IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

STEPHANIE JONES
Claimant

IA DEPT OF INSPECTIONS & APPEALS
Employer

APPEAL NO. 12A-UI-14930-W

ADMINISTRATIVE LAW JUDGE DECISION

OC: 11/18/12
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a fact-finding decision dated December 13, 2012, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, an in-person hearing was scheduled for and held on January 30, 2013. Claimant participated through legal counsel, Claire Cumbie-Drake. Kathy Sutton, Assistant Administrator of Health Facilities Division, participated as a witness by telephone. Employer participated by representative, Sam Krauss. Wendy Dishman, Administrator for the Investigations Division, and Betty Tschetter, an Executive Officer with Inspections & Appeals, were present for the employer. Jamie Murphy, Administrator of the Abuse unit, and Shawna Ferguson, Legislative Security Coordinator for the Department of Public Safety (Post 16) were present as witnesses by agreement of the parties. Employer Exhibits 1-3 were admitted into evidence, as was Claimant Exhibit A-I.

ISSUE:

The issue in this matter is whether claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds:

Claimant was employed by the Department of Inspections & Appeals. She was a Program Coordinator in the Abuse Coordinating unit. She began employment with the State in June 1999. Claimant was discharged on November 19, 2012 by employer for allegedly falsifying her timesheet on October 25, 2012.

Toward the end of the day on Thursday October 25, 2012, one of the claimant's co-worker's Jamie Murphy, Administrator of the Abuse unit, noticed that the claimant was not at her desk. Ms. Murphy did not directly supervise the claimant. Ms. Murphy walked into her cubicle and looked in claimant's bag which was left in her cubicle. She indicated that her computer screen was black and her purse was gone. On the afternoon of the following day, Ms. Murphy reported the claimant's apparent absence to the Administrator, Wendy Dishman and she wrote a detailed

statement. On October 26, 2012, Ms. Dishman interviewed three other employees who had cubicles near the claimant's cubicle and determined that none of them had seen the claimant after 3:30 p.m. The claimant was off work on Friday October 26, 2012 for scheduled vacation.

On Monday, October 29, 2012, claimant reported for work at her regular time. Ms. Dishman took further a further statement from Ms. Murphy on October 29, 2012. No statement was taken from the claimant between October 26 and October 29. On October 30, 2012, the claimant was confronted. Her statement was continued until November 1, 2012 at which time she was shown the video evidence of her leaving at 3:23 p.m. The claimant maintained during the course of the investigation that she had met with Kathy Sutton, the Assistant Administrator for the Health Facilities Division. The employer did not take a formal statement from Ms. Sutton. The employer did request the Department of Public Safety to review the video surveillance footage. Shawna Ferguson, Legislative Security Coordinator for the Department of Public Safety (Post 16) reviewed the footage and determined claimant appeared for work in the morning with a purse and a bag, left for lunch with her purse, returned from lunch without her purse and then left at 3:23 p.m. without her purse or bag. The record is unclear as to when the employer requested Ms. Ferguson to review the surveillance.

Claimant was terminated on November 19, 2012.

The claimant had a history of disciplinary action which resulted in a final warning on August 22, 2012. She was on heightened notice that her employment was in jeopardy for any type of work violation.

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:
>
> 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.
>
> 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(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.

The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. The employer has the burden to prove by a preponderance of evidence, that the claimant committed work-related misconduct.

In this matter, the greater weight of evidence fails to establish that claimant was discharged for an act of misconduct.

The evidence in this case is highly disputed, and frankly, it is very close. The ultimate issue is whether the claimant left work early, without permission but reported that she worked a full eight hours for October 25, 2012. If proven, falsification of a time card generally is considered an intentional act against an employer's interests. After reviewing all of the evidence in the record as a whole, it is determined that the evidence could support a finding either way. In other words, the employer has presented a plausible case that the claimant left early. Likewise, the claimant has presented a plausible case that she did not leave early. It is noted, however, that this case is not a typical "she-said, she-said" case where one party must be lying. In the final analysis, the real question is whether the claimant is credible. She is the only one who actually knows whether she left early or not. I find that the claimant is credible on the basis of both the substance of her testimony as well as her demeanor at hearing. Since the burden of proof is on the employer, the claimant prevails.

To be sure, aspects of the employer's case are compelling. The video footage is compelling evidence that the claimant left the building through the west doors of her office building at 3:23 p.m. The claimant's time card is hand-signed and indicates she worked eight hours for that day. Furthermore, Ms. Ferguson presented credible testimony that she did not find any footage of claimant re-entering the building after 3:23 p.m. The employer, however, has conceded that the claimant could have re-entered the building through an entrance which surveillance cameras did not cover. The employer contends this is not likely and argues forcefully that a preponderance of evidence establishes that she left early.

The claimant argues that if she left at 3:23 p.m., in all likelihood she did so to take a personal phone call. She contends she must have re-entered through a different door without surveillance and taken the stairs or a service elevator to return to her office. She testified that this was not uncommon. She further contends she met with Kathy Sutton after 3:23 p.m. and then left with both of her bags sometime after 4:30 p.m., possibly even after 4:40 which is the time Public Safety stopped looking for evidence of claimant's return on video. Importantly, claimant contends she left through the tunnel exit and traveled to Lot 4. The employer did not even ask to have these cameras checked because they did not believe it was a possibility. The claimant made a good faith effort to attain the video footage in question but the State only maintains such video footage for a limited period of time.

The most important corroborating evidence in favor of the claimant is the email from Kathy Sutton to Bev Zylstra, the Deputy Director for the agency. On October 30, 2012, Ms. Zylstra asked whether Ms. Sutton knew if she met with the claimant on October 25. Ms. Sutton checked through her notes and responded, "I found the note I made on the top of the complaint intake for Prime. It states, 'E-mail to all PCs – talked with Dawn 10/25'. Therefore, I am assuming I talked with Stephanie on 10/25 – whatever day it was, it was late in the day – almost time to leave. Attached is a follow up e-mail she sent to me related to this issue. Sorry I can't nail the date down with any degree of certainty." (Emp. Ex. 2, p. 14). Importantly, claimant did not know this email existed when she gave her statements to the employer on October 30 and November 1. Yet in her statement, she contended that Ms. Sutton would confirm that they had met and discussed the specific case in question. While Ms. Sutton could not state with certainty that the meeting occurred on October 25, she did believe she had enough information to "assume" that said date was the most likely date they met and that the meeting occurred "late in the day – almost time to leave."

When looking at all of the evidence as it fits together, the most likely is that the two met on October 25, late in the day. This, would explain why the claimant was not at her cubicle when Ms. Murphy came looking for her.

When this corroboration is combined with some minor deficiencies in the employer's investigation, the claimant's explanation seems more plausible. The deficiencies in the employer's investigation include the failure to ask where the claimant parked her car or whether she used the tunnel. Had the employer asked these questions, they would have known to check the video footage for those areas before the footage was destroyed. This evidence would have either closed the door on the claimant's defense or cleared her name. Similarly, at hearing the employer relied heavily upon the unofficial investigation on October 25, which was performed by Ms. Murphy, but did not corroborate any of this with any follow-up by the investigating manager. Ms. Murphy went into the claimant's cubicle and noted that her computer screen was dark, her purse was gone but her tote was on a chair and her lunchbag was on the desk. Ms. Murphy provided this statement to Ms. Dishman the following day. Yet there was no follow up on Friday October 26, 2012. Ms. Dishman could have checked to see if the tote was still there and whether the computer was turned off or whether there was any evidence that claimant had returned to her cubicle at any point.

This, of course, raises a larger question which is why the employer did not simply ask the claimant where she was immediately. The employer could have called the claimant on October 26, and asked her where she was the prior day. It is a reasonable assumption that the claimant's recollection would have been much fresher. This, however, would have given the claimant an opportunity to correct her time card, thereby possibly changing her violation from a time card theft allegation to a leaving early without permission violation. Ms. Dishman's explanation for not calling the claimant immediately was to give her an opportunity to correct her time card without prompting, but the net result was to cause a delay in asking the claimant for her side of the story.

No investigation is perfect and it is always easier to be critical of the course of an investigation with the benefit of hindsight. Nevertheless, it is indisputable that had the employer closed some of these holes, the claimant would have either been exonerated or she would have had much less to argue at hearing. It is concluded that the employer performed its investigation in good faith and in a sincere effort to ascertain the truth. Nevertheless, the employer simply did not believe the claimant. And this is how the case must ultimately be decided.

As stated previously, I find the claimant credible. The claimant presented confident in her responses. She maintained eye contact with the undersigned even when asked tough questions. She did not become hard to hear. She was passionate and indignant at appropriate points in her testimony. Her responses were consistent from the time she was questioned during the investigation through the time of hearing. Her essential story did not change. The claimant may have benefited from providing the employer with more exculpatory information during the course of the investigation instead of narrowly answering only the questions asked, but her actions in only answering the specific questions asked, were not unreasonable. The main factor detracting from claimant's credibility is her inability to recall the specific course of events from the afternoon of October 25, 2012. When all of the evidence is weighed as a whole, her inability to recall the precise details from the afternoon of October 25, 2012, is understandable.

For all of these reasons, the employer has failed to meet its burden of proof by a preponderance of evidence.

DECISION:

The fact-finding decision dated December 13, 2012, reference 01, is reversed. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements.

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Joseph L. Walsh
Administrative Law Judge

_____
Decision Dated and Mailed

jlw/pjs