

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LINDA R FLAMMANG
Claimant

APPEAL NO. 10A-UI-08923-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARE INITIATIVES
Employer

OC: 05/09/10
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 June 14, 2010, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on August 9, 2010. Claimant Linda Flammang participated. Attorney Lynn Corbeil represented the employer and presented testimony through Cheryl Weber, Director of Nursing, Susie Pierce, Charge Nurse, and Matt Rotert, Administrator. Exhibits One through Nine were received into evidence.

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: Linda Flammang was employed by Kingsley Nursing and Rehab as a full-time certified nursing assistant from 1988 or 1989 until May 6, 2010, when Cheryl Weber, Director of Nursing, and Matt Rotert, Administrator, discharged her from the employment for neglecting the safety of resident on May 6, 2010. On that day, Ms. Flammang assisted a resident with a whirlpool bath. Ms. Flammang had assisted in the care of this resident on many occasions and had assisted the resident with baths on multiple occasions. Ms. Flammang knew that the resident required assistance when ambulating and knew that the resident suffered from dementia that impaired the resident's judgment. Ms. Flammang also knew that resident required used of a gait belt to steady the patient as she walked. Ms. Flammang had received appropriate training in use of the gait belt. After Ms. Flammang helped the resident with her bath, Ms. Flammang assisted the resident with getting dressed and attached the gait belt to the resident. Ms. Flammang then left the resident standing at her walker, unassisted, while Ms. Flammang walked across the room and opened the door in preparation for helping the resident exit the room. While Ms. Flammang was across the room the resident fell.

Ms. Flammang feared the resident might be seriously injured and immediately called for Charge Nurse Susie Pierce. Ms. Pierce responded immediately and found the resident sitting on the floor against the wall, crying and agitated. Ms. Pierce found Ms. Flammang standing a few feet

away. Ms. Pierce was struck by the fact that Ms. Flammang had left the resident in a situation where the resident could fall and by the fact that Ms. Flammang was not attempted to comfort the resident. Ms. Pierce sent Ms. Flammang away.

The employer deemed Ms. Flammang's violation of the resident safety policy a matter that subjected Ms. Flammang to immediate discharge under the employer's written work rules. Ms. Flammang was aware of and had received a copy of the work rules.

The employer had issued two prior reprimands to Ms. Flammang in October 2009. The first was issued for not using her time wisely. The second was issued for not being sufficiently attentive to residents, not adequately communicating with other staff, and not having a smile on her face. The employer is unable to point to any specific neglect of duties involved in the latter reprimand.

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).

The weight of the evidence establishes that Ms. Flammang was negligent when she left the resident standing unassisted on May 6, 2010. The extent of the negligence was significant. The evidence fails to establish that Ms. Flammang intended to harm the resident or that Ms. Flammang made a conscious decision to deviate from the resident's care plan or the employer's standard of care. The evidence fails to establish a pattern of negligence that would indicate a willful or wanton disregard of the employer's interest. Though the decision to discharge Ms. Flammang was squarely within the employer's discretion, the weight of the evidence does not establish misconduct in connection with the employment that would disqualify Ms. Flammang for unemployment insurance benefits. Ms. Flammang was discharged for no disqualifying reason. Accordingly, Ms. Flammang is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Flammang.

DECISION:

The Agency representative's June 14, 2010, reference 01, decision is affirmed. 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/css