

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CHRISTIE M PHILLIPS
Claimant

APPEAL NO. 15A-UI-14220-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ABCM CORPORATION
Employer

OC: 12/06/15
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Christie Phillips filed a timely appeal from the December 22, 2015 (reference 01) decision that disqualified her for benefits and that relieved the employer of liability for benefits, based on an Agency conclusion that Ms. Phillips had been discharged on October 6, 2015 for conduct not in the best interest of the employer. After due notice was issued, a hearing was held on January 19, 2016. Ms. Phillips participated. The employer did not respond to the hearing notice instructions to register a telephone number for the hearing and did not participate.

ISSUE:

Whether Ms. Phillips was discharged for misconduct in connection with the employment that disqualifies her for unemployment insurance benefits or that relieves the employer of liability for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Christie Phillips was employed by ABCM Corporation, d/b/a Lake Mills Care Center, as a full-time Certified Nursing Assistant from April 2015 until October 6, 2015; when Elaine Helgeson, Administrator, discharged her from the employment for fighting with a coworker away from the workplace and outside of work hours. Ms. Phillips was assigned to the 2:00 p.m. to 10:00 p.m. shift. The other employee, Patrice Whitfield, was assigned to the 10:00 p.m. to 6:00 a.m. shift. On October 4, 2015, Ms. Whitfield had berated Ms. Phillips as Ms. Phillips was leaving for the day. Ms. Whitfield was upset that Ms. Phillips had not put a particular resident to bed before Ms. Phillips left for the day. The resident had not wanted to go to bed and Ms. Phillips was mindful of the resident's right to decide when to retire for the evening. Before she left for the evening, Ms. Phillips had assisted the resident with getting ready for bed. Ms. Whitfield followed Ms. Phillips out of the building while continuing to berate Ms. Phillips.

On October 5, Ms. Helgeson came to Ms. Phillips to discuss the incident and Ms. Phillips explained what had occurred the previous evening. Ms. Helgeson reviewed surveillance video that showed Ms. Whitfield following Ms. Phillips out the previous evening but the surveillance video lacked audio. Ms. Helgeson suggested to Ms. Phillips that Ms. Phillips should start leaving her evening shift a bit early to avoid contact with Ms. Whitfield. Ms. Phillips was unhappy with the suggestion and did not see a way for her avoid the nursing assistant assigned to follow her at shift change but acquiesced in the arrangement. On October 5, Ms. Whitfield posted a belligerent rant about Ms. Phillips on Ms. Phillips' Facebook page. In the post, Ms. Whitfield boasted of the number of bar fights she had been in and how fearless she was. Ms. Whitfield baited Ms. Phillips with "trash talk" comments regarding Ms. Phillips and her children.

On October 6, Ms. Phillips drove by Ms. Whitfield's home on Ms. Phillips way to drop of her children and report for work. Ms. Whitfield was outside her home and began to trash talk Ms. Phillips' parenting of her children. Ms. Phillips elected to start a physical fight with Ms. Whitfield. The two fought outside Ms. Whitfield's home. Someone summoned the police. The police came and cited Ms. Phillips for simple assault. The police then released Ms. Phillips and Ms. Phillips reported for work. During Ms. Phillips' shift, Ms. Helgeson spoke to Ms. Phillips about the incident. Ms. Helgeson acknowledged that Ms. Phillips was a good worker, indicated she had not confronted such an incident before, and notified Ms. Phillips that she thought it necessary to discharge Ms. Phillips from the employment. Before Ms. Helgeson discharged Ms. Phillips, she acknowledged that the employer did not have a work rule that would govern Ms. Phillips' conduct away from the workplace and outside of working hours.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 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).

An employee who engages in a physical altercation in the workplace, regardless of whether the employee struck the first blow, engages in misconduct where the employee's actions are not in self-defense or the employee failed to retreat from the physical altercation. See Savage v. Employment Appeal Board, 529 N.W.2d 640 (Iowa App. 1995).

Violation of a specific work rule, even off-duty, can constitute misconduct sufficient to disqualify a claimant from unemployment insurance benefits. See Kleidosty v. Employment Appeal Board, 482 N.W.2d 416, 418 (Iowa 1992). But the employer must have a work rule that covers the off-duty conduct.

The employer failed to participate in the appeal hearing and, thereby, failed to present any evidence to support the assertion that the off-duty conduct constituted misconduct *in connection with the employment*. The employer had the ability to present evidence in support of its burden of proof. The administrative law judge cannot find disqualifying misconduct in connection with the employment without inappropriately shifting the employer's burden of proof to Ms. Phillips. Accordingly, the administrative law judge concludes that Ms. Phillips was discharged for no disqualifying reason. Ms. Phillips is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The December 22, 2015 (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

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