

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LOIS STULL

Claimant

APPEAL NO. 13A-UI-10126-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

KEYSTONE NURSING CARE CENTER INC

Employer

OC: 08/11/13

Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Lois Stull filed a timely appeal from the August 30, 2013, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on October 10, 2013. Ms. Stull participated. Tracy Hanson 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: The employer is a long term care facility. Lois Stull worked for Keystone Nursing Care Center, Inc., during two distinct periods separated by a four-month period of retirement. The most recent period of employment started in December 2010 and ended on August 12, 2013, when Ms. Stull quit in lieu of being discharged from the employment. Ms. Stull was hired as a cook and was promoted to kitchen supervisor in September 2011. As kitchen supervisor, Ms. Stull was responsible for overall kitchen operations. Ms. Stull supervised 8 to 15 subordinates, including cooks and dietary aides. Ms. Stull was responsible for ordering food and for developing menus in conjunction with the dietitian. In October 2012, Tracy Hanson became Ms. Stull's immediate supervisor. Ms. Stull's daughter also worked for the employer. Ms. Stull was her daughter's immediate supervisor.

The final incidents that triggered the discharge concerned kitchen staffing for August 9, 10 and 11, 2013. The staffing issue arose when Ms. Stull's daughter was absent due to a purported back injury that the daughter attributed to the workplace. Ms. Stull was responsible for covering all shifts in the event a kitchen employee was absent. On August 9, Ms. Stull's daughter recruited another employee to work the August 9 shift. Ms. Stull had previously committed to volunteering at the Iowa State Fair on August 9 and the employer was aware of that prior obligation. Ms. Stull covered the shift on August 10. Ms. Stull secured another employee to cover the shift on August 11 by having that employee agree to work a double shift in exchange for Ms. Stull covering that employee's shift on August 12.

Another situation from August 10 and 11 that factored in Ms. Hanson's decision to end the employment was the absence of bacon from the resident's breakfast on August 10 and 11. Ms. Stull had not ordered sufficient bacon to cover those two meals.

On August 12, 2013, Ms. Hanson met with Ms. Stull for the purpose of ending Ms. Stull's employment. Ms. Hanson asked Ms. Stull how many times her daughter had been absent during the preceding two weeks. Ms. Stull initially said three or four times, but later said four or five times. Ms. Stull was required to complete an absence slip each time an employee was absent to document the absence. Ms. Stull had not completed any absence slips to document her daughter's absences during the preceding two weeks. It was during the discussion on August 12, 2013, that Ms. Stull told Ms. Hanson about her daughter's purported workplace injury. Ms. Stull had not completed an incident report regarding the purported workplace injury. During the August 12 discussion, Ms. Hanson spoke to Ms. Stull about the recurrent issue of running out of food supplies, including long johns, Danishes and bacon for breakfast and ground beef for other meals. The week before Ms. Stull had to substitute ground beef patties when making spaghetti for the residents. Ms. Stull asserted there were sufficient supplies on hand as of August 12. Ms. Stull could often find supplies in the freezer that others claimed not to be able to locate.

During the meeting on August 12, Ms. Hanson told Ms. Stull that she had the choice of resigning her position or being discharged from the position. When Ms. Hanson turned the discussion to ongoing problems with the break order, Ms. Stull threw down her keys, made some parting remarks and left.

In making the decision to end the employment, Ms. Hanson also considered earlier issues. On July 18, the kitchen ran out of roast beef for a senior citizen dinner. The roast beef was one of two main course options from which the residents or visitors could choose. The kitchen ended up having too little roast beef to serve roast beef to the last two residents who wanted roast beef. Ms. Hanson had told Ms. Stull to order plenty of food for the event. Ms. Hanson also considered Ms. Stull's decision to make the weekly food order from home on a day when she had called in sick. Ms. Stull made the order without knowing what was in inventory. The result was that the employer was missing some necessary items and had too much of others. Ms. Hanson also considered an incident in July wherein Ms. Stull had participated in gossip with her church friends about matters concerning her workplace. Ms. Stull had alleged that a nurse had been arrested for stealing narcotics from the resident. When Ms. Hanson initially questioned Ms. Stull about the matter, Ms. Stull denied having said anything. Later, Ms. Stull conceded she had participated in the conversation.

On May 16, 2013, Ms. Hanson spoke with Ms. Stull and issued a reprimand for failing to order ham during the preceding two weeks. Earlier that month an employee had reported there were no fruit pies to serve residents. There were indeed fruit pies in the freezer but they were not in the usual place. As part of the May reprimand, Ms. Hanson pointed out that there had been 15 menu substitutions between April 12 and 15, 2013. Ms. Hanson pointed out that federal regulations required that residents be served a balanced menu and that the facility complied with the menu once it was drafted. As part of the May reprimand, Ms. Hanson directed Ms. Stull to work 8:00 a.m. to 4:00 p.m. to provide better supervision to employees.

On February 21, 2013, Ms. Hanson issued a reprimand to Ms. Stull regarding her failure to document interactions with staff and failure to have staff document completion of cleaning chores. Ms. Hanson raised additional concerns about staff hygiene, food safety, and providing appropriate accommodations to residents with disabilities. At that time, Ms. Hanson had

Ms. Stull acknowledge in writing her obligation to provide staff with needed training. Ms. Hanson also directed Ms. Stull to provide her with a copy of the kitchen staffing schedule before it was posted. Ms. Stull thereafter provided only one such schedule to Ms. Hanson.

REASONING AND CONCLUSIONS OF LAW:

871 IAC 24.26(21) provides:

Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:

(21) The claimant was compelled to resign when given the choice of resigning or being discharged. This shall not be considered a voluntary leaving.

In analyzing quits in lieu of discharge, the administrative law judge considers whether the evidence establishes misconduct that would disqualify the claimant for unemployment insurance benefits.

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).

The findings of fact, above, are not an exhaustive statement of the deficiencies Ms. Hanson found in Ms. Stull’s performance of her kitchen supervisor duties. Nonetheless, the findings are sufficient to establish ongoing and substantial negligence on the part of Ms. Stull. The weight of the evidence indicates that the kitchen did indeed regularly run out of food items despite that fact that Ms. Stull placed a food order every week. The weight of the evidence indicates that Ms. Stull was less than diligent in preparing food orders despite knowing that once the menu had been established the facility was obligated to serve the items on the projected menu. The evidence indicates that Ms. Stull was negligent on an ongoing basis in failing to provide Ms. Hanson with a copy of the work schedule before it was posted. The evidence indicates that Ms. Stull was negligent in failing to properly document her daughter’s absences from the workplace. The evidence establishes additional areas of negligence on the part of Ms. Stull. The pattern of conduct indicates a willful disregard of the employer’s interests and the duties Ms. Stull owed to the employer as kitchen supervisor.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Stull was discharged for misconduct. Accordingly, Ms. Stull 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.

DECISION:

The agency representative's August 30, 2013, reference 01, decision is affirmed. 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css