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

LAURA K SORENSON
Claimant

APPEAL NO. 13A-UI-08111-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FIVE STAR QUALITY CARE INC
Employer

**OC: 06/16/13
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 July 5, 2013, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on August 16, 2013. Claimant Laura Sorenson participated. Darlene Brown, Human Resources Assistant, represented the employer. Exhibits Two through Eight 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: Laura Sorenson was employed by Five Star Quality Care, Inc., as a full-time direct support professional from 2009 until June 19, 2013, when the employer discharged her from the employment for allegedly failing to treat residents with dignity and respect. The employer had a written policy that required employees to treat staff with dignity and respect. Ms. Sorenson had been provided with a copy of the policy and was fully aware of the policy. Ms. Sorenson's duties involved assisting mentally and/or intellectually disabled adults with their daily living needs at a residential facility in Glenwood.

The final incident that triggered the discharge occurred on June 19. On that day, Ms. Sorenson was busy with work when she passed a particular client in the hall near the employer's front office. The client was demonstrating what the employer terms "maladaptive behaviors." As Ms. Sorensen encountered and passed by the client in the hallway, the client called Ms. Sorenson a bitch and a fucking whore. As Ms. Sorenson continued past the client, Ms. Sorenson told the client that she did not have time to deal with her right then. The client complained to a member of the employer's front office staff, Julie Childers, Administrative Secretary. Ms. Childers had overheard the exchange. Based on the allegation that Ms. Sorenson had failed to treat a resident with dignity and respect, Darlene Brown, Human Resources Assistant, met with Ms. Sorenson on June 19 and told Ms. Sorenson that she would be immediately suspended while the employer investigated the allegation. Once Ms. Brown

notified Ms. Sorenson of the suspension, Ms. Sorenson said, "I've had it." Ms. Sorenson clocked out and left. On June 20, 2013, Barbara Colvert, Qualified Intellectual Disabilities Professional, notified Ms. Sorenson that she was discharged from the employment.

In making the decision to discharge Ms. Sorenson from the employment, the employer considered prior allegations and reprimands. The next most recent reprimand had been issued in November 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 employer had presented insufficient evidence, and insufficiently direct and satisfactory evidence, to establish misconduct in connection with the June 19, 2013 incident that triggered the discharge. The employer had the ability to present testimony from Ms. Childers about hat incident, but failed to present such testimony. Ms. Sorensen was the only witness who testified from personal knowledge about the specific incident that triggered the discharge. The evidence indicates that Ms. Sorenson's response to the misbehaving client who was at the time directing patently offensive epithets at her was a rather measured response. The evidence fails to indicate anything disrespectful or undignified about Ms. Sorenson's statement to the client, in passing, that she did not have time to deal with the client. The employer has failed to present sufficient evidence to prove a current act of misconduct. In the absence of such proof, the administrative law judge need not consider the prior incidents and allegations that factored in the discharge, the most recent of which dates from seven months before the discharge.

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

DECISION:

The Agency representative's July 5, 2013, 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

_____
Decision Dated and Mailed

jet/pjs