

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MICHELLE L NICHOLSON
Claimant

APPEAL NO. 09A-UI-10012-E2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

MERCY HOSPITAL/CLINICS
Employer

OC: 05/31/09
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Employer filed an appeal from a decision of a representative dated July 1, 2009, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on July 29, 2009. Claimant participated personally. Employer participated by Jessica Lingo and Vicki Harper. Exhibits 1, pages 1-35 and A, pages 1-2 were admitted into evidence.

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: Employer discharged claimant on May 29, 2008 because she was alleged to violate HIPAA patient privacy regulation. The claimant was accused of disclosing protected information about a patient to her daycare provider Jenna, who told a third party Dawn, who in turn disclosed that information during a police interrogation.

The employer provided a copy of its policies on HIPAA to the claimant and the claimant received training on those policies. Those policies provide that an employee can receive a warning or be terminated for violation of HIPAA, depending on the severity of the event. The claimant received a warning in April 2009 about improperly disclosing information.

A portion of a police investigation report was submitted by the employer. [Exhibit 1, page 7.] The report states that Dawn learned from Jenna that Nate, Dawn's boyfriend, was the subject of investigation for a sexual assault and that Jenna learned this information from 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:

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.

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). The hearsay evidence is imprecise and conclusory. Because of the nature of the evidence produced at hearing, the employer is unable to show misconduct. The claimant's statement and employer's statement must give detailed facts as to the specific reasons 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. 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 gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation. The claimant did receive a warning in April about violating HIPAA

standards. While it is questionable at best that she violated HIPAA, as she let a patient see her own file that had information about the patient's daughter, the warning did indicate the employer took the obligations to protect confidential information seriously.

The evidence submitted by the employer is unclear that there was a HIPAA violation. If the claimant had disclosed information from a patient to her daycare provider, it would have been a HIPAA violation. Jenna, in a written unsworn statement, states that no information about a patient was disclosed. Dawn, in a written unsworn statement, stated the claimant did not provide information about a patient. The claimant testified under oath she did not disclose patient information. Her testimony was credible. The Facebook pages are ambiguous as to whether the claimant improperly disclosed information. The police report is double hearsay and Dawn recanted the story she told the police. The employer has failed to meet its burden of proof to show the claimant committed misconduct.

The administrative law judge holds that the evidence has not established that claimant was discharged for an act of misconduct when claimant was accused of violating the employer's policy concerning patient privacy.

DECISION:

The decision of the representative dated July 1, 2009, reference 01, is affirmed. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements.

James Elliott
Administrative Law Judge

Decision Dated and Mailed

jfe/css