in separating the 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 benefits are two separate decisions. *Pierce v. IDJS*, 426 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. IDJS*, 351 N.W.2d 806 (Iowa App. 1984).

The claimant's denial of any wrongdoing has not been successfully rebutted by the employer by any testimony other than that of the other residential instructor whose substantial delay in reporting the incidents is suspect. This is insufficient to meet Hope Haven's burden of proof and disqualification may not be imposed.

DECISION:

The representative's decision of April 5, 2010, reference 01 is affirmed. Brent Terhark is qualified for benefits, provided he is otherwise eligible.

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Bonny G. Hendricksmeyer
Administrative Law Judge

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Decision Dated and Mailed

bgh/kjw