

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RAE A MCVAY
Claimant

APPEAL NO. 09A-UI-18824-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WESLEY RETIREMENT SERVICES INC
Employer

OC: 11/15/09
Claimant: Respondent (1)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

Employer filed a timely appeal from a representative's decision dated December 7, 2009, reference 01, which held the claimant eligible to receive unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on January 27, 2010. The claimant participated personally. Participating on behalf of the claimant was her attorney, Mr. Adam Otto. The employer participated by Lisa Rozendaal, Director of Nursing; Mary Waddinski, RN Supervisor; and Kim Slycord, Office Manager. Employer's Exhibits Two, Three, Four, Five, Seven, Eight, Eleven, Twelve, Thirteen and Sixteen were received into evidence. Claimant's Exhibits B, C, D and E were received into evidence.

ISSUE:

The issue in this matter is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

Having considered the evidence in the record, the administrative law judge finds: Rae McVay was employed by Wesley Retirement Services, Inc. from August 30, 2004 until November 12, 2009 when she was discharged from employment. The claimant initially held a different position with the company but was transferred to the position of "homemaker" in the facility's assisted living department. In her job as a homemaker the claimant assisted residents with cleaning, life skills and assisted in eating, bathing and associated duties. The claimant worked as a team member with another home health aide in the performance of her duties. Ms. McVay was employed full time and was paid by the hour. Her immediate supervisor was Mary Waddinski. The claimant was discharged for "lack of job performance."

The claimant was discharged when the employer believed based upon accounts from other workers that were often anonymous that Ms. McVay was not performing the duties of her job in a satisfactory manner. The claimant in the past had filed a complaint that another employee was harassing her and providing false information about Ms. McVay's activities and the activities of other workers. The claimant had been required to be absent on a number of occasions because of her health and due to psychological issues and court appearances

regarding her son. The claimant had provided notice of impending absences in advance of being absent. Ms. McVay had been warned in the past regarding the number of absences that she had accrued.

Ms. McVay had received an evaluation from her employer on August 30, 2009 finding the claimant's performance to be competent or marginal in most categories. The claimant was however found unsatisfactory in attendance. (See Exhibit Seven). When the employer continued to receive complaints from staff members, some of which were again anonymous, the claimant was issued a written warning on October 2, 2009 about making breakfast for herself, parking in the wrong places, ignoring pages, failing to perform cleaning work adequately, taking pictures of a clock and looking for a different job. (See Exhibit Eight).

Ms. McVay disagreed with the evaluation that had been given to her and many aspects of the October 2 warning but attempted to improve her performance. As a "team member" the claimant's performance was often dependent upon how the other housekeeper assigned to work with her in the team was performing or not performing his or her job. Ms. McVay attempted to improve her response time to buzzers and otherwise comply with the warning that had been given to her. As a diabetic, the claimant at times had remained in the dining area to eat small portions of food to balance her insulin levels. The claimant had taken pictures of the time clock to allay allegations that she was reporting late.

Based upon continuing statements from other workers, some again that were anonymous, a decision was made to terminate Ms. McVay from her employment on November 9, 2009, although no particular incident was cited by the employer as a final reason for reaching the decision to terminate the claimant. Ms. McVay was not informed of the decision to terminate her on November 9, 2009, but was allowed to report to work on her next working day, November 12 and complete the working day before being discharged.

During this time Ms. McVay had concluded that the employer was not recognizing her medical condition as a disability and took steps to bring that status to the attention of the employer by sending the employer a certified doctor's statement. Ms. McVay had also indicated the possibility of surgery due to carpal tunnel syndrome. The employer discharged the claimant under a provision in its policies that provides for the involuntary termination of an employee whose performance or conduct is deemed unsatisfactory as solely determined by the employer. (See Exhibit 16).

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record is sufficient to warrant the denial of unemployment insurance benefits. It is not.

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 the denial of unemployment insurance benefits. Conduct sufficient to warrant an employer to discharge an employee is not necessarily serious enough to warrant the denial of unemployment insurance 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 or warnings can be used to determinate the magnitude of a current act of misconduct, a discharge for misconduct cannot be based upon past acts. The termination of employment must be based upon a current act of misconduct. See 871 IAC 24.32(8).

Allegations of misconduct without sufficient evidence to corroborate the allegation shall not be sufficient to result in disqualification. See 871 IAC 24.32(4).

When an individual is discharged due to a failure in job performance proof of that individual's incompetency to do the job is required to justify a disqualification. Kelly v. IDJS, 386 N.W.2d 552 (Iowa App. 1986). The claimant in this case was discharged when she did not meet the employer's expectations of the level of competency that she should be demonstrating in the performance of her duties.

The evidence in the record establishes that the claimant's ability to perform at the level of competency was dependent upon a "team member" and not based upon the claimant's performance solely. Ms. McVay cited a number of factors that may have affected her ability to perform at the level of competency expected by the employer. The employer has also based the majority of its evidence on out of court declarations made by individuals who were not present to testify. Some statements were anonymous and others appeared to have been prepared after the fact to support the employer's position in this matter. Ms. McVay also asserts that her direct supervisor did not work directly with her and thus evaluations or disciplinary actions were based upon hearsay statements to her supervisor from other individuals. Ms. McVay denies working below her abilities and has provided reasonable explanations for the allegations of job misconduct.

The administrative law judge notes that shortly before being discharged the claimant had asserted a disability in the form of diabetes and also was preparing to assert a claim for carpal tunnel syndrome. The employer could identify no single disqualifying act that caused the decision to be made to discharge Ms. McVay on November 9, 2009. The claimant was allowed to report and continue working for Wesley Retirement Services, Inc. after that date and was not discharged until the completion of her duties on November 12, 2009.

While the decision to terminate the claimant may have been a sound decision from a management viewpoint, the employer has not met its burden of proof of establishing intentional disqualifying misconduct sufficient to warrant the denial of unemployment insurance benefits. Gosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Benefits are allowed providing the claimant is otherwise eligible.

DECISION:

The representative's decision dated December 7, 2009, reference 01, is affirmed. The claimant was discharged for no disqualifying reason. Unemployment insurance benefits are allowed, providing the claimant meets all other eligibility requirements of Iowa law.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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