

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**KENNEY, LYNN, V**  
Claimant

**APPEAL NO. 11A-UI-00993-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**COLONIAL MANOR OF MANILLA INC**  
**MANILLA MANOR**  
Employer

**OC: 12/26/10**  
**Claimant: Respondent (1)**

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

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the January 20, 2011, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on February 22, 2011. Claimant participated. Dixie Christensen represented the employer. Exhibits One through 14 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: Lynn Kenney, R.N., was employed by Colonial Manor of Manilla, Inc., d/b/a Manilla Manor as the full-time Director of Nursing from September 2009 until December 29, 2010, when Administrator Dixie Christensen discharged her from the employment. Ms. Christensen was Ms. Kenney's immediate supervisor. Ms. Christensen discharged Ms. Kenney from the employment upon learning that Ms. Kenney was looking for other employment. Ms. Christensen learned within the last couple days of the employment that Ms. Kenney had contacted the local hospital, desperate for any work they could offer, and that Ms. Kenney had spoken with a hospice representative at Manilla Manor regarding any openings the hospice might have. Ms. Christensen had also discovered a resignation letter Ms. Kenney had drafted but had not yet submitted to the employer.

Ms. Kenney was unable to perform her duties to the employer's satisfaction during the employment. Ms. Kenney had shown some improvement and was making a good faith effort to master her duties, which included about 12 nurses and 20-30 nurses' aides. The employer concluded that Ms. Kenney lacked the necessary skill set to be an effective Director of Nursing and was in the process of working through progressive discipline steps when the employer learned Ms. Kenney was looking for other employment. Despite the deficiencies the employer

found in Ms. Kenney's performance, the employer continued to be willing to work with Ms. Kenney to continue to the employment until the employer learned she was looking for new employment.

### **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 weight of the evidence establishes that the reason the employer discharged Ms. Kenney from the employment was not her work performance, but was instead the employer's learning of Ms. Kenney's search for new employment. The weight of the evidence establishes that Ms. Kenney was unable to perform the duties of director of nursing to the employer's satisfaction, but that this was not the basis for the discharge from the employment.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Kenney was discharged for no disqualifying reason. Accordingly, Ms. Kenney is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Kenney.

**DECISION:**

The Agency representative's January 20, 2011, reference 01, decision is affirmed. 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.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs