IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JAYDENN V HANSEN
Claimant

DUBUQUE COUNTY
Employer

APPEAL NO. 17A-UI-10176-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 09/10/17
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Jaydenn Hansen filed a timely appeal from the September 27, 2017, reference 01, decision that disqualified her for benefits and that relieved the employer of liability for benefits, based on the claims deputy's conclusion that Ms. Hansen was discharged on September 6, 2017 for misconduct in connection with the employment. After due notice was issued, a hearing was held on October 23, 2017. Ms. Hansen participated. Cris Kirsch 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: Jaydenn Hansen was employed by Dubuque County as a full-time Certified Nursing Assistant (CNA) and Program Instructor (PI) at Sunnycrest Manor from April 2017 until September 6, 2017, when Tammy Freiburger, Co-Director of Nursing, and Cris Kirsch, Administrator, discharged her from the employment. Ms. Freiburger notified Ms. Hansen of the discharge. Sunnycrest Manor consists of a 77-bed long-term care facility and a 28-bed facility for people with intellectual disabilities. Ms. Hansen worked exclusively in part of the facility that housed intellectually disabled residents. Ms. Freiburger was Ms. Hansen's immediate supervisor. Ms. Hansen's work hours were 2:00 p.m. to 10:30 p.m. Ms. Hansen's work days varied.

The final incident that triggered the discharge occurred on September 3, 2017. On that day, CNA/PI directed profanity at Ms. Hansen as Ms. Hansen was exiting a common living area of her assigned unit and entering the hallway. Ms. Michaels left off speaking with CNA/PI Carissa Williams, turned to Ms. Hansen, and told Ms. Hansen, "Go fuck yourself." Resident G.S. was further down the hallway and heard the utterance. Other residents were behind Ms. Hansen in the common living area. Later in the shift, Ms. Hansen left a note for Ms. Freiburger. Ms. Hansen outlined what had occurred. Ms. Freiburger referenced that resident G.S. had been present. Ms. Hansen asked Ms. Freiburger to follow up with her during Ms. Hansen's upcoming shifts. During the shift on September 3, Ms. Hansen transported resident G.S. to and from a

park. On the trip to the park and on the trip back, G.S. initiated conversation regarding the incident involving Ms. Michaels. Ms. Hansen provided polite, but cursory responses to avoid discussing the matter with G.S. and quickly changed the subject.

On September 5, Ms. Freiburger spoke with Ms. Hansen and Ms. Hansen told Ms. Freiburger what had taken place on September 3, 2017. On September 5, Ms. Freiburger asked Ms. Kirsch to review video surveillance to see whether one or more residents had been present for the incident. The presence of residents would escalate the disciplinary matter to a higher level of discipline. On September 5, Ms. Kirsch reviewed surveillance video showing the September 3 incident between Ms. Michaels and Ms. Hansen. The surveillance supported Ms. Hansen's assertion that Ms. Michaels turned and spoken to her in a disrespectful manner. However, Ms. Kirsch did not observe resident G.S. on the video surveillance. Ms. Freiburger and Ms. Kirsch erroneously concluded that Ms. Hansen had been dishonest when she asserted the G.S. had been present for the incident involving Ms. Michaels. Ms. Freiburger and Ms. Hansen erroneously concluded that Ms. Hansen had gone out of her way to involve resident G.S. in the matter and that she had thereby violated the established work rules.

In making the decision to discharge Ms. Hansen from the employment, the employer also considered an incident from July 12, 2017, wherein Ms. Hansen told the scheduler, "You are really fucking killing me" in response to the number of hours Ms. Hansen was being asked to work. During the week in question, Ms. Hansen had worked upwards of 55 hours due to being held over after her shift because the employer was short-staffed. Ms. Freiburger issued a written warning to Ms. Hansen on July 13, 2017.

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.
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> 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). 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 presented insufficient evidence, and insufficiently direct and satisfactory evidence, to establish disqualifying misconduct in connection with the employment. The weight of the evidence fails to support the employer's assertion that Ms. Hansen was dishonest in reporting that resident G.S. had been present for the incident involving Ms. Michaels. The weight of the evidence fails to support the employer's assertion that Ms. Hansen went out of her way to involve G.S. in the matter. Ms. Kirsch reviewed video surveillance of the September 3 incident and concluded, based on her review of that material, that G.S. was not present. The employer continued to possess the video surveillance record, but did not present the video surveillance record as evidence at the hearing. The weight of the evidence indicates that resident G.S. could have been within ear shot of the incident without showing up on the surveillance record. Ms. Hansen provided credible testimony regarding G.S.'s attempt to discuss the incident during the ride to and from the park. The evidence fails to establish that Ms. Hansen initiated either conversation. The weight of the evidence establishes that Ms. Hansen provided cursory responses to G.S.'s attempt to discuss the matter and that Ms. Hansen changed the topic in an attempt to minimize G.S.'s involvement in the matter. The administrative law judge notes that the employer did not present testimony from Ms. Michaels, Ms. Williams, Ms. Freiburger or G.S. The employer had the ability to present testimony through any or all of those individuals with first-hand knowledge of the final incident. The employer elected not to present such testimony.

Because the evidence fails to establish misconduct in connection with the final incident, the evidence fails to establish a current act of misconduct in connection with the employment.

Accordingly, there can be no disqualification for unemployment insurance benefits. The evidence does establish inappropriate conduct on July 12, when Ms. Hansen told the scheduler that he was "fucking killing" her, but that remote incident cannot serve as a basis for disqualifying Ms. Hansen for unemployment insurance benefits absent a later, current act of misconduct.

Because the administrative law judge concludes that Ms. Hansen was discharged for no disqualifying reason, Ms. Hansen is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The September 27, 2017, reference 01, decision is reversed. The claimant was discharged on September 6, 2017 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/rvs