

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

DIANA K REYNOLDS
Claimant

SYSTEMS UNLIMITED INC
Employer

APPEAL 15A-UI-06399-JP-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 05/10/15
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the May 21, 2015, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on July 9, 2015. Claimant participated. Employer participated through Jenny O'Brien, and Amy Bashman. Mary Bartachek-Bronemann, Tammy Reynolds, and Sara Porter were present on behalf of the employer but did not testify. Employer Exhibit numbers One through Three were admitted into evidence without 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 Direct Support Position (DSP) from July 30, 2009, and was separated from employment on May 5, 2015, when she was discharged.

A DSP employee is responsible for going to an individual's home and helping them with their everyday activities, including taking them out to eat when appropriate.

On October 14, 2014, claimant signed an Agreement for Continued Employment (hereinafter "ACE"). Employer Exhibit One. The ACE was a result of prior behavior by claimant. Employer Exhibit One. The ACE put claimant on notice that her job was in jeopardy and if she committed another violation, she would be terminated. Employer Exhibit One.

On April 21, 2015, claimant was working with "client". Client was one of three residents at a home. On April 21, 2015, claimant was instructed by her direct supervisor that client wanted to go out for supper. When client returned to the house from work, claimant told client they were going to go out to eat that night, but they had to wait until other staff got to the house. When it was time to go eat, claimant found client in client's room. Claimant knew client was difficult to get out of his room. Claimant and Ms. Basham, the other DSP working in the home that day, made multiple attempts to get client to leave his room so they could go out to eat. Client

refused to leave his room. Ms. Basham took client's roommate and left the house to get something to eat. When they returned, client asked claimant what was to eat. Claimant told client they would have to check the refrigerator to see what was available. Claimant did not offer to take client out to eat. Client wanted to go out to eat, but claimant refused to take the client. Ms. Basham testified that refusing to take client out to eat was considered a right restriction, because the client had the right to go out to eat. Client began cursing at claimant because she refused to take him out to eat. Client had used profanity before. Client had been expecting to go out to eat. Ms. Basham thought claimant sounded annoyed with client. The incident troubled Ms. Basham enough that she went outside the house and debated whether to call their direct supervisor or just take client out to eat. Before Ms. Basham could make a decision, client came outside with his cell phone. Client handed Ms. Basham the cell phone and claimant's direct supervisor was on the other line. Client had called claimant's direct supervisors because of claimant's interaction with him. The direct supervisor told Ms. Basham to take client out to eat. When they returned, claimant told Ms. Basham to work with client the rest of the night because she did not want to work with client. The employer does not allow a DSP to refuse to work with an individual in the home. A right restriction can result in a write up or termination, depending on the seriousness.

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.

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).

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 appearance, 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).

While the employer did not present Ms. Bartachek-Bronemann, Ms. Porter, or Ms. Tammy Reynolds to provide sworn testimony or submit to cross-examination, the combination of Ms. O'Brien and Ms. Bashman's testimony and the employer's exhibits, when compared to claimant's recollection of the event, establish the employer's evidence as credible. Workers in the dependent care profession, reasonably have a higher standard of care required in the performance of their job duties. That duty is evident by the individual's (client's) reliance on them. Client relied on claimant for his everyday activities, including being taken out to eat. Claimant had been told by her direct supervisor that client was expecting to go out to eat. Claimant knew client was difficult to get out of his room when she initially approached him to go eat. Client's profanity may have been an overreaction, but given the nature of claimant's job and client's past use of profanity, it should not have been unexpected. Claimant had been previously warned about her interaction with the individuals residing in the house. Employer Exhibit One. However, despite the signed ACE, claimant failed to treat client with respect and violated client's right to go out to eat.

The employer has presented substantial and credible evidence that claimant caused there to be a right restriction on client after having been previously warned regarding her conduct with the ACE. Employer Exhibit One. This is disqualifying misconduct.

DECISION:

The May 21, 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 she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

jp/mak