

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KYLIE J ABRAHAMSON
Claimant

APPEAL NO. 07A-UI-10750-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

GOOD SAMARITAN SOCIETY INC
Employer

OC: 10/21/07 R: 01
Claimant: Respondent (2)

Iowa Code section 96.5(2)(a) – Discharge for Misconduct
Iowa Code section 96.3(7) – Recovery of Overpayment

STATEMENT OF THE CASE:

Good Samaritan Society filed a timely appeal from the November 13, 2007, reference 02, decision that allowed benefits. After due notice was issued, a hearing was commenced on December 6, 2007. The hearing had to adjourn prematurely due to the claimant's need to attend to parental responsibilities. The hearing was concluded on December 14, 2007. Claimant Kylie Abrahamson participated. Denise Leal represented the employer and presented testimony through Sandra Paulson, R.N., Director of Nursing, and Bobby Miller, L.P.N. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One through Six into evidence.

ISSUES:

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

Whether the claimant has been overpaid unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Kylie Abrahamson was employed by Good Samaritan Society, Inc., as a full-time Certified Nursing Assistant (C.N.A.) from April 11, 2002 until October 25, 2007, when Director of Nursing Denise Leal, R.N., and Administrator Bruce Radtke discharged her for directing threatening and offensive remarks toward a dependent adult in her care. The incident that prompted the discharge occurred on October 21, 2007. Ms. Abrahamson and another C.N.A., Diane Loftis, were assisting Nurse Bobby Miller, L.P.N., with a male resident. Ms. Abrahamson and Ms. Loftis were holding the resident in a standing position while Nurse Miller placed ointment on the resident's buttocks. The resident was less than cooperative. Ms. Abrahamson uttered the remark, "I'm going to break his fingers." Ms. Loftis and Ms. Miller each heard the remark. Ms. Loftis responded, "No, you won't." Immediately thereafter, the three women were assisting the resident into bed. Ms. Abrahamson told the resident that he was "a pain in the ass." Ms. Loftis attempted to smooth things over with the resident by saying that Ms. Abrahamson

has called him “a pain in the behind.” Ms. Abrahamson said, “No, I didn’t; I said pain in the ass.” The comments were uttered not only in the presence of the resident, but also in the presence of another resident and that resident’s spouse.

Nurse Miller reported the incident to Director of Nursing Sandra Paulson. Ms. Paulson took statements from Nurse Miller and C.N.A. Loftis. Ms. Abrahamson provided verbal and written statements denying that she uttered the remarks. Ms. Abrahamson had participated in training concerning dependent adult abuse and understood that dependent adult abuse could be physical or verbal. In addition, the employer’s Code of Ethics prohibited threats of abuse treatment and verbal abuse. Ms. Abrahamson was familiar with the Code of Ethics.

Ms. Abrahamson established a claim for benefits that was effective October 21, 2007 and has received benefits totaling \$389.00.

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 greater weight of the evidence indicates that Ms. Abrahamson did in fact utter the remarks attributed to her by Nurse Miller and C.N.A. Loftis. The greater weight of the evidence indicates that the employer received credible statements from both of the employees who witnessed the behavior. The evidence indicates that Ms. Abrahamson had a good relationship with both employees and that neither had a reason to fabricate allegations concerning Ms. Abrahamson. The evidence indicates that Ms. Abrahamson's denial of the allegations was attributable, in part, to her prior knowledge that such remarks violated the employer's Code of Ethics and might amount to dependent adult abuse. The evidence indicates that Ms. Abrahamson did in fact utter a threat of violence directed at a dependent adult resident in her care and did in fact direct other verbal abuse at a dependent adult resident in her care.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Abrahamson was discharged for misconduct. Accordingly, Ms. Abrahamson 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 for benefits paid to Ms. Abrahamson.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

Because Ms. Abrahamson has received benefits for which she has been deemed ineligible, those benefits constitute an overpayment that Ms. Abrahamson must repay to Iowa Workforce Development. Ms. Abrahamson is overpaid \$389.00.

DECISION:

The Agency representative's November 13, 2007, reference 02, decision is reversed. 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. The claimant is overpaid \$389.00.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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