IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

RUBY S BROWDER
Claimant

FIVE STAR QUALITY CARE INC
Employer

APPEAL NO. 13A-UI-04785-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 03/24/13
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 April 15, 2013, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on May 28, 2013. Claimant Ruby Browder participated. Diana Hartman represented the employer and presented additional testimony through Mary Rebik. Exhibits One through Six 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: Ruby Browder was employed by Five Star Quality Care, Inc., from 2002 until March 27, 2013, when the employer discharged her from the employment. Ms. Browder had worked at the same nursing home facility as a certified nursing assistant since 1970 and became an employee of Five Star Quality Care, Inc., when that company acquired the facility.

The incident that triggered the discharge occurred on March 26, 2013, at a time when a state surveyor was at the nursing home facility investigating an unrelated complaint. During the surveyor's visit, Ms. Browder was in the process of getting residents to the dining room for the evening meal. Ms. Browder has several residents in her care that required use of a mechanical lift to transfer them from their beds to a wheelchair. Ms. Browder could not find another C.N.A. to assist her with transferring a particular resident from the resident's bed to a chair. Ms. Browder had not asked a nurse or other superior to assist with the transfer. Ms. Browder used a Hoyer lift to transfer the resident without assistance from a second staff member. Under the employer's policy, and pursuant to the patient's care plan, use of the Hoyer lift required that two nursing staff members be present to ensure safe operation of the mechanical lift. The employer had implemented a Resident Lift Program early in 2012. Ms. Browder had undergone appropriate training in the lift protocol and had signed her acknowledgment of the new Resident Lift policy and that she had received appropriate training.

After Ms. Browder transferred the resident, and as she was exiting the resident's room, the state surveyor confronted Ms. Browder and asked her how she had transferred the resident. Ms. Browder attempted to avoid answering the question by asserting that the facility always used two staff to transfer a resident with a Hoyer lift. Charge Nurse Shawn Pinegar, L.P.N., was present for the conversation. Ms. Browder looked to Nurse Pinegar for assistance in answering the question. Nurse Pinegar instead asked Ms. Browder for the name of the person who assisted her with the transfer. Ms. Browder responded, "No one." The state surveyor asked Ms. Browder why she had done the lift alone and Ms. Browder answered, "I don't know."

Once she was done speaking with the state surveyor, Ms. Browder reported the incident to the Assistant Director of Nursing, Mary Rebik. Ms. Browder told Ms. Rebik that she had messed up. Ms. Browder told Ms. Rebik that she could not find help with transferring the resident, that it was getting late, and that she did not want the employer to get mad about her getting residents to the dining room late. Ms. Browder apologized and said she would not do it again. Ms. Rebik reminded Ms. Browder that she needed to find a second staff member anytime she used a Hoyer lift to transfer a patient. Ms. Rebik told Ms. Browder that they would need to discuss the incident further. Ms. Browder then returned to performing her duties.

A short while later, the state surveyor spoke to Ms. Rebik about the incident. In addition, the state surveyor also wanted to confirm that Ms. Browder had changed the resident's brief before transferring the resident from the bed. Ms. Browder had indeed changed the resident's brief.

On March 27, Diana Hartman, R.N., Director of Nursing and Ms. Rebik spoke with Ms. Browder about the incident on March 26. Ms. Browder reminded Ms. Hartman that she had spoken to her several weeks earlier about having difficulty finding assistance when she needed it. Ms. Hartman pointed out that multiple supervisory staff had been available to assist with the transfer, but that Ms. Browder had not sought assistance from any of them. Ms. Hartman told Ms. Browder that she was being suspended while the employer investigated the matter. Ms. Browder asked whether she would be able to apply for unemployment insurance benefits. Ms. Hartman told Ms. Browder that she could pursue whatever avenue she wished, but that she was not being discharged at that time. Ms. Hartman told Ms. Browder that she could "resign if she wanted to due to the seriousness of the mistake she had made..." The employer had prepared a resignation memo for Ms. Browder to date and sign. Ms. Browder recognized that her discharge from the employment was imminent and told the employer she would resign. Ms. Browder asked if she could continue to come to the facility and visit with the residents and Ms. Hartman told her she could.

REASONING AND CONCLUSIONS OF LAW:

A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, or failure to pass a probationary period. 871 IAC 24.1(113)(c). A quit is a separation initiated by the employee. 871 IAC 24.1(113)(b). In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 698, 612 (Iowa 1980) and Peck v. EAB, 492 N.W.2d 438 (Iowa App. 1992). In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer. See 871 IAC 24.25.

871 IAC 24.26(21) provides:

> Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:
>
> (21) The claimant was compelled to resign when given the choice of resigning or being discharged. This shall not be considered a voluntary leaving.

In analyzing quits in lieu of discharge, the administrative law judge considers whether the evidence establishes misconduct that would disqualify the claimant for unemployment insurance benefits.

The weight of the evidence establishes a quit in lieu of discharge from the employment. At the time of the March 27, 2013 discussion, the employer notified Ms. Browder that she was being suspended. The employer raised the topic of Ms. Browder resigning from the employment and stressed the seriousness of the March 26 incident. The employer prepared a resignation memo that Ms. Browder merely needed to date and sign. The separation was not voluntary. The separation occurred instead in the context of signals from the employer that discharge from the employment was imminent. Ms. Browder reasonably concluded from the employer's actions that her discharge was imminent.

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) alone. The termination of employment must be based on a current act. See 871 IAC 24.32(8).

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 evidence in the record is sufficient to establish a violation of the employer's written Resident Lift policy. Ms. Browder knew that the resident required a second staff member be present and that she was violating the employer's policy at the time she transferred the resident without assistance from another staff member. To make matters worse, Ms. Browder was initially dishonest with the state surveyor when questioned about the incident. The question is whether this isolated incident rose to the level of substantial misconduct in connection with the employment that disqualifies Ms. Browder for unemployment insurance benefits. That is not an easy call. The incident occurred in the context of a very long employment. The evidence indicates that Ms. Browder sincerely cared about the safety of the residents in her care and about performing her duties to the satisfaction of the employer. The weight of the evidence indicates that Ms. Browder was performing her duties in the context of insufficient CNA staffing. The incident involved a judgment call on the part of Ms. Browder and she made the wrong judgment, both in transferring the resident without assistance and in not providing an immediate, truthful response to the state surveyor. The administrative law judge notes that testimony from Nurse Pinegar was conspicuously absent from the hearing. The administrative law judge concludes that while the evidence does establish misconduct in connection with the employment, given the totality of the circumstances it did not involve *willful and wanton* disregard of the employer's interests and did not rise to the level of substantial misconduct that would disqualify Ms. Browder for unemployment insurance benefits.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Browder involuntarily separated from the employment for no disqualifying reason. Accordingly, Ms. Browder is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The Agency representative's April 15, 2013, 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/pjs