

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

BROOK D FORMANEK
Claimant

IA VETERANS HOME – MARSHALLTOWN
Employer

APPEAL NO. 19A-UI-07705-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 09/08/19
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 September 25, 2019, reference 02, 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 deputy's conclusion that the claimant was discharged on September 6, 2019 for no disqualifying reason. After due notice was issued, a hearing was held on October 22, 2019. Claimant Brook Formanek participated. Trenton Kilpatrick of Corporate Cost Control represented the employer and presented testimony through Melissa Sienknecht. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1 through 6 into evidence. 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.

ISSUES:

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

Whether the discharge was based on a current act.

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: Brook Formanek began her employment with the Iowa Veterans Home in Marshalltown in November 2018 as a temporary, part-time Resident Treatment Worker (RTW). Effective March 22, 2019, Ms. Formanek became a full-time Resident Treatment Worker (RTW). The first six months of the full-time employment was in a probationary period. Throughout the employment, Tina Hornung, Nursing Supervisor, was Ms. Formanek's supervisor. The employment ended on September 6, 2019, when Hornung notified Ms. Formanek that she was

being discharged from the employment. In connection with the discharge, Ms. Hornung provided Ms. Formanek with a discharge letter that stated the basis of the discharge as follows:

As a probationary employee, you have not met the expectations of your job as a Resident Treatment Worker at the Iowa Veterans Home. Therefore, effective September 6, 2019, your position is terminated.

The discharge occurred a couple weeks before the probationary period was to expire. The employer did not provide Ms. Formanek with a reason for the discharge beyond the general statement in the discharge letter.

The employer alleges an August 19, 2019 incident as the trigger for the employer's decision to end the employment on September 6, 2019. The employer alleges that Ms. Formanek knowingly violated a nurse's directive not to give a resident fluids at a time when the resident was suffering from a bowel obstruction. However, no such directive had been issued to Ms. Formanek. In the course of getting the resident ready for a trip to the hospital, Ms. Formanek responded to the resident's request for a drink by going to get the resident some water. Before Ms. Formanek could give the water to the resident, a Certified Nursing Assistance (CNA) yelled "No!" In that moment, Ms. Formanek learned that the resident was supposed to be NPO, nothing by mouth. Ms. Hornung questioned Ms. Formanek about the incident that same day. Ms. Formanek was nervous during that discussion and erroneously stated that she did not know what NPO meant. Ms. Formanek had completed CNA training in September 2018 and had learned the meaning of NPO during that training. Ms. Hornung said nothing to Ms. Formanek during the August 19 discussion or at any other subsequent point to put Ms. Formanek on notice that the August 19 incident could or would result in Ms. Formanek being discharged from the employment.

Earlier concerns factored in the employer's discharge decision. In April 2019, Ms. Formanek a coworker alleged that Ms. Formanek had called the coworker a bitch. Ms. Hornung counseled Ms. Formanek to remain professional and to review the work rules the employer had provided at the start of the employment. The employer alleges that Ms. Formanek left items unsecured in a resident care unit on or about July 5, 2019. However, Ms. Formanek was actually the person who secured the items after another staff member left them unsecured. On or about July 5, 2019, the employer faulted Ms. Formanek for expressing unfamiliarity with a party type of lift device. Ms. Formanek had up to that point used a different type of lift device available in the workplace. The employer alleges that Ms. Hornung spoke with Ms. Formanek on July 9, 2019 regarding the need to keep interpersonal drama out of the workplace. The employer alleges that the employer spoke with Ms. Formanek on July 17, 2019 regarding the need to check on residents every two hours, about 15-minute breaks not be guaranteed, and about 15-minute breaks not occurring on a set schedule.

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 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).

Continued failure to follow reasonable instructions constitutes misconduct. See *Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See *Woods v. Iowa Department of Job Service*, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the

worker's reason for non-compliance. See *Endicott v. Iowa Department of Job Service*, 367 N.W.2d 300 (Iowa Ct. App. 1985).

The evidence in the record establishes a September 6, 2019 discharge for no disqualifying reason. The weight of the evidence establishes that Ms. Formanek performed her assigned duties in good faith, to the best of her ability, but not to the employer's satisfaction. The timing of the employer's discharge decision was based on the employer's election not to allow Ms. Formanek reach permanent employment status following a six-month probationary period. The discharge decision was not based a current act of misconduct. Ms. Formanek had not disregarded a directive on August 19, 2019. Ms. Formanek had been unaware of the resident's NPO status until a coworker directed her not to give a resident liquids. Ms. Formanek immediately complied. Though the employer was aware of the August 19 incident on the day it occurred, the employer made no mention to Ms. Formanek on that day or at any point thereafter that the incident could or would result in Ms. Formanek being discharged from the employment. Even at the time of discharge, the employer did not reference the August 19 incident as the triggering event. The employer elected not to present testimony from people with personal knowledge of Ms. Formanek's employment. The employer's sole witness had no contact with the claimant during the employment and provided testimony that was largely speculative, largely devoid of relevant detail, and largely unreliable. Ms. Formanek is eligible for benefits, provided she meets all other eligibility requirements. The employer's account may be charged for benefits.

DECISION:

The September 25, 2019, reference 02, decision is affirmed. The claimant was discharged on September 6, 2019 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/scn