

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

HEATHER M LUCKINBILL
Claimant

APPEAL NO. 11A-UI-07725-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

THE NEW HOMESTEAD
Employer

**OC: 05/15/11
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

Heather Luckinbill filed a timely appeal from the June 8, 2011, reference 02, decision that denied benefits. After due notice was issued, a hearing was started on July 8, 2011 and concluded on July 12, 2011. Ms. Luckinbill participated. Lori Caltrider, assistant director of nursing, represented the employer and presented additional testimony through Ann Simpson, director of nursing. Exhibit One was received into evidence. The parties waived formal notice on the issues of whether the claimant was discharged for misconduct in connection with the employment or voluntarily quit for good cause attributable to the employer.

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: Heather Luckinbill was employed by The New Homestead/Guthrie Center Nursing Home as a full-time certified nursing assistant from July 2010 until May 11, 2011, when Director of Nursing Ann Simpson, Assistant Director of Nursing Lori Caltrider, and Administrator Maradith Janssen discharged her from the employment. Ms. Luckinbill would ordinarily be responsible for providing care and assistance to eight residents at a time.

On May 10, 2011, the employer received two resident complaints about Ms. Luckinbill being rude and rushing the resident. One resident's daughter initially brought the complaint to Ms. Caltrider. The daughter relayed that Ms. Luckinbill had been rude and had slammed furniture. The daughter relayed that that the resident was not in fear of Ms. Luckinbill, but that the resident felt strongly that Ms. Luckinbill should not be assisting with her care. After she received the complaint through the daughter, Ms. Caltrider spoke with the resident. The essence of that resident's complaint was that Ms. Luckinbill was loud, rude, acted like she was mad at the resident, and would not respond to the resident. The resident told Ms. Caltrider that Ms. Luckinbill had no business taking care of her. The resident in question has some issues

with confusion. Ms. Luckinbill had most recently cared for the resident on May 9, the day before the complaint. The resident had made prior complaints about Ms. Luckinbill.

The second resident who complained to the employer about Ms. Luckinbill on May 10 had similar complaints. The resident told the employer that Ms. Luckinbill was loud, rude, had a bad attitude, and slammed things around. Ms. Luckinbill had most recently cared for this resident on May 8, two days before the complaint. This resident had made no prior complaints about Ms. Luckinbill.

In March 2011, Ms. Simpson and Ms. Caltrider had previously removed Ms. Luckinbill from caring for another resident. The resident and the resident's family had complained about a C.N.A. being rough while providing her cares. That resident also stated that the C.N.A. in question was rude, was always rushing her, and that the resident did not like the C.N.A. Though the employer could not be certain that Ms. Luckinbill was the C.N.A. the resident was upset with, the resident's family members knew Ms. Luckinbill from outside the nursing home and did not approve of her caring for their loved one.

The employer had a written policy requiring staff to maintain a calm, non-threatening, non-hostile demeanor when caring for residents. The policy required that staff explain to the resident the cares to be provided to the resident. The policy was in the handbook that had been provided to Ms. Luckinbill.

A couple days prior to the two final incidents that triggered the discharge, one of the nurses issued a reprimand to Ms. Luckinbill for allegedly jerking a resident up from a chair in the dining room. Ms. Luckinbill had been sitting with six residents in the dining room. Four had finished their meal and were visiting with one another. Two were still eating. Ms. Luckinbill sat down to have a sandwich while the two residents finished their meals. A medication aide was monitoring Ms. Luckinbill and grew impatient with Ms. Luckinbill because Ms. Luckinbill was eating her sandwich rather than taking the four residents who were done with their meal back to the rooms. At the medication aide's insistence, Ms. Luckinbill got one of the residents up from the table to take her back to her room. The resident was ready to go. Based on medication aide's directive, Ms. Luckinbill persisted with removing the resident from the dining room and escorting her to her room. The medication aide alleged to the charge nurse that Ms. Luckinbill had jerked the resident up from the table. The charge nurse issued a written reprimand to Ms. Luckinbill despite Ms. Luckinbill's insistence that the incident had not happened the way the medication aide had described it.

In making the decision to discharge Ms. Luckinbill from the employment, the employer considered an incident from April 3, 2011 that involved Ms. Luckinbill and a charge nurse with whom Ms. Luckinbill had a personality conflict. Ms. Luckinbill observed the nurse watching television while Ms. Luckinbill performed her C.N.A. duties. Ms. Luckinbill asked the charge nurse whether she was on her break. The charge nurse asked her what business it was of hers and asserted that she had been performing work. Ms. Luckinbill continued in the same vein at intervals until the charge nurse told her she was sending her home. Ms. Luckinbill asserted that she had just been doing her job while the nurse had been watching T.V. Ms. Luckinbill refused the nurses directive to leave, even though the nurse told Ms. Luckinbill that she had cleared the decision with Ms. Caltrider. Ms. Luckinbill continued to assert her right to stay and work. Ms. Luckinbill involved another coworker in the matter. Even after Ms. Luckinbill clocked out, she refused to leave the building and asserted her right to stick around for a cigarette break with a coworker. In all, Ms. Luckinbill spent 15 minutes intentionally challenging the nurse's authority to make her leave the workplace.

In making the decision to discharge Ms. Luckinbill from the employment, the employer considered an incident on March 17, 2011, wherein Ms. Luckinbill left a resident with Alzheimer's, and who was a fall risk, alone on a toilet. Ms. Luckinbill had not left the resident with a means of summoning help. Soon after Ms. Luckinbill left the resident alone, another staff member asked her whether she had indeed left the resident unattended and Ms. Luckinbill returned to the resident. Ms. Luckinbill knew she was not to leave the resident unattended. The reason for leaving the resident unattended had had nothing to do with some other emergency that Ms. Luckinbill needed to attend to.

In making the decision to discharge Ms. Luckinbill from the employment, the employer considered an incident from November 3, 2010, where Ms. Luckinbill fell back asleep on a couch after a coworker roused her from the nap Ms. Luckinbill had been taking during her break. Ms. Luckinbill's break was over at 3:30 a.m., but she fell back asleep and continued to sleep until the charge nurse woke her at 4:10 a.m. and sent her home.

The date of Ms. Luckinbill's discharge coincided with the day the administration met with the nursing assistants to discuss low resident numbers and the employer's plan to cut work hours.

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).

Because the law requires a current act of misconduct before Ms. Luckinbill can be disqualified for unemployment insurance benefits based on a discharge, the administrative law judge will first address those incidents that happened close in time to the discharge. These included the two complaints from May 10 and the reprimand regarding the dining room incident a couple days earlier.

The evidence indicates that on May 10 the employer had two complaints from residents alleging that Ms. Luckinbill was loud, rude, and in a rush. The allegations also included that Ms. Luckinbill slammed furniture. It is difficult for the administrative law judge to judge the credibility of the complaining parties when they have neither testified nor provided any type of a written statement for the administrative law judge to consider and weigh. In order to find that Ms. Luckinbill was careless, negligent, or acted with intentional disregard of the resident and/or the employer in connection with these two complaints, the employer essentially asks that the administrative law judge defer entirely to the employer's judgment regarding an investigation of the matters, and that the administrative law judge consider both complaints together so that the allegations concerning one can lend weight to the other. The employer's judgment concerning the matters is in turn dependent upon the reliability of the information provided by the complaining parties.

The administrative law judge concludes it would be inappropriate to take such approach when judging evidence, especially when the employer had the burden of proving its case through the presentation of direct and satisfactory evidence. The employer had the ability to present much more direct and satisfactory evidence concerning both May 10 allegations than was presented, but elected not to present such evidence. Instead, the employer has presented evidence consisting exclusively of layers of hearsay.

The same problem exists with the allegation that Ms. Luckinbill manhandled a resident in the dining room within a few days before the discharge. In that instance, another employee allegedly witnessed the offending conduct. The employer had the ability to present testimony through that employee, but for some reason elected not to.

The other matters the employer considered in making the decision to discharge Ms. Luckinbill date from April 3 or earlier, a month or more before the discharge. The evidence regarding most of those matters suffers from the same deficiencies identified above concerning the final incidents. In each instance, the employer had the ability to present more direct and satisfactory evidence, but elected not to.

The administrative law judge cannot conclude that there was misconduct or a pattern of misconduct based solely on a string of *allegations*, most of which do not rise to the level of proof necessary to show misconduct. None of the allegations concerning the final three matters that triggered the discharge rises to the level of proof, by the preponderance of the evidence, of carelessness, negligence, or intentional disregard of the employer's interests. In other words, the evidence fails to establish a current act of misconduct. In the absence of a current act of misconduct, the discharge cannot serve as the basis for disqualifying Ms. Luckinbill for benefits.

The administrative law judge concurs with Ms. Luckinbill that the timing of her discharge, coming the same day as the staff meeting at which the employer discussed low census and the cutting of work hours, is suspect. The weight of the evidence indicates that this was as much a factor in Ms. Luckinbill's discharge as anything else.

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

DECISION:

The Agency representative's June 8, 2011, reference 02, decision is reversed. 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

Decision Dated and Mailed

jet/kjw