

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KAREN J BISHOP
Claimant

APPEAL NO. 09A-UI-18401-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

LEXINGTON SQUARE LLC
Employer

OC: 09/06/09
Claimant: Respondent (5R)

Iowa Code Section 96.5(2) – Discharge
Iowa Code Section 96.6(2) – Timeliness of Protest
Iowa Code Section 96.7(2)(a)(6) – Statement of Charges

STATEMENT OF THE CASE:

The employer filed an appeal from the December 3, 2009, reference 01, decision that allowed benefits and found the employer's protest untimely. After due notice was issued, a hearing was held by telephone conference call on January 19, 2010. The claimant participated. The employer participated through Jean Davis, Human Resources Coordinator. The administrative law judge took official notice of the Agency administrative file documents that the Claims Division relied up on in making the reference 01 decision. The administrative law judge also took official notice of the quarterly statements of charges concerning the employer that appear in the Agency's administrative records.

ISSUES:

Whether the employer's protest of the claim for benefits was timely.

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

FINDINGS OF FACT:

Having reviewed the evidence in the record, the administrative law judge finds: On September 14, 2009, the Agency mailed a notice of claim concerning claimant Karen Bishop to the employer's address of record. The notice of claim contained a warning that any protest must be postmarked, faxed or returned by the due date set forth on the notice, which was September 24, 2009. The employer did not receive the notice of claim. The employer's first notice that Ms. Bishop had filed a claim for benefits that affected the employer was the quarterly statement of charges that the Agency mailed to the employer on November 9, 2009. The employer protested the charges by e-mail directed to the Chargebacks Area of the Agency's Tax Bureau on November 13, 2009.

Karen Bishop was employed by Lexington Square nursing home as a full-time licensed practical nurse from August 2008 until December 16, 2008, when Susan Grant, R.N., discharged her from the employment due to an expired nursing license. At the time, Ms. Grant was the

assistant administrator. Ms. Grant is still with the employer, but is now the administrator. Ms. Grant did not participate in the appeal hearing. Ms. Bishop's supervisor was Teri Abell, Director of Nursing. Ms. Bishop is still with the employer, but did not participate in the appeal hearing.

The employer witness, Jean Davis, Human Resources Coordinator, was not with the employer at the time of Ms. Bishop's employment or at the time when Ms. Bishop separated from the employment.

Ms. Bishop commenced an approved medical leave of absence on December 7, 2008. Ms. Bishop's mother had recently died and Ms. Bishop was also dealing with high blood pressure. Ms. Bishop's doctor took her off work to address the blood pressure issues. Based on the medical documentation Ms. Bishop provided to the employer, the employer approved a medical leave through January 1, 2009.

Ms. Bishop's nursing license was set to expire on December 15, 2008. The law allowed Ms. Bishop to continue to practice nursing during a 30-day grace period following the expiration of the license. If Ms. Bishop renewed her license after the expiration date, but during the 30-day grace period, Ms. Bishop would have to pay a small financial penalty. Contrary to the employer's assertion the state would not consider a nurse practicing during the grace period to be practicing without a license. The employer's policy did not provide for continued practice during the grace period.

On December 16, 2009, Ms. Grant mailed Ms. Bishop a letter discharging Ms. Bishop from the employment for failure to renew her license prior to the December 15, 2008 expiration date.

Ms. Bishop had received prior counselings for other matters, but the discharge letter did not reference these and the weight of the evidence indicates these were not a factor in the discharge decision.

REASONING AND CONCLUSIONS OF LAW:

871 IAC 24.35(1) provides:

(1) Except as otherwise provided by statute or by department rule, any payment, appeal, application, request, notice, objection, petition, report or other information or document submitted to the department shall be considered received by and filed with the department:

a. If transmitted via the United States postal service or its successor, 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 is 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.

b. If transmitted by any means other than the United States postal service or its successor, on the date it is received by the department.

871 IAC 24.35(2) provides:

(2) The submission of any payment, appeal, application, request, notice, objection, petition, report or other information or document not within the specified statutory or

regulatory period shall be considered timely if it is established to the satisfaction of the department that the delay in submission was due to department error or misinformation or to delay or other action of the United States postal service or its successor.

a. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.

b. The department shall designate personnel who are to decide whether an extension of time shall be granted.

c. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the department after considering the circumstances in the case.

d. If submission is not considered timely, although the interested party contends that the delay was due to department error or misinformation or delay or other action of the United States postal service or its successor, the department shall issue an appealable decision to the interested party.

Iowa Code section 96.6-2 provides in pertinent part:

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.

Iowa Code section 96.7-2-a(6) provides:

2. Contribution rates based on benefit experience.

a. (6) Within forty days after the close of each calendar quarter, the department shall notify each employer of the amount of benefits charged to the employer's account during that quarter. The notification shall show the name of each individual to whom benefits were paid, the individual's social security number, and the amount of benefits paid to the individual. An employer which has not been notified as provided in section 96.6, subsection 2, of the allowance of benefits to an individual, may within thirty days after the date of mailing of the notification appeal to the department for a hearing to determine the eligibility of the individual to receive benefits. The appeal shall be referred to an administrative law judge for hearing and the employer and the individual shall receive notice of the time and place of the hearing.

The weight of the evidence indicates that the employer was denied a reasonable opportunity to file a protest by the September 24, 2009 deadline set forth on the notice of claim because the employer had not received the notice of claim. The weight of the evidence indicates that the employer's first knowledge of the claim was in the quarterly statement of charges mailed to the employer on November 9, 2009. The employer filed a protest on November 13, 2009. The protest was timely. The administrative law judge has jurisdiction to consider and enter a ruling concerning the merits of the protest.

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 employer discharged Ms. Bishop from the employment because her nursing license had expired. The license expired on December 15, 2008, while Ms. Bishop was on an approved

medical leave of absence. Under the applicable administrative law, Ms. Bishop had until January 15, 2009 to renew her license and was authorized by law to continue practicing nursing until that date. 655 IAC 3.1 and 3.7.

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

DECISION:

The Agency representative's December 3, 2009, reference 01, decision is modified as follows. The employer's protest was timely. 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.

This matter is remanded to the Claims Division for determination of whether the claimant has been able and available for work since she established her claim for benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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