

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**ROBERTA E JOHNSON**

Claimant

**APPEAL NO. 13A-UI-04663-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**FIVE STAR QUALITY CARE INC**

Employer

**OC: 03/24/13**

**Claimant: Respondent (2-R)**

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

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the April 10, 2013, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on May 29, 2013. Claimant Roberta Johnson submitted a written statement in lieu of participating in the hearing. Ms. Johnson did not request a postponement of the hearing. Ranae Bryant represented the employer and presented additional testimony through Danielle Beik. Exhibits One and A 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: Roberta Johnson was employed by Five Star Quality Care, Inc., as a full-time nursing home cook from 1990 until March 15, 2013, when the employer discharged her from the employment. The final incident that triggered the discharge occurred on March 15, 2013, when Ms. Johnson attempted to serve boiling Cream of Wheat to a nursing home resident. The kitchen had Cream of Wheat stocked in a steam table at an appropriate temperature, 195 degrees. Once the Cream of Wheat was ladled into a bowl and before it was taken to a nursing home resident, it could cool 20 degrees or more so that would be at a safe and appropriate temperature once it reached a nursing home resident in the dining room. On March 15, a particular nursing home resident complained that her Cream of Wheat was too cold and requested a warmer bowl. Danielle Beik, Director of Nursing, was the manager on duty assisting with the morning meal that day. Ms. Beik communicated the resident's request to Ms. Johnson. Rather than ladling another bowl from the steam table and seeing that it was immediately taken to the resident, Ms. Johnson elected to go a step further and used a microwave. What Ms. Johnson produced was a boiling hot bowl of hot cereal. Ms. Beik noticed the Cream of Wheat was boiling as she was enroute to serve the cereal to the resident. Ms. Beik returned to the kitchen area and told Ms. Johnson that the Cream of Wheat was too hot to serve to the resident. Ms. Johnson replied, "She's bitching about it being too cold." Ms. Beik asked Ms. Johnson to check the

temperature of the Cream of Wheat and Ms. Johnson refused, citing her decades of experience as a cook and her ability to judge the temperature of the food item without measuring the temperature. Ms. Beik had Ms. Johnson prepare another bowl of Cream of Wheat. This time, Ms. Johnson ladled the Cream of Wheat from the steam table into the bowl and Ms. Beik took the new bowl of cereal to the resident.

The employer considered additional matters when making the decision to discharge Ms. Johnson from the employment. In October 2012, the employer had suspended Ms. Johnson for three days in connection with multiple concerns. One concern was that Ms. Johnson was touching her tracheotomy stoma or tube with a bare hand while working. Another concern was that Ms. Johnson was touching food with a bare hand rather than with gloved hands as required. Another concern was a bathroom hygiene issue related to Ms. Johnson's tracheotomy. In August 2012, the employer had counseled Ms. Johnson for a serious hygiene issue after Ms. Johnson was observed leaving the employee restroom with feces on her person and after housekeeping staff complained about the related mess Ms. Johnson had left in the restroom. The employer had issued an additional written warning to Ms. Johnson in May 2012.

## **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) alone. 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 weight of the evidence establishes a pattern of conduct that indicates a willful disregard of the standards of conduct the employer reasonably expected of Ms. Johnson as a dietary worker in a nursing home environment. In connection with the final incident that triggered the discharge, Ms. Johnson disregarded the safety of the resident and disregarded basic food safety in preparing a bowl of hot cereal that could have scalded the resident and in refusing to measure the temperature of the boiling hot cereal. In addition, Ms. Johnson demonstrated disrespect and disregard for the resident in referring to the resident's preference as “bitching.” That single incident, in light of the disregard shown for the safety of the resident and the contempt uttered, was sufficient to establish misconduct in connection with the employment. But there was more. Ms. Johnson had on at least two prior occasions created a bio hazardous situation that the employer had to then address. Ms. Johnson's poor hygiene placed all of the residents who dined on food she prepared and all of the staff who had to come in contact with the surfaces she had contaminated in risk of illness, perhaps serious illness.

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

Iowa Code section 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code section 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at

the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received would constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of the amount of the overpayment and whether the claimant will have to repay the overpaid benefits.

**DECISION:**

The Agency representative's April 10, 2013, reference 01, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements. The employer's account will not be charged.

This matter is remanded to the Claims Division for determination of the amount of the overpayment and whether the claimant will have to repay the overpaid benefits.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs