

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JOSHUA J DUDLEY
Claimant

G & G LIVING CENTERS INC
Employer

APPEAL 16A-UI-08452-DB-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 07/03/16
Claimant: Appellant (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant/appellant filed an appeal from the August 1, 2016, (reference 01) unemployment insurance decision that disallowed benefits. The parties were properly notified of the hearing. A telephone hearing was held on August 22, 2016. The claimant, Joshua J. Dudley, participated personally. The employer, G & G Living Centers Inc., participated through Chief Executive Officer Lorrie Meier and Employment Services Manager Rachel Jaster. Employer's Exhibits 1 – 9 were admitted.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Did claimant voluntarily quit the employment with good cause attributable to employer?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a Living Support Staff. This employer provides day rehabilitation services to individuals with intellectual disabilities. Claimant was employed from October 2, 2006 until July 8, 2016 when he was discharged from employment. Claimant's job duties involved engaging clients with meaningful activities including role playing; arts; crafts; and games. Ms. Jaster was claimant's immediate supervisor.

This employer has a progressive disciplinary policy. See Exhibit 5. However, the employer reserves the right to discharge an employee at any time. See Exhibit 5. The written policy sets forth different classes of violations and what discipline may be imposed for violations of those different classes. See Exhibit 5. Claimant received a copy of this disciplinary policy. See Exhibit 4.

During the course of his employment claimant had received a written warning on December 18, 2015; a written warning on March 16, 2016; a verbal performance improvement counseling on May 31, 2016; and a written warning on June 28, 2016. See Exhibits 6 – 9. The final incident

came to the employer's attention on July 7, 2016 and claimant was suspended pending investigation. See Exhibit 2. Claimant was then terminated on July 8, 2016. See Exhibit 1.

On July 7, 2016 Ms. Jaster was notified by another co-worker that claimant was performing personal tasks while at work. This co-worker took pictures of claimant working on his two personal computers which he brought into his work area while he was supposed to be engaging the clients he was assigned to for that date. In fact, one of the clients came to this co-worker to find out what to do because claimant was not paying attention to the client.

Both Ms. Jaster and Ms. Meier met with the claimant that same day. During the course of this meeting the claimant admitted that he had been doing personal tasks on the personal computers he had brought to work with him. Ms. Meier estimated that he had used approximately four hours over the past two days (July 5 and July 6) for personal work unrelated to his job tasks. Claimant agreed. Claimant was issued a suspension without pay until further notice. See Exhibit 2.

Ms. Meier continued to investigate the matter and found that claimant had billed for a full day with clients on those two dates even though he had not been working for approximately two hours on each day. Ms. Meier considered this to be fraudulent billing. She notified claimant by telephone on July 8, 2016 and informed him that he had been discharged due to this final incident.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged for job-related misconduct. Benefits are denied.

As a preliminary matter, I find that the Claimant did not quit. Claimant was discharged from employment.

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).

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty 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. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

Iowa Admin. Code r.871-24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

Further, 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). 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." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). The focus of the administrative code definition of misconduct is on deliberate, intentional or culpable acts by the employee. *Id.* When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* 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). Further, 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). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000).

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 that Ms. Meier's testimony is more credible than claimant's testimony.

The final incident involved claimant performing personal tasks while he was supposed to be working, as well as falsely billing for this time. This was in violation of employer's disciplinary policies Class II #9 and Class III 14. See Exhibit 5. Claimant did this on two separate occasions; this was not an isolated incident. Even though claimant was aware of the employer's policies, he completed personal tasks on company time anyway. He billed for services that were not rendered to his clients. Claimant's action of failing to follow the employer's policies constitute an intentional and substantial disregard of the employer's interest and is indicative of a deliberate disregard of the employer's interests, even without prior warning. As such, benefits are denied.

DECISION:

The August 1, 2016, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for job-related misconduct. Benefits are withheld in regards to this employer until such time as claimant is deemed eligible.

Dawn Boucher
Administrative Law Judge

Decision Dated and Mailed

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