

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

AMANDA M SMITH
3931 – 15TH ST
DES MOINES IA 50313-3025

IOWA JEWISH SENIOR LIFE CENTER
900 POLK BLVD
DES MOINES IA 50312

Appeal Number: 06A-UI-04477-JTT
OC: 04/02/06 R: 02
Claimant: Respondent (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

Iowa Jewish Senior Life Center filed a timely appeal from the April 11, 2006, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on May 10, 2006. Claimant Amanda Smith participated. Director of Nursing Peggy Luciano represented the employer and presented additional testimony through Nursing Secretary, Certified Nursing Assistant, and Medical Supply Clerk Nora Cable.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Amanda Smith was employed by Iowa Jewish Senior Life Center as a full-time certified nursing assistant from January 26, 2006 until April 6, 2006, when Executive Director Steven Blend and Director of Nursing Peggy Luciano discharged her.

The final incident that prompted the discharge came to the employer's attention on April 3, 2006, when the daughter of a resident reported to a social worker that Ms. Smith had left a dissolution decree in the resident's room. The resident was allegedly upset by observing the document. The resident's daughter expressed concern that Ms. Smith had been using the resident's phone for personal use. The resident, the resident's daughter, and the social worker to whom the complaint was uttered did not testify at the hearing. Ms. Smith had in fact mistakenly left the document in the resident's room the prior evening. Ms. Smith had collected the document from her locker to review while she was on break. When Ms. Smith was returning from break, and prior to Ms. Smith having an opportunity to return the document to her locker before returning to her duties, a unit clerk directed Ms. Smith to immediately assist the resident in question. Ms. Smith accidentally left the document behind in the resident's room when she finished assisting the resident. When D.O.N. Peggy Luciano questioned Ms. Smith about leaving the document behind, Ms. Luciano questioned Ms. Smith about whether she had used the resident's phone. Ms. Smith indicated she had not and would not. Ms. Smith encouraged the employer to review phone records. The employer believed Ms. Smith and took no further steps regarding the alleged phone use. The employer had a policy that prohibited employees from possessing and/or displaying personal documents when around residents.

The employer had reprimanded Ms. Smith on March 24, for allegedly using her cell phone in the work area.

The employer had reprimanded Ms. Smith on March 21, for recurrent tardiness. However, Ms. Smith was a new employee and had misunderstood that she was expected to appear at 2:45 p.m. to begin her 3:00 p.m. shift. Ms. Smith had arrived later than 3:00 p.m. on February 23, March 6, and March 13.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Smith was discharged for misconduct in connection with the employment. It does not.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 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 weight of the evidence in the record fails to establish any intentional misconduct, carelessness, or negligence on the part of Ms. Smith in connection with the dissolution decree being left in the resident's room. Instead, the evidence indicates that Ms. Smith was prematurely summoned to assist a resident before she had an opportunity to return the legal document to her locker. The presence of the legal document in the resident's room was an unfortunate mistake and nothing more than that. See 871 IAC 24.32(1)(a). Ms. Smith's alleged cell phone use and attendance issues no longer constituted "current acts" at the time the employer advised her she faced discharge. See 871 IAC 24.32(8).

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Smith was discharged for no disqualifying reason. Accordingly, Ms. Smith is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Smith.

DECISION:

The Agency representative's decision dated April 11, 2006, reference 01, 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.

jt/pjs