

**IN THE IOWA ADMINISTRATIVE HEARINGS DIVISION
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

CLAIMANT
Claimant

EMPLOYER
Employer

APPEAL NO. 23A-UI-09305-JT-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 09/03/23
Claimant: Appellant (2)**

Iowa Code Section 96.5(2)(a) & (d) – Discharge

STATEMENT OF THE CASE:

On September 29, 2023, claimant filed a timely appeal from the September 20, 2023 (reference 01) decision that disqualified the claimant for benefits and that relieved the employer's account of liability for benefits, based on the deputy's conclusion that the claimant was placed on disciplinary suspension on July 26, 2023 for violation of company rules. After due notice was issued, a hearing was held on November 2, 2023. Claimant participated personally and was represented by counsel. The claimant testified. An additional claimant witness was present for the hearing but did not testify. The employer participated and presented testimony from two witnesses. Exhibits 1 through 14 were received into evidence.

ISSUE:

Whether the claimant was suspended and/or discharged for misconduct in connection with the employment.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

The employer is a temporary employment firm that supplies temporary workers to long-term care facilities and other healthcare businesses.

The claimant established her employment relationship with the employer in June 2023. The claimant is a Certified Nursing Assistant (CNA) and performed work for the employer in a series of per diem (single day) temporary work assignments. The claimant last performed work for the employer on July 26, 2023 in an assignment at a long-term care facility. When the claimant was performing work in an assignment the charge nurse on duty would be her supervisor.

On July 28, 2023, the employer notified the claimant she was indefinitely suspended from the employment. To date, the employer has not recalled the claimant to the employment nor offered any additional assignments. Prior to suspending the claimant, the employer cancelled additional scheduled assignments.

The July 28, 2023 indefinite suspension was based on allegations made by the long-term care facility. On July 26, 2023, an L.P.N. representing the long-term care facility contacted the employer to bring the concerns to the employer's attention. At the same time, the long-term care facility notified the employer that the claimant could not return to perform additional work at the long-term care facility.

Staff from the long-term care facility made multiple allegations concerning the claimant's work at that facility. Most of the allegations came from a CNA who wrote multiple unsworn written statements on July 25, 2023. Some allegations came from a social services employee. The employer did not speak with the long-term care facility staff to substantiate the allegations or to discern whether the allegations or those making the allegations were reliable. The long-term care facility staff alleged the claimant was not performing resident cares properly, specifically, that the claimant was not using washcloths when getting residents ready for bed. The long-term care facility staff alleged the claimant had a negative attitude and appeared annoyed or ignored requests when staff asked for help with resident transfers. The long-term care facility staff alleged the claimant purposely escalated an interaction with a dementia care resident by encouraging the resident to hit her so that could get time off work. The long-term care facility staff alleged the claimant ignored a wheelchair bound resident's request for help as the resident slid from his wheelchair. The long-term care facility staff alleged the claimant became angry when using an EZ stand to assist a resident in getting up from a toilet and that the claimant shoved the EZ stand against a sink when the resident was still using the EZ stand. The long-term care facility staff alleged the claimant loitered at the nurses' station while residents used their call lights to request assistance and that the claimant further ignored multiple lights by walking past the lit call lights rather than entering the residents' rooms to respond to the call lights. The long-term care facility staff alleged the claimant called a resident a pedophile and a "ho" (whore) and then also referred to another resident as a "ho." The long-term care facility staff alleged the claimant threw an iPad tablet computer onto a breakroom table. The long-term care facility staff alleged the claimant slammed a resident's door at the time the resident's call light was on.

On July 28, 2023, the employer sent an email message to the claimant that included the long-term care facility allegations and solicited the claimant's written response to the allegations.

On July 31, 2023, the claimant submitted her written response to the allegations. In response to the allegation that the claimant did not use washcloths when performing resident cares, the claimant stated she had used both wipes and washcloths to perform resident cares. In response to the allegation that the claimant had escalated an interaction with a dementia care resident, the claimant stated she had merely attempted to redirect the dementia patient by letting him know he was hurting her thumb when he grabbed it and that he would cause her to miss work if he broke her thumb. The claimant added that the resident then released her thumb and she was able to redirect the resident to the next task. The claimant denied the allegation that she had ignored a resident sliding from a wheelchair. The claimant added that in such circumstances she would have assisted the resident as needed, would have repositioned the resident to avoid harm to the resident, and would have moved the resident to a safer sitting arrangement. With regard to the alleged EZ stand incident, the claimant stated that resident bathrooms were very small, that the EZ stand could easily come in contact with the sink as she attempted to maneuver it, and that she ensured there was no harm to a resident as she maneuvered the EZ stand. The claimant denied that she had loitered at the nurses' station or that she had ignored resident call lights. The claimant stated that she would instead answer call lights as quickly as possible, would walk the halls as necessary, and would otherwise assist residents and staff as needed. With regard to the door slamming allegation, the claimant stated any alleged door slamming was unintentional. With regard to the utterance concern, the

claimant explained that she had been joking with a resident who had talked about his many girlfriends and that other staff had taken her utterances out of context. With regard to the allegation that she had thrown an iPad on a table, the claimant stated she respected the facility's property and would not have thrown it. The claimant closed her written response by citing her many years in the field and questioned why the long-term care facility staff had not addressed their concerns with her at the time the concerns arose.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)(a) and (d) provides as follows:

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.

...

d. For the purposes of this subsection, "misconduct" means a deliberate act or omission by an employee that constitutes a material breach of the duties and obligations arising out of the employee's contract of employment. Misconduct is 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. Misconduct by an individual includes but is not limited to all of the following:

...

(2) Knowing violation of a reasonable and uniformly enforced rule of an employer.

(3) Intentional damage of an employer's property.

...

(6) Conduct that substantially and unjustifiably endangers the personal safety of coworkers or the general public.

...

See also Iowa Admin. Code r. 871-24.32(1)(a) (duplicating the text of the above statute).

Iowa Administrative Code rule 871-24.32(9) provides as follows:

Suspension or disciplinary layoff. Whenever a claim is filed and the reason for the claimant's unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as discharged, and the issue of misconduct must be resolved. Alleged misconduct or dishonesty without corroboration is not sufficient to result in disqualification.

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 Iowa Administrative Code rule 871-24.32(4).

The evidence in the record establishes a discharge for no disqualifying reason. On September 28, 2023, the employer placed the claimant off work for an indefinite period. As of November 2, 2023, more than a month after the suspension was imposed, the employer had not recalled the claimant to the employment. The suspension was effectively a discharge from the employment. Aside from the employer witness’ testimony regarding her personal contact with the long-term care facility nurse, the employer’s evidence consists entirely of hearsay-within-hearsay allegations. The employer did not offer sworn testimony or a sworn written statement from anyone with personal knowledge of the long-term care facility concerns. The weight of the evidence does not establish that the claimant failed to perform duties as assigned, loitered, failed to appropriately assist residents or staff, operated the EZ stand inappropriately, threw an iPad, or taunted a dementia care patient. The weight of the evidence indicates the alleged door slamming was unintentional. The weight of the evidence indicates the claimant made a good faith error in judgment when engaging in good-humored banter with a couple of residents and used language inappropriate to the environment. The claimant did not knowingly or intentionally violate a uniformly enforced work rule, did not endanger residents or staff, did not neglect her duties, and did not otherwise demonstrate willful and wanton disregard of the employer’s interests. The claimant is eligible for benefits, provided the claimant is otherwise eligible. The employer’s account may be charged for benefits.

DECISION:

The September 20, 2023 (reference 01) decision is REVERSED. The claimant was suspended and effectively discharged on September 28, 2023 for no disqualifying reason. The claimant is eligible for benefits, provided the claimant is otherwise eligible. The employer's account may be charged for benefits.

A rectangular box containing a handwritten signature in cursive script that reads "James E. Timberland".

James E. Timberland
Administrative Law Judge

November 13, 2023
Decision Dated and Mailed

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APPEAL RIGHTS. If you disagree with the decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

**Employment Appeal Board
6200 Park Ave Suite 100
Des Moines, Iowa 50321
Fax: (515)281-7191
Online: eab.iowa.gov**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

AN APPEAL TO THE BOARD SHALL STATE CLEARLY:

- 1) The name, address, and social security number of the claimant.
- 2) A reference to the decision from which the appeal is taken.
- 3) That an appeal from such decision is being made and such appeal is signed.
- 4) The grounds upon which such appeal is based.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at <https://www.legis.iowa.gov/docs/code/17A.19.pdf>.

Note to Parties: YOU MAY REPRESENT yourself in the appeal or obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds.

Note to Claimant: It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:

A true and correct copy of this decision was mailed to each of the parties listed.

DERECHOS DE APELACIÓN. Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

**Employment Appeal Board
6200 Park Ave Suite 100
Des Moines, Iowa 50321
Fax: (515)281-7191
Online: eab.iowa.gov**

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:

- 1) El nombre, dirección y número de seguro social del reclamante.
- 2) Una referencia a la decisión de la que se toma la apelación.
- 3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
- 4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días después de que la decisión adquiriera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que está en línea en <https://www.legis.iowa.gov/docs/code/17A.19.pdf>.

Nota para las partes: USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

Nota para el reclamante: es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

SERVICIO DE INFORMACIÓN:

Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.