

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

SARAH L HERVEY
Claimant

JACKSON RECOVERY CENTERS INC
Employer

APPEAL 17A-UI-01536-SC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 01/08/17
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Sarah L. Hervey (claimant) filed an appeal from the February 9, 2017, reference 02, unemployment insurance decision that denied benefits based upon the determination Jackson Recovery Centers, Inc. (employer) discharged her for violation of a known company policy. The parties were properly notified about the hearing. A telephone hearing was held on March 3, 2017. The claimant participated and was represented by Attorney Jay Denne. Stacy McIntosh participated on the claimant's behalf. The employer participated through Human Resources Director Sharon Miller, Program Manager for In-Patient Adolescence Program Gladys Smith, and Clinical Coordinator Audrey Baird and was represented by Attorney Allison Dirksen. Claimant's Exhibits A and B were received. Employer's Exhibits 1 through 9 were 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 beginning on February 3, 2015, and was separated from employment on January 11, 2017, when she was discharged. The claimant was promoted to the position of Therapist in February 2016. She was responsible for providing counseling to adolescents with addictive and other behavior and emotional disorders. The employer has a Code of Conduct and Code of Ethics that prohibits any relationship beyond a professional one between staff and patients. The claimant reported to and Clinical Coordinator Audrey Baird (Baird) who reported to Program Manager for In-Patient Adolescence Program Gladys Smith (Smith).

At 6:00 a.m. on Friday, January 6, 2017, a custodial staff member was cleaning the claimant's office. She found notes by the claimant's garbage can. None of the notes were dated or addressed to a particular person. In one of the notes, the claimant indicated she loved being the recipient's therapist and recognized she was unprofessional with him. In another note, she told the recipient that she was into his ideas about her future relationships, stated the two connected which "freaks" her out, told him to finish the busy part of his life and they could see

what happened, and told him that occasionally she wanted to look nice because she liked when he called her pretty. (Employer's Exhibit 4, 10A.) The third note was a partial statement in which the claimant stated all things happened for a reason, but did not finish the thought. The custodial staff who found the notes brought them to Smith.

Smith met with Human Resources Kim Jorgensen (Jorgensen). They met with the claimant that afternoon and asked her about the notes. The claimant reported that the notes were a result of a former patient contacting her on Facebook which brought back memories and feelings. She wrote the notes as a form of journaling to deal with her feelings. The claimant was suspended pending an investigation.

Later that afternoon, the claimant sent an email to the Smith to further explain the concerns that had been brought up that afternoon. The claimant then disclosed that she had received two notes from an adolescent patient the day before. She explained that she had previously discussed with him in individual session issues regarding inappropriate relationships between therapists and patients. She stated it was the patient's notes that brought up issues from the person on Facebook and she wrote the notes with no intention to deliver them. She claimed she was going to show Baird the notes written by the patient when she arrived to work that day but was unable to do so as she was suspended.

On Monday, January 9, 2017, the employer searched the claimant's desk and found the two notes written by the patient. In one of the notes, the patient stated his heart speeds up when he sees the claimant and he acknowledged that she felt unprofessional about the situation. He asked if they could be more than friends. He concluded by asking if he could kiss her when he was alone with her next. In another note, the patient stated he also felt a connection with the claimant and told her not to be "freaked out." (Employer's Exhibit 4, 10B.) He stated he had liked for her a while and asked for a future with her. He then also stated no matter what anyone said he always found her to be pretty or beautiful.

The same day, the claimant came in for an interview. She read from a prepared statement denying any wrong doing. She acknowledged that she had been told the patient made statements to other staff that he was going to date her and they would go to dinner as a couple. She stated she addressed the patient's inappropriate statements with him and nothing physical happened between the two. The claimant also disclosed a personal relationship she was having with a co-worker. The claimant stated she told Baird about the patient's crush and was going to show the notes to her on that Friday.

The employer spoke with Baird who denied having knowledge of the situation between the claimant and the patient. The employer read the notes and determined the claimant had been engaging in an inappropriate exchange with her patient. It also had Baird review the claimant's progress notes to determine if she ever documented that she discussed transference and counter-transference with the patient. The claimant had not noted any conversations along those lines. The employer discharged her for failing to follow the Code of Conduct and Code of Ethics. The codes are there to protect the patient from inappropriate relations with a person in power. The codes are also there as the employer is credentialed and violations of this nature could affect the credentialing.

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 based upon wages credited from this employer's account are denied.

Iowa law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id.* Iowa regulations define misconduct:

“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.

Iowa Admin. Code r. 871-24.32(1)a. 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 Dep't of Job Serv.*, 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. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). 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). 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).

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 to be more credible. The claimant's timeline and explanation of events evolved over the two written statements submitted during the employer's investigation and the testimony she provided during the hearing. While

no one but the claimant and the patient will ever definitively know if this had been a therapist/patient relationship that had become unprofessional, the notes written by the claimant and the patient indicates an ongoing unprofessional relationship or discussion when viewed in their entirety. Additionally, the claimant's conduct after the fact seemed to indicate something unprofessional had occurred as the claimant, by her own admission, knew about the notes from the patient prior to her meeting with Smith and Jorgensen, but did not say anything about the patient's notes or possible transference issues.

Workers in the medical or dependent care profession, reasonably have a higher standard of care required in the performance of their job duties. While the claimant was not yet licensed, she was studying for her licensure exam and has a four-year degree in psychology. The employer covered the policies with her in orientation and the claimant was aware of transference issues. The claimant did not document the transference issues or remove herself from the patient's treatment. The claimant was an adult and the therapist working with an adolescent with known behavioral and emotional issues. She was aware of the transference issues, but did not note them or take appropriate steps to remove herself as his therapist. Her failure to document or address the issue, regardless of the extent of the unprofessional relationship, indicates a deliberate disregard of the employer's best interest. The employer has an interest in protecting patients and employees from issues arising from unprofessional relationships. One way to do that is to keep a clear record of any sort of issues that might arise so they can be dealt with and documented. The claimant's conduct is disqualifying misconduct without prior warning.

DECISION:

The February 9, 2017, reference 02, 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.

Stephanie R. Callahan
Administrative Law Judge

Decision Dated and Mailed

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