

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

TRICIA L GRIMES
Claimant

DAC INC
Employer

APPEAL 15R-UI-10535-JCT
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 06/21/15
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the July 10, 2015, (reference 01) unemployment insurance decision that denied benefits based upon separation. The parties were properly notified about the hearing. A telephone hearing was held on October 7, 2015. The claimant participated with her attorney, Dorothy O'Brien. The employer participated through Melinda Haley. Jill Kent and Joellen Hall also participated on behalf of the employer. Claimant Exhibits 1 and 2 were admitted into evidence.

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 direct support specialist and was separated from employment on June 15, 2015, when she was discharged for failure to provide supervision.

The employer provides support and supervision for individuals with intellectual disabilities. Specifically, the claimant was responsible for providing care for three individuals housed in an apartment. The claimant worked the overnight shift, and while other shifts had two individuals assigned, she was the sole caretaker during her shift.

The employer has a general policy that allows employees to take breaks throughout their shifts, and use the restroom when necessary. The employer asserted that each residence though also had specific rules based upon the needs of the individuals being served, and the residence that the claimant worked at did not allow breaks once a new individual moved in around February 2015. The employer was aware the claimant had previously taken breaks to smoke cigarettes while assigned to that residence (Claimant Exhibit 2). The employer did not provide any written policy that was provided to employees regarding not taking breaks.

The final incident occurred when it was reported to the employer that the claimant took a break to smoke a cigarette during her overnight shift on June 14, 2015. It was reported to the employer by one of the individuals at the residence, that during the break, sexual contact

occurred between two of the male residents, and the evidence was disputed as to whether it was consensual or not. The claimant admitted to taking a cigarette break, after she had verified each of the three individuals were in their respective beds, asleep, with doors closed, and when she returned approximately seven minutes later, no changes had occurred or were reported to her. She was subsequently discharged.

The claimant later exchanged text messages with one of the individuals involved in the sexual contact, who indicated the act took place not on the claimant's shift but another employee's shift (Claimant Exhibit One).

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.

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, 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 is misconduct that warrants denial of unemployment insurance benefits are two separate matters. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, 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(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

The employer cited the reason for discharge as failure to properly supervise the residents assigned when the claimant took a cigarette break on her June 14, 2015 shift. The claimant asserted at the hearing that her manager, Ms. Hall, knew she took cigarette breaks while assigned to that residence (Claimant exhibit 2) and never had received anything instructing her she was no longer permitted to do so. The employer did not provide any evidence of contradictory instructions being given in writing. Further, the claimant testified before taking her brief break, she verified each of the three individuals were in their respective rooms, with doors closed, sleeping, and that when she returned, there appeared to be no change, and no incident was reported to her.

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 taking an unauthorized break which resulted in sexual contact between two individuals for which the claimant was responsible for providing supervision. 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 claimant was the only individual present at the residence on June 14, 2015, and who participated in the hearing. In addition, the claimant offered supporting evidence by way of text messages with one of the two residents involved in the sexual contact was that it occurred between the residents on the shift of another employee, and not the claimant's (claimant exhibit one). 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.

Cognizant of the responsibility the employer and claimant had to protect the individuals at the residence, the employer failed to provide credible evidence that the claimant was prohibited from taking any break while assigned to the residence in question. Rather, both parties testified that employees are allowed to take breaks, and that the claimant's shift was the only one at the residence without a second employee assigned. Further, the claimant took reasonable steps to make sure the premises were secured by checking on the individuals before and after her short break. Based on the evidence presented, the conduct for which the claimant was discharged was at most an isolated incident of poor judgment and inasmuch as the employer had not previously warned the claimant about the issue leading to the separation, it has not met the burden of proof to establish that the 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. While the employer may have been justified in discharging the claimant, work-connected misconduct as defined by the unemployment insurance law has not been established in this case within the meaning of the statute, and the claimant is not disqualified from benefits. Benefits are allowed.

DECISION:

The July 10, 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. The benefits claimed and withheld shall be paid, provided she is otherwise eligible.

Jennifer L. Coe
Administrative Law Judge

Decision Dated and Mailed

jlc/pjs