

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

CATHERINE J PETERSON
Claimant

HAWKEYE CARE CENTER OF CARROLL
Employer

APPEAL 16A-UI-10012-LJ-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 08/21/16
Claimant: Appellant (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(1)a – Definition of Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from the September 12, 2016, (reference 01) unemployment insurance decision that denied benefits based upon a determination that claimant failed to perform satisfactory work even though she was capable of doing so. The parties were properly notified of the hearing. A telephone hearing was held on September 29, 2016. The claimant, Catherine J. Peterson, participated. The employer, Hawkeye Care Center of Carroll, participated through Linda Prouty, administrator; Becky Lohff, dietary manager; and Heather Mueggenberg, human resources.

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, most recently as a dietary cook, from June 5, 2015, until August 23, 2016, when she was discharged.

The final incident of misconduct occurred on August 22, 2016. That day, both the employer's dietician and Lohff were observing claimant performing her job and saw her make a number of errors. Claimant did not prepare a vegetable correctly, she failed to properly prepare ground meat for a ground food diet, and she took food that had been portioned onto a plate and put it back into a steaming tray. Claimant failed to follow the recipes given to her, she did not follow the proper portion size, and she served the meal fifteen minutes late. She also needed to be reminded to serve alternate vegetables for special diets.

Mueggenberg spoke to claimant on August 22, and she had no explanation for these issues occurring. According to Mueggenberg and Lohff, claimant's conduct violated job performance expectations and safety standards. Claimant denies she committed these errors, and she attributes any errors she did commit to a lack of training. Claimant provided explanations for

most of the issues Lohff and the dietician witnessed on August 22, and she claims she was not doing anything differently from any other employee.

Claimant received a final written warning on August 15, for safety and job performance issues. Claimant served burnt potato wedges, she failed to follow a recipe, and she left sausages unattended, which resulted in them burning. Claimant was notified through this final written warning that she was at risk of being discharged. Claimant received a written warning on May 23, 2016, for infection and control issues. That day, she failed to wash her hands and properly use gloves, she threw broccoli on the floor, and she walked away from her station during food service.

Multiple employer witnesses testified about the importance of following menu guidelines, portion size guidelines, and meal plans. Doctors write diet orders that must be followed, and federal and state guidelines set nutrition standards. If a cook deviated from a recipe, the resident's diet and calorie intake would be altered, and this was unacceptable. The employer denies claimant did not receive training. Mueggenberg testified that claimant attended an inservice on August 12, during which the employer reviewed portion control, recipes, and diet plans with all the cooks and dietary aides. On August 8, the employer reviewed its policies and state-imposed guidelines with all staff-members, including claimant. The employer also provided staff education about following menus on June 8. Prouty testified that claimant was discharged because claimant was not making any improvement, despite education and discipline.

REASONING AND CONCLUSIONS OF LAW:

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

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).

The Iowa Court of Appeals found substantial evidence of misconduct in testimony that the claimant worked slower than he was capable of working and would temporarily and briefly improve following oral reprimands. *Sellers v. Emp't Appeal Bd.*, 531 N.W.2d 645 (Iowa Ct. App. 1995). 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).

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 the employer's version of events more credible than claimant's. The administrative law judge founds claimant's explanations for each of the errors on August 22 to be excuses rather than legitimate reasons. The employer provided credible testimony regarding multiple training opportunities claimant received, and the administrative law judge does not believe that claimant was not given training or was not able to do her job.

Claimant's repeated failure to accurately perform her job duties after having been warned is evidence of negligence or carelessness to such a degree of recurrence as to rise to the level of disqualifying job-related misconduct. See Iowa Admin. Code r. 871-24.32(1)a. The employer provided credible evidence establishing that claimant was repeatedly warned about how to properly perform her job. Claimant's failure to accurately perform the job duties, despite these warnings and the training opportunities extended to her, amounts to disqualifying misconduct. Benefits are withheld.

DECISION:

The September 12, 2016, (reference 01) unemployment insurance decision is affirmed. 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.

Elizabeth A. Johnson
Administrative Law Judge

Decision Dated and Mailed

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