

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BRIANNA M ADAMS
Claimant

APPEAL NO. 15A-UI-08446-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CRYSTAL INC
Employer

OC: 06/28/15
Claimant: Respondent (1)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.3(7) – Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the July 16, 2015, reference 01, decision that allowed benefits to the claimant provided she was otherwise eligible and that held the employer's account could be charged for benefits, based on an Agency conclusion that the claimant had been discharged on June 29 2015 for no disqualifying reason. After due notice was issued, a hearing was held on August 27, 2015. Claimant Brianna Adams participated. Diane Panzi represented the employer and presented additional testimony through Rachel Kelsey. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One through Five into evidence.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Brianna Adams was employed by Crystal, Inc., doing business as Karen Acres Health Care Center, as a full-time certified nursing assistant from March 2015 until June 29, 2015, when Rachel Kelsey, R.N., Director of Nursing, discharged her from the employment for alleged insubordination and an alleged safety violation. Ms. Kelsey was Ms. Adams' supervisor. Ms. Adams would also answer to the charge nurse on duty.

The conduct that triggered the discharge is alleged to have occurred during Ms. Adams' shift on June 26, 2015. Jo Foley, R.N., was the charge nurse on duty. During the shift, Ms. Adams contacted Ms. Kelsey to complain about the manner in which Ms. Foley was speaking to her. During the shift, as Ms. Adams was leaving for break, Ms. Foley directed Ms. Adams to respond to a resident's call light. Ms. Adams did not hear the directive and went to break without answering the call light. When Ms. Adams returned from break, Ms. Foley was upset with

Ms. Adams and told Ms. Adams that she was supposed to respond to the resident's call light. Ms. Adams told Ms. Foley she had not heard any such directive. Ms. Foley said, "Am I speaking Chinese to you or what?" Ms. Adams reiterated that she had not heard the directive. Ms. Foley replied, "Bullshit." Ms. Adams asked Ms. Foley not to talk to her in such a manner. Ms. Adams had previously complained to the director of nursing regarding the manner in which Nurse Foley addressed her. After this exchange, Ms. Adams contacted Ms. Kelsey by telephone. Ms. Kelsey was away from the workplace at the time, but returned to the facility. When Ms. Kelsey returned to the facility, Ms. Foley alleged not only that Ms. Adams had failed to respond to the call light, but also alleged that Ms. Adams has also used a Hoyer lift to transfer a resident without the assistance of another staff member. The use of the Hoyer lift required the presence of a second staff member to ensure safe operation of the lift to transfer the resident. Ms. Adams had indeed had the assistance of another C.N.A. when she used the lift. Ms. Kelsey suspended Ms. Adams pending further consideration of the matter. On June 29, 2015, Ms. Kelsey notified Ms. Adams that she was discharged from the employment.

The employer considered additional matters when making the decision to discharge Ms. Adams from the employment. The next most recent incident that factored in the discharge concerned Ms. Adams' early departure due to illness on May 6, 2015. The employer issued a reprimand on May 7, 2015 for that incident and for alleged negative attitude and lack of team work.

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.

Iowa Admin. Code r. 871-24.32(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.

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).

Continued failure to follow reasonable instructions constitutes misconduct. See *Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See *Woods v. Iowa Department of Job Service*, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See *Endicott v. Iowa Department of Job Service*, 367 N.W.2d 300 (Iowa Ct. App. 1985).

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 to rebut Ms. Adams' testimony and to prove by a preponderance of the evidence either allegation concerning the June 26, 2015 shift. The employer did not present testimony, or even a written statement, from anyone who allegedly witnessed the purported conduct on June 26, 2015. The employer had the ability to present testimony from persons with personal knowledge of the incidents, but employer elected not to present such testimony. Because the evidence is insufficient to establish misconduct in connection with either allegation dating from June 26, 2015, and because the evidence otherwise fails to establish a current act of misconduct, the administrative law judge concludes that Ms. Adams was discharged for no disqualifying reason. Accordingly, Ms. Adams is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The July 16, 2015, 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/css