

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

HALIE BUDREAU
Claimant

APPEAL NO: 18A-UI-08769-JC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

RECOVER HEALTH SERVICES LLC
Employer

OC: 07/15/18
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer/appellant, Recover Health Services LLC., filed an appeal from the August 6, 2018, (reference 01) unemployment insurance decision that allowed benefits. After proper notice was given to the parties, a telephone hearing was held on September 7, 2018. The claimant participated personally. The employer participated through Zach Schultz, branch manager. Employer Exhibits 1-3 were admitted into evidence. The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can any charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as an RN (registered nurse) beginning March 9, 2018 and was separated from employment on July 16, 2018, when she was discharged.

The claimant's primary job duties included visiting pediatric clients, who needed medical care and assistance with daily living tasks. The claimant was expected to follow care plans, comprised of medical directives and tasks assigned by parents. The claimant's caseload consisted of two children/families. Between the claimant's start date and July 3, 2018, the claimant was removed three times from clients at the parents' requests, due to her care or inability to follow care plans. Two of the families requested removal, due to the claimant's handling of a tracheotomy tube and charging a machine used for a child with a tracheotomy tube. The third incident involved the claimant falling asleep on the job. Consequently, she was given a written warning on July 3, 2018 by the employer (Employer Exhibit 1).

On July 9, 2018, the claimant cared for a child client which required her to be taken to the emergency room mid-shift. Part of the claimant's job duties, per the care plan, were to brush the child's teeth, hair, and style her hair. There was no medical directive or safety reason the child's hair needed to be fixed. That morning, the child fell ill with a fever before being hospitalized. The claimant worked to care for the child, contact her parents, and coordinate with a doctor before she was transported to the emergency room. As a result, the claimant stated she did get the hair brushed and teeth brush but not the hair fixed before hospitalization. The parent reportedly requested removal of the claimant as a result. Since the claimant had already been removed from three other clients, she was discharged.

Mr. Schultz began employment on the claimant's last day of employment. He had no details available about the final incident and no personal knowledge of the incidents leading to separation.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$2,425.00, since filing a claim with an effective date of July 15, 2018. The administrative record also establishes that the employer did not participate in the fact-finding interview or make a witness with direct knowledge available for rebuttal. Cicely Sherrod, claims analyst, for Thomas and Company (the employer's vendor), returned a voicemail at the time of the fact-finding interview to state the employer would not be participating and to use the information provided with the claim. This information consisted of Employer Exhibits 1-3 at the hearing, and a copy of the SIDES claim protest. No policy was provided, the warning was cut off as illegible, and no rebuttal witness was furnished.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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 employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 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. IDJS*, 364 N.W.2d 262 (Iowa 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. IDJS*, 425 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." *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). Failure in job performance due to inability or incapacity is not considered misconduct because the actions were not volitional. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

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.* Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct, as defined by the unemployment insurance law.

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.

The credible evidence presented is the claimant was placed on a written warning on July 3, 2018 (Employer Exhibit 1) after she was removed from three clients' homes at the parents' requests. All three families raised concern about her care for their children and her ability follow care plans, which were a combination of physician orders and parental requests, such as brushing teeth or hair for the child. The claimant knew or should have known her job was in jeopardy.

On July 9, 2018, the claimant was caring for a child client and expected to brush her teeth, brush her hair, and fix her hair, as part of the daily care plan. The claimant acknowledged she knew the expectations for this client, and stated she did brush the child's teeth and hair but did not fix the child's hair before the child was taken to the emergency room mid-shift. The question of whether the refusal to perform a specific task constitutes misconduct must be determined by evaluating both the reasonableness of the employer's request in light of all circumstances and the employee's reason for noncompliance. *Endicott v. Iowa Dep't of Job Serv.*, 367 N.W.2d 300 (Iowa Ct. App. 1985).

The administrative law judge recognizes the employer's concerns with the claimant failing to follow care plans, and under most circumstances, the claimant should have fixed the child's hair that day. However, the claimant credibly testified the child was running a fever, and she was trying to contact the parent and hospital that day before she was taken to the emergency room. The administrative law judge is persuaded the claimant's reason for non-compliance with the hair fixing directive was reasonable under the circumstances. The claimant did not purposefully neglect the care plan but rather placed the medical care as priority to fixing the child's hair. For these reasons, the administrative law judge cannot conclude the claimant's actions on July 9, 2018, which led to the parent's complaint and removal of the client to be misconduct.

The question before the administrative law judge in this case is not whether the employer has the right to discharge this employee, but whether the claimant's discharge is disqualifying under the provisions of the Iowa Employment Security Law. While the decision to terminate the claimant may have been a sound decision from a management viewpoint, for the above stated reasons, the administrative law judge concludes that the employer has not sustained its burden of proof in establishing that the claimant's discharge was due to job related misconduct. Accordingly, benefits are allowed, provided the claimant is otherwise eligible.

Because the claimant is eligible for benefits, the issues of overpayment and relief of charges are moot.

DECISION:

The August 6, 2018, (reference 01) decision is affirmed. The claimant was discharged for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/scn