IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MICHELLE R OTTEN
Claimant

CRESTVIEW ACRES INC
Employer

APPEAL NO. 10A-UI-17655-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/31/10
Claimant: Appellant (2)

Iowa Code § 96.5(2)(a) – Discharge for Misconduct
871 IAC 24.26(21) – Quit in Lieu of Discharge

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the December 13, 2010, reference 01, decision that denied benefits. After due notice was issued, a hearing was started on February 8, 2011 and concluded on February 24, 2011. Claimant participated. Mary Quigley represented the employer and presented additional testimony through Kris Ericksen and Terry Cooper. Exhibits One through 10, A and B were received into evidence.

ISSUE:

Whether the claimant separated from the employment for a reason that disqualifies her for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Michelle Otten, R.N. was employed by Crestview Acres as a full-time Director of Nursing from May 10, 2010 until October 29, 2010, when she resigned in lieu of being discharged from the employment. When Ms. Otten started the employment, her immediate supervisor had been Matthew Carpenter, Administrator. In July 2010, Mary Quigley joined the company as Administrator and became Ms. Otten's immediate supervisor.

On October 29, 2010, Corporate Nurse Kris Ericksen, Ms. Quigley, Operations Manager Terry Cooper summoned Ms. Otten to a meeting. The employer had already made the decision to discharge Ms. Otten as Director of Nursing. The purpose of the meeting was to discharge Ms. Otten from the employment. The employer had already drafted discharge documentation. The employer was not open to having Ms. Otten continue as director of nursing. While the employer might have been open to demoting Ms. Otten to another position, the employer did not convey this to Ms. Otten. Mr. Cooper opened the meeting by telling Ms. Quigley that she was not a good fit for the Director of Nursing position. Ms. Otten quickly and accurately concluded that the purpose of the meeting was to discharge her from the position. Ms. Otten confirmed with Mr. Cooper that the purpose of the meeting was to remove her from her position. Ms. Otten told the employer she was not going to let them fire her and that she was resigning

from the employment. The employer produced a piece of paper upon which Ms. Otten wrote her resignation. The employer accepted the resignation and the employment ended.

The employer decided to discharge Ms. Otten from the employment after a follow up survey conducted by the Department of Inspections & Appeals on October 26, 2010. The employer held Ms. Otten primarily responsible for the deficiencies the state agency had found. Ms. Otten, as the new Director of Nursing, relied upon the seasoned nurse managers under her to appropriately carry out their duties. The nurse managers in turn relied upon the nurses under their supervision to appropriately carry out their duties. During the course of Ms. Otten's employment the employer had laid out expectations for Ms. Otten to meet. Though the expectations were unreasonable, given Ms. Otten's short tenure in the position, Ms. Otten acted in good faith to perform the duties assigned to her. Ms. Otten was hindered by the dysfunctional nursing home environment Ms. Otten inherited as the new Director of Nursing. In September 2010, Ms. Quigley completed a performance appraisal for Ms. Otten. Ms. Quigley reviewed the performance appraisal with Ms. Otten on September 20, 2010. In every assessed "performance factor" Ms. Quigley rated Ms. Otten Good or Very Good.

REASONING AND CONCLUSIONS OF LAW:

871 IAC 24.26(21) provides:

> Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:
>
> > (21) The claimant was compelled to resign when given the choice of resigning or being discharged. This shall not be considered a voluntary leaving.

In analyzing quits in lieu of discharge, the administrative law judge considers whether the evidence establishes misconduct that would disqualify the claimant for unemployment insurance benefits.

Iowa Code § 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 § 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 establishes that Ms. Otten quit in lieu of being discharged from the employment. The employer had indeed decided to discharge her from the employment, had prepared associated discharge paperwork, and confirmed during that meeting that that was the purpose of the meeting. The weight of the evidence establishes that the employer used Ms. Otten as a scapegoat in connection with the October 26, 2010 state survey that revealed deficiencies. Ms. Otten was a Director of Nursing who had been on the job only five months. The Administrator, Ms. Quigley had been with the employer an even shorter period. Ms. Otten inherited a dysfunctional nursing home environment. Ms. Otten performed the Director of Nursing duties to the best of her ability. Ms. Otten had to prioritize the seemingly endless list of duties the employer wished to heap upon her. Ms. Otten reasonably relied upon those below her to carry out their duties in a competent manner. The employer makes many allegations of carelessness and negligence. After carefully considering the evidence, the administrative law judge concludes that each of the allegations is suspect and that the evidence fails to establish carelessness or negligence on the part of Ms. Otten. The employer on the one hand presents a favorable review from September 20, 2010 as an exhibit, but on the other hand appears to argue that Ms. Otten was generally negligent in performing her duties. Both cannot be true. The weight of the evidence establishes that the employer had unreasonable expectations and unreasonably attributed systemic problems to Ms. Otten, the new Director of Nursing.

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

DECISION:

The Agency representative's December 13, 2010, reference 01, decision is reversed. The claimant quit in lieu of being discharged from the employment. The claimant involuntarily separated from the employment for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. 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/pjs