IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JUDY M BRADFORD
Claimant

ALLEN MEMORIAL HOSPITAL
Employer

APPEAL NO. 11A-UI-00471-VST

ADMINISTRATIVE LAW JUDGE DECISION

OC: 11/07/10
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from a representative’s decision dated January 6, 2011, reference 02, which held the claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on February 14, 2011. The claimant participated. The employer participated by Steve Sesterhenn, senior vice president for human resources. The record consists of the testimony of Steve Sesterhenn and the testimony of Judy Bradford.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a medical facility, hospital, and college located in Waterloo, Iowa. The claimant was hired on June 9, 2008, as a unit coordinator in the skilled nursing unit. That unit was closed at the end of March 2010 and the claimant was transferred to the mental health unit. The claimant’s last day of work was November 5, 2010. She was placed on unpaid administrative leave on November 8, 2010. She is still an employee of the employer.

The incident that led to the claimant’s suspension occurred on November 3, 2010. The claimant was in the room where the telephone and a television were located. It was approximately 10:00 p.m. and the claimant was cleaning up the room, wiping off tables, and putting away dishes. One of the patients in the room made a derogatory comment about African-Americans to the claimant. The claimant picked up a glass of water and asked the patient how he would feel if she threw the glass of water at him. The subsequent events of the evening are in dispute between the parties. The employer concluded, after an investigation, that the claimant escalated the situation further. The claimant said she had no further contact with the patient and that after she said what she did, the patient calmed down. The patient did have to be restrained at some point.

The claimant met with representatives of the employer on November 8, 2010. A representative from the union was present to assist the claimant. The claimant signed what the employer called a "last chance agreement." The claimant would be suspended for 21 days and thereafter have six months to find another job in the hospital. She could not return to the mental health unit or to the emergency room. The patient was a regular at both the mental health unit and the emergency room and had said he was looking for the claimant. For the claimant's safety, she could not work in the emergency room or the mental health unit. The claimant has applied for several jobs within the hospital and had an interview for an open position last week. She does not have bumping rights, because the incident was a level three violation and no bumping rights are available.

The last chance agreement also states that the claimant agreed that the employer had good cause for terminating her, but given the totality of the circumstances, she was being placed on administrative leave instead. The claimant does not recall that being in the agreement and does not feel she did anything wrong. No one who directly witnessed the event on November 3, 2010, testified at the hearing, with the exception of the claimant.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 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:
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> 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.

871 IAC 24.32(1)a provides:

> Discharge for misconduct.
>
> (1) Definition.
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> 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.

871 IAC 24.32(9) provides:

> (9) Suspension or disciplinary layoff. Whenever a claim is filed and the reason for the claimant's unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as discharged, and the issue of misconduct must be resolved. Alleged misconduct or dishonesty without corroboration is not sufficient to result in disqualification.

Misconduct that leads to termination, or in this case administrative leave without pay, is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. The legal definition of misconduct excludes errors of judgment or discretion that occur in isolated situations. The employer has the burden of proof to establish misconduct.

The employer, a hospital, has in place written policies that prohibit an employee from threatening a patient or a member of the patient's family. The claimant was aware of these policies. The very difficult issue in this case is whether the claimant's statement to a patient on November 3, 2010, was a threat to the patient. The patient, who was often a patient in the mental health unit, called the claimant a "bitch" or perhaps a "black bitch." The claimant then picked up a glass of water and asked the patient how he would feel if she threw that glass of water at him. According to the claimant, the patient calmed down and she had no further contact with him. The employer, relying on statements gathered from other employees during its investigation, stated that the claimant continued to have contact with the patient and escalated the situation by calling him a "white ass."

The employer's testimony is hearsay testimony. None of the employees who actually witnessed the events on November 3, 2010, were present at the hearing. The claimant testified that she did not threaten the patient and that she had no further contact with him after she made the comment about the glass of water. She said that she was just trying to give the patient an example of what might happen. The administrative law judge concludes that if the claimant's testimony is accepted, then the claimant's comment, while unfortunate, is more an error of judgment or discretion on her part. She did not deescalate the situation as she had been trained to do. There is no evidence that she had had similar incidents in the past.

Hearsay testimony is admissible in administrative hearings. However, hearsay testimony cannot be the basis for a finding of misconduct. Findings must be based upon the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs. Iowa Code section 17A.14(1). Allegations of misconduct 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. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

The Iowa Court of Appeals set forth a methodology for making the determination as to whether hearsay rises to the level of substantial evidence. In Schmitz v. Iowa Department of Human Services, 461 N.W.2d 603, 607-608 (Iowa App. 1990), the Court required evaluation of the "quality and quantity of the [hearsay] evidence to see whether it rises to the necessary levels of trustworthiness, credibility and accuracy required by a reasonably prudent person in the conduct of their affairs." To perform this evaluation, the Court developed a five-point test, requiring

agencies to employ a "common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better evidence; (4) the need for precision; (5) the administrative policy to be fulfilled." Id. At 608.

Because the employer's witnesses did not testify at the hearing, the administrative law judge had no opportunity to question them and to weigh the credibility of their testimony versus the testimony of the claimant. There is therefore, insufficient evidence in this record to find misconduct. Benefits are allowed if the claimant is otherwise eligible.

DECISION:

The decision of the representative dated January 6, 2011, reference 02, is reversed. Unemployment insurance benefits are allowed provided claimant is otherwise eligible.

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Vicki L. Seeck
Administrative Law Judge

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Decision Dated and Mailed

vls/kjw