

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CANDIS M BUNCE

Claimant

APPEAL NO. 12A-UI-02469-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DISCOVERY LIVING INC

Employer

OC: 01/22/12

Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Candis Bunce filed a timely appeal from the March 7, 2012, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on April 10, 2012. Ms. Bunce participated. Bob Hebl represented the employer and presented additional testimony through Mary Hand. Exhibits 1 through 27 were received 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 discharge was based on a current act.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The employer provides services to persons with development disabilities. Candis Bunce was employed by Discovery Living, Inc., as a full-time Community Living Assistant from May 2010 until January 24, 2012, when Bob Hebl, executive director, discharged her from the employment. Ms. Bunce's duties involved assisting clients with daily living skills and activities in a group home environment. The employer operated multiple group homes.

On January 18, 2012, Ms. Bunce was assisting an adult female client with a shower at the Copper home when Ms. Bunce noticed scratch marks and what initially appeared to be bite marks on the client's breast. Upon closer inspection, Ms. Bunce concluded that the marks or dots were too circular in placement to be bite marks and that they looked instead like marks from a rivet of some sort. The client suffers from moderate mental retardation and autism. The client has limited verbal ability. The client repeats and states random words. The client lacked ability to tell Ms. Bunce or anyone else how she might have acquired the marks. Ms. Bunce alerted coworker Tia Tuttle to the marks on the client's breast. With Ms. Bunce standing by, Ms. Tuttle telephoned their supervisor, Julie Magorian, who went to the group home to examine the client. Ms. Magorian notified the client's mother and Service Coordinator Mary Hand.

Pursuant to the employer's established protocol, Ms. Bunce prepared an incident report. While Ms. Bunce's shift ended that evening, Ms. Tuttle was scheduled to work the overnight shift. In the morning, Ms. Tuttle delivered the incident report to the employer's Cedar Rapids office. Ms. Hand then conferred with Carol Saddoris, director of residential services.

Later in the day on January 19, the client's mother telephoned Ms. Hand. The client's mother had been in contact with the staff where the client worked. The client's mother wanted to make sure that Ms. Hand was aware of the marks on the client. The client's mother was concerned that the client may have acquired the marks as a result of being left unsupervised with another client at the Copper home. Ms. Hand agreed to look into the matter further.

Later in the day on January 19, Ms. Magorian telephoned Ms. Hand to indicate that she had spoken with the client's mother. Ms. Magorian also reported that the employees working at the Copper home on January 19 had reported to Ms. Magorian that the client had uttered Ms. Bunce's name as the employees were attempting to talk to the client about the marks on her breast. Of course, this alleged phenomenon, communicated to Ms. Hand through multiple layers of hearsay, provided nothing of significance to suggest that *Ms. Bunce* had been the source of the marks on the client's breast, but the employer proceeded as if it did. Ms. Hand reported the new information to Ms. Saddoris, who directed Ms. Hand to suspend Ms. Bunce with pay. Ms. Saddoris told Ms. Hand that she would report the matter to the Iowa Department of Human Resources the next morning as suspected dependant adult abuse.

Ms. Hand notified Ms. Bunce that she was suspended with pay. The client's mother requested that Ms. Bunce no longer work with the client. The client's mother owned the Copper home where the client resided. Once the employer reported the matter to DHS, the employer ceased any further investigation of the matter concerning the marks on the client's breast. Instead, the employer looked for a basis to discharge Ms. Bunce from the employment. Mr. Hebl settled on discharging Ms. Bunce based on the client's mother's request that Ms. Bunce no longer work with the client and based on alleged service documentation errors. The most recent alleged documentation error concerned documentation errors concerned documentation from December 2011 that Ms. Magorian had reviewed and documented as insufficient on January 3, 2012. The employer looked backward to consider earlier alleged documentation deficiencies and another client family's request to not have Ms. Bunce provide services to their loved one.

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).

The evidence in the record fails to establish a "current act" of misconduct or any act of misconduct in connection with the employment. The evidence provides no basis for a conclusion that *Ms. Bunce* was in any way responsible for the marks she noted on the client and promptly reported on January 18, 2012. While the client's mother requested that Ms. Bunce no longer work with the client, that fact also provides no basis for a conclusion that Ms. Bunce was in any way responsible for the marks on the client and no basis for a finding of misconduct. The alleged documentation errors had come to the employer's attention on or before January 3, 2012, concerned December 2011 documentation, and therefore did not concern "current acts." The employer provided only Ms. Magorian's conclusory notes concerning the alleged deficient documentation, but not one actual example of deficient documentation. Thus, even if the alleged documentation deficiencies had involved "current acts," the employer presented insufficient evidence, and insufficiently direct and satisfactory evidence, to establish documentation deficiencies.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Bunce was discharged for no disqualifying reason. Accordingly,

Ms. Bunce is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Bunce.

DECISION:

The Agency representative's March 7, 2012, reference 01, decision is reversed. 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/kjw