IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

CLARINE E MCNAMARA
Claimant

CARE INITIATIVES
Employer

APPEAL NO: 14A-UI-00810-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 12/15/13
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Care Initiatives (employer) appealed a representative's January 13, 2014 decision (reference 01) that concluded Clarine E. McNamara (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on February 20, 2014. The claimant participated in the hearing. Joseph Thornton, attorney at law, appeared on the employer's behalf, and presented testimony from three witnesses, Miriam Selusi, Lindsey Williams, and David Zaldivar. During the hearing, Employer's Exhibits One through Four were entered into evidence. Based on the evidence, the arguments of the parties, a review of the law, and assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

OUTCOME:

Affirmed. Benefits allowed.

FINDINGS OF FACT:

The claimant started working for the employer on April 8, 2013. She worked full time as a certified nursing aide (CNA) in the employer's long-term care nursing facility, working on an overnight shift from about 10:00 p.m. to about 6:30 a.m. Her last day of work was the shift that ended on the morning of December 19, 2013. The employer discharged her on December 20, 2013. The reason asserted for the discharge was the conclusion that the claimant had falsified her reason for being absent on her shift on the evening of December 13.

When the claimant got off work on the morning of December 12 she had advised the director of nursing, Selusi, that she had been having stomach pains. She later decided to go into a clinic, where she was seen by a doctor at about 12:00 p.m. She was told that she had a sinus

infection, and that the drainage from the infection was irritating her stomach. She was given a doctor's note excusing her from work through December 15, and she was then sent to the hospital to have some further tests. On her way to the hospital, at about 1:00 p.m. she called Selusi and reported that she had a doctor's note and would not be at work that evening. She got home sometime before 3:00 p.m. and then rested at home the rest of the evening and night.

The claimant and a friend/coworker had gone out to some local bars over the Thanksgiving weekend, about two weeks prior to December 13. On the night of December 13 that friend posted one or more of some pictures taken from that night on her Facebook page, and "tagged" the claimant in at least one of them, causing the picture to show up on the claimant's Facebook page. On the morning of December 14 the employer became aware of the posting of the pictures. The employer came to the conclusion that the pictures had been taken on the night of December 13 and that the claimant had provided a false reason for her absence on December 13. As a result of reaching this conclusion, the employer discharged the claimant.

REASONING AND CONCLUSIONS OF LAW:

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 reason cited by the employer for discharging the claimant is the conclusion that the claimant had provided a false reason for her absence on the night of December 13. Notably, the employer did not contest that the claimant had a valid doctor's excuse indicating that she was to be off work on that night. The employer relies on a lay understanding of how social media sites work as far as whether the date of posting is the same date as the date the pictures were taken; the claimant provided her own lay understanding that a picture could appear to be originally posted as dated on the date when it is posted even if it had been taken previously.

While the posting of the pictures might have been the basis of some reasonable suspicion that the claimant could have been out on the night of December 13, it is far from establishing such as a fact by a preponderance of the evidence. Requiring the claimant to counter the suspicion to absolutely prove that she was not out would be to impermissibly switch the burden of proof from the employer to the claimant. 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 in fact was absent on the night of December 13 for a reason other than the fact that she was legitimately ill. The employer has not met its burden to show disqualifying misconduct. *Cosper*, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's January 13, 2014 decision (reference 01) is affirmed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

ld/pjs