

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KERRY L BRANDT
Claimant

APPEAL NO. 12A-UI-10386-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

JOHN D CALISESI DC PC
Employer

**OC: 07/29/12
Claimant: Appellant (1)**

Iowa Code section 96.5(2)(a) – Discharge for Misconduct
871 IAC 24.32(8) – Current Act Requirement

STATEMENT OF THE CASE:

Kerryn Brandt filed a timely appeal from the August 22, 2012, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on September 24, 2012. Ms. Brandt participated personally and was represented by attorney Kristine Tidgren. Dr. John Calisesi, D.C., represented the employer and presented additional testimony through Elizabeth Calisesi. Exhibits One and Two were received into evidence.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the discharge was based on a current act.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The employer operates a chiropractic clinic. Kerryn Brandt was employed as a full-time office clerk from July 2011 until July 28, 2012, when the employer discharged her from the employment.

There were many problems with Ms. Brandt's work performance throughout the employment. The final incident that triggered the discharge occurred on Saturday, July 28, the last day of the employment, when Ms. Brandt told two new patients that Dr. Pierson could not see them that day and that they would have to call back on Monday. To the employer this was turning away business. Dr. Pierson directed Ms. Brandt to call the patients back and schedule them for appointments that same day. Also on that morning, the employer had to call in another employee to work because Ms. Brandt was not keeping up with her duties.

The matter that factored most heavily in the discharge was Ms. Brandt's untimely re-filing of insurance claims with insurers. It was not uncommon for insurance companies to reject an initial claim and create the need to resubmit the claim. One insurer, United Healthcare, imposed a 90-day limit for submission of claims, measured from the data service. Between June 11 and

June 25, 2012, Dr. Pierson located five United Healthcare claims that had to be written off because Ms. Brandt had failed to resubmit the claims in a timely manner. The claims were for services provided in October and November 2011.

One of the ongoing problems in the employment was Ms. Brandt's failure to transcribe doctors' notes in a timely manner. The employer expected a 24-hour to 48-hour turnaround time to ensure that any questions Ms. Brandt had about the dictated notes were answered in a timely manner, to ensure the notes were accurate, and in some cases to comply with Medicare documentation requirements. Ms. Brandt insisted on including an additional step in the dictation process despite the employer's repeated instructions to omit that step. Ms. Brandt would dictate into a Microsoft Word document and then cut-and-paste the dictation into the transcription program employer wanted her to use. Ms. Brandt did not provide the employer with any type of medical reason as to why she needed to dictate in that manner. Ms. Brandt was regularly late in completing the dictation. The employer noted such instances in September, October, November, February, March, April and May. In January, Ms. Brandt waited three weeks after an appointment to ask one of the doctors a question about dictated notes she needed to transcribe. The amount of dictation that needed to be transcribed had actually decreased during Ms. Brandt's employment. The employer ended up taking away the dictation duties from Ms. Brandt due to the ongoing problems with untimely transcription.

There were several instances of tardiness throughout the employment. Ms. Brandt was late for personal reasons on November 30, December 5, January 20, January 23, February 1, February 9, April 3, and May 1.

There were many instances where Ms. Brandt was inattentive to her duties or simply failed to follow through on duties. On November 5, the doctors had to enhance the phone three times because Ms. Brandt did not answer it. Answering the phone was part of Ms. Brandt's duties. On January 7, Ms. Brandt failed to assist with getting patients off a therapy after being directed to do so. The first time, Ms. Brandt indicated she did not hear the timer. In connection with this incident and others, the employer learned that Ms. Brandt had some hearing issues and could not hear the therapy timer. The second time Ms. Brandt failed to get the patient off therapy that day it was because she simply forgot. On January 21, Ms. Brandt failed to solicit and collect a \$20.00 hospice donation from a new patient. It was the employer's policy to solicit and collect a donation from each new patient. Ms. Brandt was aware the policy. On March 12, Ms. Brandt failed to type a letter that Dr. Calisesi had directed her to prepare and another employee type the letter instead. On May 26, Ms. Brandt was on her cell phone in the clinic, with her back to patients. On July 7, Dr. Pierson had reported to Dr. Calisesi that that the accounts receivable were especially high. This was due at least in part to Ms. Brandt was not following up with insurance companies in a timely manner with regard to denied claims.

There were several other incidents where Ms. Brandt demonstrated an inability to master duties or retain training or information. Ms. Brandt waited until the last day of the employment to suggest to the employer that she had some type of cognitive impairment.

On July 28, Dr. John Calisesi, D.C., and his spouse, Elizabeth Calisesi, spoke to Ms. Brandt about their decision to end her employment. Dr. Calisesi told Ms. Brandt that it was a difficult decision, but that he had to let her go. Dr. Calisesi told Ms. Brandt that he found her to be a very pleasant person and that he had initially enjoyed her presence. Ms. Brandt told Dr. Calisesi that she knew her discharge was coming, that she did not blame Dr. Calisesi, that she knew he had a business to run. Ms. Brandt added that she knew the employer had lessened her workload, but that she was still having issues. Ms. Brandt indicated that she had memory issues and knew she had not been doing her job. Ms. Brandt then told the employer

for the first time that she had gone to a doctor several years earlier for assistance in filing for disability benefits, that the doctor had declined to support the attempt to collect disability benefits, and that Ms. Brandt had returned to school for retraining so that she could get further employment.

The doctors counseled Ms. Brandt throughout the employment as issues arose with Ms. Brandt's performance.

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.

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge

considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

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 many issues in the employment cannot be explained away by Ms. Brandt's purported cognitive efficiency. The administrative law judge notes that Ms. Brandt has provided no bona fide medical evidence to suggest that she had some type of health or mental impairment that prevented her from performing her duties as assigned. The evidence demonstrates many instances throughout the employment when Ms. Brandt was careless and/or negligent in performing her assigned duties. These incidents, taken together, demonstrated a willful disregard of the employer's interests. The problem conduct continued up until the last day, when Ms. Brandt turned away new patients.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Brandt was discharged for misconduct. Accordingly, Ms. Brandt is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer's account shall not be charged.

DECISION:

The Agency representative's August 22, 2012, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements. The employer's account will not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css