

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

KAMI M BRINYARK
Claimant

APPEAL NO. 18A-UI-11480-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARE INITIATIVES
Employer

OC: 11/04/18
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the November 21, 2018, reference 01, decision that held the claimant was eligible for benefits provided she met all other eligibility requirements and that the employer's account could be charged for benefits, based on the Benefits Bureau deputy's conclusion that the claimant was discharged on October 26, 2018 for no disqualifying reason. After due notice was issued, a hearing was held on December 12, 2018. Ms. Brinyark participated. Dave Peterson represented the employer and presented testimony through Amanda Rivera, Cheryl Dreyer and Kristen Lyons. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant. The administrative law judge took official notice of the fact-finding materials for the limited purpose of determining whether the employer participated in the fact-finding interview and, if not, whether the claimant engaged in fraud or intentional misrepresentation in connection with the fact-finding interview. On December 20, 2018, the administrative law judge reopened the hearing record for the purpose of resolving an issue with the employer's proposed exhibits. All of the above-referenced parties except Ms. Rivera appeared on December 20, 2018. The administrative law judge received Exhibits 2 through 8 into evidence.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Kami Brinyark was employed by Care Initiatives, d/b/a Ravenwood Specialty Care, as a full-time Certified Nursing Assistant (CNA) from August 2017 until October 26, 2018, when Cheryl Dreyer, Director of Nursing, and Kristen Lyons, Assistant Director of Nursing, discharged her from the employment. Ms. Lyons was Ms. Brinyark's supervisor. The sole incident that factored in the discharge occurred on October 26, 2018, when Ms. Brinyark was preparing to assist a resident with a shower. The resident's care plan called for two staff to assist the resident with "transfers" and for use of a gait belt during the transfer. As Ms. Brinyark waited for another CNA to join her to assist with transferring the resident from his wheelchair to the shower chair, the

resident became impatient and attempted the transfer on his own. Because Ms. Brinyark had not yet commenced the transfer process, she had not yet locked the wheels of the resident's wheelchair. The wheelchair rolled backwards as the resident stood up. Ms. Brinyark was unable to move the resident without the assistance from another staff member and was unable to keep the resident upright without the assistance of another staff member. As the resident's legs began to buckle, Ms. Brinyark slowly lowered the resident to the floor. Ms. Brinyark then reported the resident's "fall" to Ms. Lyons, who had been sitting a few yards away in at the nurses' station but out of earshot due to the door to the shower room being closed. Ms. Lyons directed Ms. Brinyark to locate the other CNA assigned to the area. Ms. Brinyark located the other CNA, who was using her personal cell phone in a resident's room. The employer commenced its resident "fall" monitoring protocol to ensure the resident was unharmed. Ms. Lyons and Ms. Dreyer then met Ms. Brinyark and discharged her from the employment for allegedly initiating an unsafe transfer, a "Critical/Type A" violation under the employer's written work rules. The employer provided the work rules to Ms. Brinyark at the time of hire.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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 Iowa Administrative Code rule 871-24.32(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 Iowa Administrative Code rule 871-24.32(4).

The weight of the evidence in the record establishes a discharge that was not based on misconduct in connection with the employment. The employer presented insufficient evidence to rebut Ms. Brinyark's testimony that the resident, not Ms. Brinyark, initiated the unsafe transfer. Once the resident unexpectedly stood up, Ms. Brinyark was left to respond as best she could. Because the resident's unexpected movement resulted in the resident's wheelchair moving out of range, and because Ms. Brinyark was unable to support the resident, the safest thing for Ms. Brinyark to do under the circumstances was to lower the resident to the floor. That is what Ms. Brinyark did. She then took appropriate steps to get help. Because the weight of the evidence establishes a discharge for no disqualifying reason, Ms. Brinyark is eligible for benefits, provided she meets all other eligibility requirements. The employer's account may be charged.

DECISION:

The November 21, 2018, reference 01, decision is affirmed. The claimant was discharged on October 26, 2018 for no disqualifying reason. The claimant is eligible for benefits, provided she meets all other eligibility requirements. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs