

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

EMILY J LAMOUREUX
Claimant

APPEAL NO. 21A-UI-06153-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARE INITIATIVES
Employer

OC: 11/15/20
Claimant: Respondent (1)

Iowa Code section 96.5(2)(a) – Discharge

STATEMENT OF THE CASE:

The employer filed a timely appeal from the February 15, 2021, reference 02, decision that held the claimant was eligible for benefits, provided she met all other eligibility requirements, and that employer's account could be charged for benefits, based on the Benefits Bureau deputy's conclusion that the claimant was discharged on December 7, 2020 for no disqualifying reason. After due notice was issued, a hearing was held on May 5, 2021. Claimant, Emily Lamoureux, participated. Alyce Smolsky of Equifax represented the employer and presented additional testimony through Lisa Huebner and Kristi Schubert. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1 through 4 into evidence. The administrative law judge took official notice of the fact-finding materials for the limited purpose of determining whether the employer participated in the fact-finding interview and, if not, whether the claimant engaged in fraud or intentional misrepresentation in connection with the fact-finding interview.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed by Care Initiatives as a full-time Certified Nursing Assistant from August 2020 until December 8, 2020, when the employer discharged her from the employment. The claimant was assigned to the 2:00 p.m. to 10:00 p.m. shift. Lisa Huebner, Director of Nursing, was the claimant's supervisor. The employer alleges that on December 5, 2020, the claimant gave a resident an ice cream bowl to drink water from at a time when glasses and bottled water were available. The resident complained to the charge nurse, who in turn submitted a report to DON Huebner. DON Huebner spoke with the resident and the resident affirmed the allegation. The resident made the further point that the resident was not a dog and was paying \$6,000.00 a month to reside in the care facility. When DON Huebner spoke with the claimant, she did so in an accusatory manner. The claimant denied that she had given the resident a bowl to use as a drinking vessel. The claimant was aware that the employer had bottled water and disposable cups available. The claimant concedes that she provided one or more residents with water

during the December 5 shift. The claimant categorically denies that she at any time provided a resident a bowl to drink from.

The employer also alleges that during the same December 5, 2020 shift the claimant called a resident "stupid." The employer alleges the utterance was heard by the resident and by another Certified Nursing Assistant who is no longer with the employer. DON Huebner spoke with the resident and the resident affirmed the allegation. When DON Huebner spoke with the claimant, the claimant denied the allegation. The claimant concedes she may have referred to something as stupid, but categorically denies that she ever called a person stupid.

The employer deemed both matters from December 5, 2020 to be violations of the employer's policy regarding resident dignity. The policy addresses neglect and references infliction of physical or mental harm as violations of the policy. The employer reviewed the policy with the claimant at the start of the employment.

In making the decision to discharge the claimant from the employment, the employer also considered a charge nurses allegation in a written report that the claimant did not assist others whether asked to help. The employer concedes the employer did not confirm that allegation or inquire about the specifics.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)(a) provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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).

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).

The weight of the evidence in the record establishes a discharge for no disqualifying reason. The employer had the burden of proof in this matter, but presented insufficient evidence to rebut the claimant's testimony that the two alleged incidents that triggered the discharge did not happen. The administrative law judge cannot rule in favor of the employer in this matter without shifting the burden of proof to the claimant, which the law does not allow. The incidents that triggered the discharge were not matters that the employer's witnesses observed. The administrative law judge cannot presume that the allegations or those from whom the allegations originated are credible. The employer could have presented testimony or written statements from individuals with firsthand knowledge of the matters, but did not do so. With regard to one of the allegations, the alleged utterance, a coworker allegedly heard the utterance, but there is no testimony or written statement from the coworker. The claimant was discharged for no disqualifying reason. Accordingly, the claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The February 15, 2021, reference 02, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.



James E. Timberland
Administrative Law Judge

September 13, 2021
Decision Dated and Mailed

jet/scn