IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DRAPEAUX, CONNIE, L
Claimant

AHF/KENTUCKY - IA
WILLOW GARDENS CARE CENTER
Employer

APPEAL NO. 10A-UI-16200-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/24/10
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the November 15, 2010, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on January 13, 2011. Claimant participated. Jaci Tipton represented the employer and presented additional testimony through Angie Kausalick. Exhibits A through D 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: The employer operates a nursing home facility in Marion. Connie Drapeaux was employed as a dietary aide from 2003 until May 9, 2010, when Jaci Tipton, Dietary Manager, discharged her from the employment. Ms. Tipton had been Ms. Drapeaux's immediate supervisor for about the last year of the employment. Ms. Drapeaux's duties included assisting with getting meals and drinks ready to serve to residents.

Ms. Tipton's decision to discharge Ms. Drapeaux was based on a number of incidents that had been reported to her by other staff. The final such incident was from May 8, 2010. The employer alleges Ms. Drapeaux gave a resident regular fruit instead of pureed fruit and further alleges that the resident could have choked on the food or aspirated. Ms. Drapeaux insists she gave the resident pureed fruit. The next most recent dates from May 5, 2010. The employer alleges that Ms. Drapeaux gave jello to residents who were restricted to thickened-liquids, despite an earlier in-service training that warned against the practice because the jello could thin and the resident could aspirate. Ms. Tipton does not know how many residents were affected. Ms. Drapeaux insists she did not give the jello to the lone resident in question. Another employee attempted to tell Ms. Tipton the same thing at the time Ms. Tipton was reprimanding Ms. Drapeaux for the incident.

In making the decision to discharge Ms. Drapeaux from the employment, Ms. Tipton considered an incident in April 2010, during which Ms. Drapeaux almost gave strawberry-rhubarb pie to a resident who was allergic to strawberries. Ms. Drapeaux was unaware the resident was allergic to strawberries until the cook approached while Ms. Drapeaux was serving the resident and indicated that the resident was allergic and could not have the pie. Ms. Drapeaux gave the resident apple pie instead. Thereafter, Ms. Drapeaux was mindful not to give the resident food containing strawberries.

In making the decision to discharge Ms. Drapeaux from the employment, Ms. Tipton considered an incident in April 2010 when Ms. Drapeaux deviated from the menu and served pudding to six residents restricted to a pureed diet instead of the pie that was on the menu. Ms. Tipton had counted the number of pieces of pie available and had concluded there was not enough for everyone. Ms. Drapeaux okayed with supervising cook the decision to give the residents pudding instead before she served the residents. Ms. Tipton came to work the following Monday, noted 15 pieces of pie in the refrigerator, and concluded that Ms. Drapeaux must have miscounted. The remaining pie was actually pie that had been prepared for a dining room other than the one Ms. Drapeaux was assigned to serve. The pie had been returned to the kitchen from the other dining room after the meal in question. Ms. Drapeaux had not miscounted.

In making the decision to discharge Ms. Drapeaux from the employment, Ms. Tipton considered reports from the cook that Ms. Drapeaux had allegedly taken pie from the workplace without authorization in April. Ms. Drapeaux denies both incidents.

In making the decision to discharge Ms. Drapeaux from the employment, Ms. Tipton considered two matters from November 2009. In one instance Ms. Tipton observed pieces of crème pies resting outside the refrigerator. Ms. Drapeaux had cut the pieces of pie for the next meal and lacked sufficient space for storing the pieces in the refrigerator. Ms. Tipton recognized the unrefrigerated milk-based crème pies as a safety risk, should the food spoil. In another instance from November 2009, Ms. Drapeaux failed to remove plumb pits before pureeing the plumbs. Ms. Drapeaux instead put the pureed mixture through a strainer and then attempted to serve it to residents, who rejected the food. The cook offered the residents apple sauce instead.

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 employer has, by and large, failed to present sufficiently direct and satisfactory evidence to establish carelessness, negligence, or intentional disregard of the employer's interests in connection with the incidents that factored into the decision to discharge Ms. Drapeaux from the employment. Concerning those incidents where Ms. Tipton was not personally present, the employer had the ability to present testimony from other employees who had been present. The employer failed to present any such testimony. The evidence in the record is insufficient to establish that Ms. Drapeaux acted inappropriately in connection with any of the April or May 2010 incidents. Thus, the evidence fails to establish a current act of misconduct necessary to disqualify Ms. Drapeaux for unemployment insurance benefits.

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

DECISION:

The Agency representative's November 15, 2010, reference 01, 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.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs