

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BONITA K PICKEL
Claimant

APPEAL NO. 12A-UI-04930-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FINLEY HOSPITAL
Employer

OC: 03/25/12
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Bonita Pickel filed a timely appeal from the April 20, 2012, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on May 21, 2012. Ms. Pickel participated. Sarah Dickey, Human Resources Business Partner, represented the employer.

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: Bonita Pickel was employed by Finley Hospital as a full-time Registered Nurse from 2004 until March 27, 2012, when Diana Batchelor, Nursing Director, Angela Basten, Nurse Manager, and Carla Waldbillig, Human Resources Director, discharged her from the employment for alleged dependent adult abuse. Ms. Basten was Ms. Pickel's immediate supervisor. Ms. Pickel worked as a charge nurse in the employer's Geriatric Psychiatric unit and worked with elderly patients suffering from end-stage dementia.

The final incident that triggered the discharge occurred during Ms. Pickel's shift on March 17, 2012 and involved an 87-year-old female patient. The patient was suffering from end-stage dementia. The patient had behaviors related to the dementia that included psychotic episodes during which the patient would attempt to eat her feces. The patient had been kept in the exclusion room due to her behaviors. On March 17, Kim Sloman, R.N., was assigned to care for the 87-year-old patient and was having trouble caring for the patient. Ms. Sloman had assisted the patient with using the toilet at a time when the patient was having a psychotic episode. Ms. Pickel assisted Ms. Sloman with helping the patient up off the toilet and noted the patient had stool stuck to her skin. Ms. Pickel told Ms. Sloman that she would go find a lubricant to assist with removing the feces from the patient's skin. While Ms. Pickel had stepped away for that purpose, Ms. Sloman yelled for Ms. Pickel to return immediately. Ms. Sloman told Ms. Pickel that the patient had pulled feces out of her anus and was attempting to eat it. In the heat of the moment, Ms. Pickel said, "Oh, this is disgusting" and "What would

your grandchildren think?" Ms. Pickel was simultaneously responding to the physically revolting situation and attempting to get through to the patient to end the patient's psychotic episode. Ms. Pickel and Ms. Sloman cleaned the patient. Ms. Pickel contacted the attending physician to alert him to the patient's behaviors. The doctor ordered a psychotropic medication be given to the patient. Ms. Pickel gave the medication to the patient. The patient calmed down, but had a one-on-one caregiver for the rest of the night.

Ms. Sloman reported Ms. Pickel's utterances to Nurse Manager Angela Basten as possible dependent adult abuse. Tech Stephanie Young also reported the incident to the employer. Ms. Pickel was herself a mandatory abuse reporter and had been trained on identifying and reporting dependent adult abuse. On March 21, the employer suspended Ms. Pickel from the employment while Sarah Dickey, Human Resources Business Partner, conducted an investigation.

On March 22, Ms. Dickey spoke with Ms. Pickel. Ms. Pickel admitted to saying that the situation was disgusting and to asking the patient what her grandchildren would think. Ms. Pickel denied the further allegation that she had said "This is absolutely repulsive." Ms. Pickel concedes that she said the patient was acting like a child, but asserts the comment was for Ms. Sloman's consumption, not directed at the patient.

During the interview on March 22, Ms. Dickey took the opportunity to question Ms. Pickel about other allegations. Ms. Dickey questioned Ms. Pickel about a conversation she had had with a female coworker concerning breast size during pregnancy. Ms. Pickel had not meant offense and had not known the other staff member was offended. Ms. Dickey alleged that Ms. Pickel had commented on a coworker's family moving into a retirement home. Ms. Pickel denied the allegation. Ms. Dickey alleged that Ms. Pickel had made a comment to a coworker about the staff member's family being nudists and swingers. Ms. Pickel denied making the comment.

During the March 22 interview, Ms. Dickey questioned Ms. Pickel about an incident in early March involving a 90-year-old male patient with end-stage dementia. Ms. Pickel had needed to wash feces off the patient's scrotum and had told the patient that she needed to wash the feces off his "balls." Ms. Pickel had used the term so that the patient could understand.

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).

Iowa Code section 235B.2(5)(a) defines dependent adult abuse, in relevant part, as follows:

5. a. "Dependent adult abuse" means:

(1) Any of the following as a result of the willful or negligent acts or omissions of a caretaker:

(a) Physical injury to, or injury which is at a variance with the history given of the injury, or unreasonable confinement, unreasonable punishment, or assault of a dependent adult.

(b) The commission of a sexual offense ... with or against a dependent adult.

(c) Exploitation of a dependent adult which means the act or process of taking unfair advantage of a dependent adult or the adult's physical or financial resources for one's own personal or pecuniary profit, without the informed consent of the dependent adult, including theft, by the use of undue influence, harassment, duress, deception, false representation, or false pretenses.

(d) The deprivation of the minimum food, shelter, clothing, supervision, physical or mental health care, or other care necessary to maintain a dependent adult's life or health.

(2) The deprivation of the minimum food, shelter, clothing, supervision, physical or mental health care, and other care necessary to maintain a dependent adult's life or health as a result of the acts or omissions of the dependent adult.

(3) (a) Sexual exploitation of a dependent adult by a caretaker.

Iowa Code section 235E.1(5)(a) defines, dependent adult abuse, in relevant part, as follows;

5. a. "Dependent adult abuse" means:

(1) Any of the following as a result of the willful misconduct or gross negligence or reckless acts or omissions of a caretaker, taking into account the totality of the circumstances:

(a) A physical injury to, or injury which is at a variance with the history given of the injury, or unreasonable confinement, unreasonable punishment, or assault of a dependent adult which involves a breach of skill, care, and learning ordinarily exercised by a caretaker in similar circumstances. "Assault of a dependent adult" means the commission of any act which is generally intended to cause pain or injury to a dependent adult, or which is generally intended to result in physical contact which would be considered by a reasonable person to be insulting or offensive or any act which is intended to place another in fear of immediate physical contact which will be painful, injurious, insulting, or offensive, coupled with the apparent ability to execute the act.

(b) The commission of a sexual offense ... with or against a dependent adult.

(c) Exploitation of a dependent adult. "Exploitation" means a caretaker who knowingly obtains, uses, endeavors to obtain to use, or who misappropriates, a dependent adult's funds, assets, medications, or property with the intent to temporarily or permanently deprive a dependent adult of the use, benefit, or possession of the funds, assets, medication, or property for the benefit of someone other than the dependent adult.

(d) Neglect of a dependent adult. "Neglect of a dependent adult" means the deprivation of the minimum food, shelter, clothing, supervision, physical or mental health care, or other care necessary to maintain a dependent adult's life or physical or mental health.

(2) Sexual exploitation of a dependent adult by a caretaker ...

The employer has failed to present sufficient evidence, and sufficiently direct and satisfactory evidence, to establish misconduct in connection with the employment. The employer appeared to resent the administrative law judge's reasonable expectation that the employer would come to the hearing prepared to present evidence sufficient to prove misconduct and to present it in a manner such that the administrative law judge could properly weigh the evidence. The employer appeared instead to expect the administrative law judge to wholly defer to the employer's judgments and conclusions in the matter. It would be inappropriate for the administrative law judge to do that in any case. The employer failed to present testimony from a single person with firsthand knowledge of the conduct that triggered the discharge. The employer failed to present a written statement from a single person with firsthand knowledge of the conduct that factored in the discharge. The employer had the ability to present such

testimony and/or statements and elected not to. While Ms. Pickel's statements on March 17 demonstrated poor judgment, they were not uttered in a vacuum, and did not constitute dependent adult abuse under the Iowa Code definitions referenced above. Ms. Pickel's testimony put her utterances in their proper context. The statements were uttered in the heat of the moment while addressing inherently shocking and repugnant behavior. Ms. Pickel's status as a nurse did not make her immune from a normal human response to a repugnant, stressful situation. Some of the comments were feeble and misguided attempts to reach the patient mentally to stop the behavior. Ms. Pickel's utterances were not intended to demean the patient. The evidence indicates that patient did not perceive them as such, if the patient perceived them at all.

The employer failed to present sufficient evidence, and sufficiently direct and satisfactory evidence, to establish misconduct in connection with the earlier incidents and allegations that factored in the discharge. Ms. Pickel's use of the term "balls" to speak to the 90-year-old patient about the need to clean feces from his scrotum area merely put the communication in terms the patient could understand. The employer's allegations concerning the other comments attributed to Ms. Pickel consisted of allegations wholly unsupported by meaningful proof.

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

DECISION:

The Agency representative's April 20, 2012, 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs