

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MICHELLE E INGHAM
Claimant

APPEAL NO. 10A-UI-12090-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARE INITIATIVES
Employer

OC: 06/27/10
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 August 17, 2010, reference 02, decision that allowed benefits. After due notice was issued, a hearing was held on October 13, 2010. Claimant Michelle Ingham participated. Alice Smolsky of Talx represented the employer and presented testimony through Sherry Niles, Sara Posekany, and Tammy Stewart. Exhibits One through Five 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: Michelle Ingham was employed by Care Initiatives as a full-time certified nursing assistant at Windsor Nursing and Rehab of Iowa from 2008 until June 30, 2010, when Cindy Klenzman, Director of Nursing, discharged her for alleged failure to perform assigned tasks. Ms. Klenzman was Ms. Ingham's supervisor, though the charge nurse on duty functioned as Ms. Ingham's immediate supervisor on a day to day basis. Ms. Klenzman is no longer with the employer.

The final incident(s) that prompted the discharge are alleged to have occurred on June 20 or 21, 2010. The employer alleges that Ms. Ingham failed to perform three resident bed changes, leaving the residents without clean undergarments and without clean "soaker" pads. The employer also alleges that Ms. Ingham left a resident resting in dried feces. The employer alleges as well that Ms. Ingham left her tattoo uncovered after being told to cover the tattoo. The employer witnesses do not know the identity of the nurse who allegedly discovered these issues. Ms. Klenzman allegedly investigated. Ms. Ingham's tattoo on her wrist had only been uncovered long enough for Ms. Ingham to remove the cover that was pulling her hair and to enlist the assistance of a nurse to place a new cover on the tattoo. The employer did not bring the June 20-21 concerns to Ms. Ingham's attention until June 30, 2010, when the employer discharged Ms. Ingham from the employment. At that point, and at the time of the hearing, Ms. Ingham had no recollection of failing to perform any of her assigned duties on June 21,

2010. Rather, on the disciplinary documentation the employer prepared, Ms. Ingham asserted she had done last rounds on the residents and had changed those whose bed clothes were wet. The written discipline fails to provide the date upon which Ms. Ingham allegedly fails to change the bed clothes.

The above incident followed other incidents and reprimands.

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 employer has failed to present sufficient evidence, and sufficiently direct and satisfactory evidence to establish a current act of misconduct. The weight of the evidence indicates that the tattoo incident occurred on June 20, 2010, as stated in the written reprimand dated June 30, 2010. The evidence establishes that the other final matters, the alleged failures to change resident bed clothes or address dried feces—if these occurred—occurred on June 21, 2010 and came to the employer's attention at that time. The evidence indicates that the employer then waited nine days to address the bed clothes issues with Ms. Ingham and waited 10 days to address the tattoo issues. The employer's delay was reasonable. As of June 30, the matters alleged to have occurred on June 20 and 21 no longer constituted current acts and cannot serve as the basis for disqualifying Ms. Ingham for unemployment insurance benefits. See 871 IAC 24.32(8). In addition, the employer has simply failed to present sufficient direct and satisfactory evidence to prove, by a preponderance of the evidence, that Ms. Ingham did the things on June 20-21 that the employer alleged she did.

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

DECISION:

The Agency representative's August 17, 2010, reference 02, 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs