

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BERNARD J DOLAN
Claimant

APPEAL NO. 12A-UI-01499-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DUBUQUE COUNTY
Employer

**OC: 12/25/11
Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

Bernard Dolan filed a timely appeal from the February 3, 2012, reference 03, decision that denied benefits. After due notice was issued, a hearing was held on March 20, 2012. Mr. Dolan participated. Cathy Hedley represented the employer. Exhibits One through Four 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: Bernard Dolan was employed by Sunny Crest Manor as a full-time Environmental Service Worker (custodian) until December 16, 2011, when Cathy Hedley, Administrator, discharged him for ongoing negligence and carelessness in the performance of his duties. Mr. Dolan had been an Environmental Service Worker since 2008 and had been with the Sunny Crest Manor since 2002. Mr. Dolan's duties included cleaning and sanitizing 28 residents' beds on a monthly basis. The employer discharged Mr. Dolan after he repeatedly failed to clean most of the beds at all and repeatedly failed to clean the remainder properly. Mr. Dolan's neglect of his bed cleaning duties continued to the last day of the employment. The employer issued multiple warnings to Mr. Dolan regarding his failure to perform the assigned duties. Mr. Dolan had no reasonable basis for failing to perform the assigned duties. Mr. Dolan's neglect of his bed cleaning duties occurred in the context of other failure to perform duties in an appropriate manner. These included using too much liquid to clean a floor and failure to place a wet floor sign in the vicinity. Both of these additional matters placed elderly residents and other staff at risk of injury. When questioned about his failure to perform his duties adequately, Mr. Dolan was prone to providing flip responses that indicated a disregard for the residents, the employer, and other staff.

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).

Mr. Dolan's challenge to the lower decision is based on his disagreement with the language in that decision, which language indicated that he was discharged for loafing. The evidence indicates instead that Mr. Dolan was discharged based on a pattern of negligence and carelessness that indicated a willful and wanton disregard for the employer interests and the disregard for the other staff and the elderly residents who relied upon him performing his duties appropriately. Mr. Dolan had the ability to perform his duties appropriately, but repeatedly decided not to do that even after repeated reprimands.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Dolan was discharged for misconduct. Accordingly, Mr. Dolan is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits paid to Mr. Dolan.

DECISION:

The Agency representative's February 3, 2012, reference 03, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account will not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs