IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

STACI M WALLACE
Claimant

IA DEPT OF HUMAN SVCS/GLENWOOD
Employer

APPEAL NO. 14A-UI-10973-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 07/13/14
Claimant: Respondent (1)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
871 IAC 24.32(8) – Current Act Requirement
Iowa Code Section 96.6(2) – Timeliness of Appeal

STATEMENT OF THE CASE:

The employer filed an appeal from the July 30, 2014, reference 01, decision that allowed benefits to the claimant provided she was otherwise eligible and that held the employer's account could be charged for benefits, based on an Agency conclusion that the claimant's May 2, 2014 discharge was not based on a current act. After due notice was issued, a hearing was held on November 12, 2014. Claimant Staci Wallace participated. Sandra Linsin of Employers Edge represented the employer and presented testimony through Reina Gonzales, Amy Ryan, Pamela Stipe, and Gary Anders. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One, Two and Three into evidence.

ISSUES:

Whether the employer's appeal was timely.

Whether the claimant was discharged for misconduct in connection with the employment.

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's representative of record is Employers Edge, L.L.C., and the employer's address of record is an Employers Edge post office box in Colorado. On July 30, 2014, Iowa Workforce Development mailed a copy of the July 30, 2014, reference 01, decision to the employer at the address record. Employers Edge received the decision on behalf of the employer in a timely manner, prior to the deadline for appeal. The decision contained a warning that an appeal from the decision must be postmarked by August 9, 2014 or received by the Appeals Section by that date. The employer representative received the decision on August 4, 2014. Reina Gonzales, an Employers Edge Claims Specialist, drafted the employer's appeal on August 7, 2014 and faxed a four-page appeal to the Appeals Section at Iowa Workforce Development.

Ms. Gonzales received a fax confirmation message that indicated successful transmission of the fax. The Appeals Section did not docket an appeal on August 7, 2014. The weight of the evidence indicates that the Appeals Section must have received the employer's faxed appeal, but somehow misplaced the appeal. The employer representative next followed up on the matter on October 21, 2014 by faxing another appeal to the Appeals Section with the August 7 letter and the fax confirmation attached. The Appeals Section received and docketed the appeal.

Staci Wallace was employed by the Iowa Department of Human Services at the Glenwood Resource Center as a full-time resident treatment worker from 2000 until May 5, 2014 when Doug Wise, Treatment Program Administrator, discharged her from the employment. The Glenwood Resource Center provides care and support to mentally and physically challenged persons in a residential environment.

The incident that triggered the discharge occurred on March 22, 2014. On that day, Amy Ryan, Residential Treatment Supervisor, was making rounds and entered the home where Ms. Wallace was working. While Ms. Ryan was performing duties in a common room where multiple residents were located, she observed Ms. Wallace walk into the room, cross the room, and raise her foot up so that the toe area of her shoe tapped the underside of the toe area of a resident's shoe. The resident in question was reclining in a chair with her feet up. Ms. Wallace also "shushed" the resident. The disabled resident makes repetitive noises as part of her disability issues. Ms. Wallace's purpose in making the foot contact and the "shushing" was to get the client to stop making the repetitive noises. The employer deemed Ms. Wallace's conduct rude and disrespectful. The employer also deemed Ms. Wallace's conduct to be physical abuse. Ms. Ryan was initially shocked at the conduct she had observed. She left the area, but shortly thereafter made contact with Ms. Wallace. Ms. Ryan directed Ms. Wallace not to kick the resident. Ms. Wallace denied having kicked the resident.

On March 22, 2014, Ms. Ryan reported the matter to Katie Rawl, Director of Quality Management. Ms. Ryan completed a written statement the same day. The employer had Ms. Wallace write a statement about the incident the same day. In her statement, Ms. Wallace asserted that she was unaware of making contact with the disabled resident. Ms. Wallace asserted that she had merely been moving by the resident's chair and that any contact was accidental. The employer placed Ms. Wallace on paid administrative leave pending further investigation. The employer made no reference to Ms. Wallace being at risk of discharge from the employment at the time the employer placed her on paid administrative leave.

The employer assigned Investigator Brenda Rainy to further investigate. Ms. Rainy interviewed Ms. Ryan and another residential treatment worker who had not observed the contact between Ms. Wallace and the resident in question. On March 27, Ms. Rainy interviewed Ms. Wallace with a union steward present. During the interview, Ms. Rainy advised Ms. Wallace of the purpose of the interview and that the investigation could lead to discipline. Ms. Rainy made no reference to discharge from the employment as a possible disciplinary measure. During the interview, Ms. Wallace said that she had run into the resident's chair and must have done so harder than she thought. Ms. Wallace said that she had asked the resident to be quiet while she spoke with another resident. Ms. Wallace said that she had fallen into the resident's chair while attempting to move past another resident's walker. Ms. Rainy concluded her investigation on March 30, 2014 and her report was forwarded to an incident review committee. Ms. Rainy recommended that the employer conclude that the allegation of resident abuse was substantiated.

On April 9, 2014, Mr. Wise submitted the committee's findings and conclusions to a personnel officer, whose job it was to make a recommendation regarding discipline. The employer then took no further action on the matter until the first week of May 2014.

On May 5, 2014, the employer met with Ms. Wallace for a Loudermill hearing. Within two-or three days prior to that, the employer summoned Ms. Wallace for a meeting with Mr. Wise. At the conclusion of the Loudermill hearing, the employer discharged Ms. Wallace from the employment. the employer provided Ms. Wallace with a termination letter that set forth the employer policies that the employer deemed Ms. Wallace to have violated. The employer indicated that Ms. Wallace's conduct on March 22, 2014 constituted physical abuse in violation of GRC Incident Management Policy. The employer referenced work rules that required Ms. Wallace to treat clients and others with dignity and respect. The employer referenced a work rule that prohibited Ms. Wallace from mistreating or abusing clients and others.

At no time prior to May 5, 2014, did the employer mentioned to Ms. Wallace that she might face discharge from the employment as a result of the March 22, 2014 incident.

In making the decision to discharge Ms. Wallace from the employment, the employer considered a Return to Work Agreement that Ms. Wallace had signed on March 25, 2010. The agreement followed a July 17, 2009, Final Warning and suspension. The employer indicated at the time of the March 2010 agreement that the final warning would expire four years from the date of Ms. Wallace's return to work.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.6(2) provides:

> 2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of § 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to § 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving § 96.5, subsection 10, and has the burden of proving that a voluntary quit pursuant to § 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving § 96.5, subsection 1, paragraphs "a" through "h". Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding § 96.8, subsection 5.

The ten-day deadline for appeal begins to run on the date Workforce Development mails the decision to the parties. The "decision date" found in the upper right-hand portion of the Agency representative's decision, unless otherwise corrected immediately below that entry, is presumptive evidence of the date of mailing. Gaskins v. Unempl. Comp. Bd. of Rev., 429 A.2d 138 (Pa. Comm. 1981); Johnson v. Board of Adjustment, 239 N.W.2d 873, 92 A.L.R.3d 304 (Iowa 1976).

An appeal submitted by mail is deemed filed on the date it is mailed as shown by the postmark or in the absence of a postmark the postage meter mark of the envelope in which it was received, or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion. See 871 AC 24.35(1)(a). See also Messina v. IDJS, 341 N.W.2d 52 (Iowa 1983). An appeal submitted by any other means is deemed filed on the date it is received by the Unemployment Insurance Division of Iowa Workforce Development. See 871 IAC 24.35(1)(b).

The employer has presented sufficient evidence to establish that an appeal was faxed by the employer representative and received by the Appeals Section on August 7, 2014. The appeal was timely and the administrative law judge jurisdiction to rule on the merits of the appeal.

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.

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). 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 evidence in the record establishes a discharge that was not based on a current act of misconduct. The incident that triggered the discharge occurred on March 22, 2014 and came to the employer's attention that same day. The employer's investigator concluded her investigation and provided her report to the employer on March 30, 2014. The employer thereafter unreasonably delayed further action on the matter. The employer offered no explanation for what was going on with the matter between April 9 and the beginning of May. The employer delayed to May 5, 2014, to give notice to Ms. Wallace that the incident from March 22, 2014, could and would result in discharge from the employment. Because the discharge was not based on a current act, the discharge would not disqualify Ms. Wallace for unemployment insurance benefits. Because the discharge was not based on a current act, the administrative law judge need not rule on whether the incident that triggered the discharge involved misconduct. Ms. Wallace is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The appeal was timely. The July 30, 2014, reference 01, decision is affirmed. The discharge was not based on a current act. The claimant is eligible for benefits, provided she meets all other eligibility requirements. The employer's account may be charged.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/css