

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

ASHLEY A PARKER
Claimant

DEVELOPMENTAL SERVICES OF IOWA
Employer

APPEAL 15A-UI-08430-SC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 06/28/15
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the July 22, 2015, (reference 01) unemployment insurance decision that denied benefits based upon the determination she was discharged for engaging in conduct that was not in the best interest of the employer. The parties were properly notified about the hearing. A telephone hearing was held on August 19, 2015. Claimant Ashley Parker participated on her own behalf. Employer Developmental Services of Iowa participated through Program Coordinator Ashley Combs and Human Resources Manager Ashley Simoni. Employer's Exhibit 1 was received.

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: The claimant was employed full-time as a Front Line Supervisor beginning October 29, 2012, and was separated from employment on July 20, 2015, when she was discharged. The claimant was responsible for supervising support staff and clients in an assisted living house for persons with developmental disabilities. The claimant reported inappropriate conduct and suspended one of her staff in May 2015, when the staff member took clients to her personal residence for a picnic and left them unsupervised. During the investigation, the staff member reported alleged wrongdoing by the claimant.

The staff member described an incident in which one client, who had switched case managers prior to entering services, was left alone and used illegal drugs. Some clients are allowed alone time. When the client's drug use was discovered, the claimant contacted her supervisor, the case manager, and the client's father. The claimant had previously received information from the new case manager that the client was allowed to have alone time so he could enter the community on his own.

The employer suspended the claimant on June 17, 2015, pending investigation into this incident. The employer reviewed the case file and spoke with the client's former case manager, neither of which indicated the client was allowed any alone time. The employer determined the claimant falsified information, failed to maintain appropriate boundaries with her staff, and instructed her staff to allow the client alone time that was not documented in his plan.

The claimant had previously received numerous warnings over her tenure with the employer. However, those warnings were mostly related to poor work performance as a supervisor and failing to complete required reports. The poor work performance included such things as not verifying the timekeeping for which she was responsible, missing physician forms, and poor communication.

REASONING AND CONCLUSIONS OF LAW:

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

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).

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. 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). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. 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. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). 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).

When the record is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. *Schmitz v. Iowa Dep't Human Servs.*, 461 N.W.2d 603, 607 (Iowa Ct. App. 1990). Both the quality and the quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See, Iowa Code § 17A.14 (1). In making the evaluation, the fact-finder should conduct a common sense evaluation of (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. *Schmitz*, 461 N.W.2d at 608.

The decision in this case rests, at least in part, upon the credibility of the parties. The employer did not present a witness with direct knowledge of the situation. No request to continue the hearing was made and no written statement of the individual was offered. Given the serious nature of the proceeding and the employer's allegations resulting in claimant's discharge from employment, the employer's nearly complete reliance on hearsay statements is unsettling. Mindful of the ruling in *Crosser, id.*, and noting that the claimant presented direct, first-hand testimony while the employer relied upon second-hand reports, the administrative law judge concludes that the claimant's recollection of the events is more credible than that of the employer.

The employer has argued the claimant was involved in misconduct when she allowed a client to have alone time and, in turn, he was discovered using illegal drugs. The employer relied on a statement from an employee who was likely upset with the claimant and information obtained from the previous case worker. The claimant credibly testified that the client had a second case worker who allowed him to have alone time. The employer did not provide a statement from the employee who reported the incident or any additional documentation from the investigation, other than the document created memorializing the claimant's termination. The employer did not have the investigator who gathered the evidence testify at the hearing. The employer has failed to show the claimant engaged in misconduct.

Accepting, *arguendo*, the claimant did engage in misconduct, the employer has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain

expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Training or general notice to staff about a policy is not considered a disciplinary warning. A warning for poor job performance or failing to document certain things is not similar to falsifying records or failure to supervise and the employer's simple accrual of a certain number of warnings counting towards discharge does not establish repeated negligence or deliberation and is not dispositive of the issue of misconduct for the purpose of determining eligibility for unemployment insurance benefits. Benefits are allowed.

DECISION:

The July 22, 2015, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

Stephanie R. Callahan
Administrative Law Judge

Decision Dated and Mailed

src/pjs