

IOWA WORKFORCE DEVELOPMENT  
Unemployment Insurance Appeals Section  
1000 East Grand—Des Moines, Iowa 50319  
DECISION OF THE ADMINISTRATIVE LAW JUDGE  
68-0157 (7-97) – 3091078 - EI

CINDY BUNKER  
1775 – 78<sup>TH</sup> ST  
BLAIRSTOWN IA 52209-9522

CARE INITIATIVES  
C/O JOHNSON & ASSOCIATES  
PO BOX 6007  
OMAHA NE 68106-6007

Appeal Number: 06A-UI-05479-JTT  
OC: 04/23/06 R: 03  
Claimant: Appellant (2)

**This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

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

STATEMENT OF THE CASE:

Claimant Cindy Bunker filed a timely appeal from the May 15, 2006, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on June 13, 2006. Claimant participated. Jessica Meyer of Johnson & Associates/TALX UC eXpress represented the employer and presented testimony through Administrator Dorie Brennacke, Social Services Coordinator Bonnie Chilcote, and Certified Medication Aid Colleen Stull.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Cindy Bunker was employed by Care Initiatives as the full-time Director of Nursing of the Belle Plaine Nursing and Rehab Center from February 17, 2003 until April 26, 2006, when Administrator Dorie Brennacke discharged her.

Ms. Brennacke's decision to discharge Ms. Bunker was not based upon a particular final incident. Instead, Ms. Brennacke based her decision to discharge Ms. Bunker on several matters. Ms. Brennacke believed Ms. Bunker failed to properly address the issue of residents not receiving two baths per week as mandated by law and professional standards. The problem with the bath schedule arose in the fall of 2005 when the facility's census dropped and the corporation, in turn, cut man hours that had been used for bathing residents. Ms. Bunker discussed this matter several times with the corporate nursing consultant in an attempt to find a workable solution. Ms. Bunker and the nurse consultant rearranged the bathing schedule, shifted bathing responsibilities from a bath aid to nurses, attempted to persuade residents to shower instead of taking whirlpool baths, and as a last resort, gave residents a sponge bath when two baths per week were not possible. Ms. Brennacke believed Ms. Bunker was negligent in failing to inform the employer's corporate nursing consultants of a nurse's failure to follow the instructions of surveyors from Department of Inspections and Appeals during a survey that took place April 17-21, 2006. However, it was Ms. Brennacke who brought the matter to Ms. Bunker's attention, at which time Ms. Bunker attempted to accommodate the state surveyors. Ms. Brennacke held Ms. Bunker personally responsible, as Director of Nursing, for multiple facility deficiencies identified through the Department of Inspections and Appeals survey. However, the employer utilized charge nurses to supervise each shift and those individuals were more directly involved in providing care to residents and maintaining appropriate standards. Ms. Brennacke faulted Ms. Bunker for leaving the workplace on April 12 at a time when the nursing home was short-staffed. Ms. Bunker had gone to an all-day conference and learned of the staffing situation when she arrived back at the facility during the early evening. Ms. Bunker ascertained that appropriate steps were being taken to address the staffing issue and then left to deal with pressing personal business. Ms. Brennacke held Ms. Bunker at least partially responsible for a resident's fall and injury on April 14. Ms. Bunker had acquired straps for use in securing the lower side rails of resident beds to prevent aids from raising the side rails, but abandoned the idea of using the straps when they proved ineffective in securing the side rails. An aid had violated established policy by raising the resident's lower side rails and the resident had fallen while attempting to get out of bed. Because Ms. Bunker had updated for Ms. Brennacke a list of residents with pressure alarms, Ms. Brennacke held Ms. Bunker at least partially responsible for not ensuring that the resident's pressure alarm was attached and functioning. However, Ms. Bunker had not been directly responsible for securing the alarm to the resident, had, in fact, made certain that the alarm was provided for staff use, and reasonably relied upon the staff to utilize the alarm.

#### REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Bunker was discharged for misconduct in connection with the employment. It does 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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

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 intentional misconduct or recurrent negligent and/or careless conduct on the part of Ms. Bunker. The employer submitted insufficient evidence to prove, by a preponderance of the evidence, that Ms. Bunker was negligent in supervising or disciplining the staff with regard to implementation of appropriate care practices. On the contrary, the evidence indicates systemic deficiencies for which the employer held Ms. Bunker unduly accountable. While the decision to discharge Ms. Bunker was within the employer's

discretion, the evidence does not establish substantial misconduct that would disqualify Ms. Bunker for unemployment insurance benefits.

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

**DECISION:**

The Agency representative's decision dated May 15, 2006, reference 01, 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.

jt/kkf