

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SHERRI SCOTT
Claimant

APPEAL NO. 08A-UI-05945-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARE INITIATIVES
Employer

OC: 06/01/08 R: 03
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

Care Initiatives filed a timely appeal from the June 25, 2008, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on July 15, 2008. Claimant Sherri Scott provided a telephone number for the hearing, but was not available at that number at the 11:00 a.m. time set for the hearing. Attorney Josh Burrows of Johnson & Associates/TALX UC eXpress represented the employer and presented testimony through Administrator Steve Dowd, Certified Nursing Assistant Terri Hemm, Certified Nursing Assistant Jason While, Nurse Manager Jodie Bevans, and Director of Nursing, Maureena Prakash, R.N. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One through Four into evidence.

The claimant contacted the Appeal Section shortly after 1:00 p.m., after the hearing record had been closed. The claimant indicated she had written down the wrong day for the hearing. The claimant failed to provide good cause for reopening the record.

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: Sherri Scott was employed by Lantern Park Nursing Home as a part-time certified nursing assistant (C.N.A.) from May 11, 2005 until June 3, 2008, when the employer discharged her. The discharge decision was made by Administrator Steve Dowd, Nurse Manager Jodie Bevans, and Director of Nursing, Maureena Prakash.

The final incident that prompted the discharge occurred on May 28, 2008. At about 8:00 a.m., Ms. Scott took a couple of residents to the shower/bath area where C.N.A. Terri Hemm and C.N.A. Jason While were assisting a resident with bathing. Ms. Hemm told Ms. Scott that Ms. Hemm would need to wait to bathe one of the residents Ms. Scott had brought until after breakfast. Ms. Scott became upset. Ms. Scott entered the shower area where Ms. Hemm and

Mr. While were assisting a resident. Ms. Scott told Ms. Hemm that she did not appreciate Ms. Hemm pushing “her people” around and did not appreciate Ms. Hemm whispering about her. Ms. Hemm and Mr. While concluded that Ms. Scott was acting paranoid. Both reported Ms. Scott’s conduct to Nurse Manager Jodie Bevans. Ms. Hemm told Ms. Bevans that Ms. Scott had been aggressive and that she felt threatened by Ms. Scott. Ms. Scott is a big person. Ms. Scott had been moving her arms about as she had been speaking to Ms. Hemm. Ms. Scott had done nothing to indicate she was going to strike Ms. Hemm. Shortly after Mr. While and Ms. Hemm complained to Ms. Bevans, Med Aide Teresa Davis complained to Ms. Bevans about an incident in the hallway. Ms. Davis said that Ms. Scott had been acting paranoid and angry. Ms. Davis said that Ms. Scott was being loud and aggressive. Ms. Davis did not elaborate with regard to any comments Ms. Scott had made.

After Ms. Bevans received the employee complaints, she spoke with Ms. Scott. Ms. Bevans had previously noted that Ms. Scott appeared “sad and moping.” Ms. Scott shared with Ms. Bevans that she had personal problems that were affecting her job. Ms. Scott told Ms. Bevans that she was “stressed out” and agreed that she was not being productive. Ms. Scott denied that she had been angry, loud or aggressive that morning.

The final incident followed prior complaints from a few residents that Ms. Scott was “rude and sassy” or angry when interacting with residents. The most recent complaint had been made at the end of March or beginning of April 2008 and had prompted Mr. Dowd to issue a written reprimand. In February, resident B.R.’s daughter had complained about Ms. Scott leaving B.R. in a urine soaked brief for three to four hours. Ms. Scott denied the allegation of neglect. The employer issued a reprimand.

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).

Threats of violence in the workplace constitute misconduct that disqualifies a claimant for benefits. The employer need not wait until the employee acts upon the threat. See Henecke v. Iowa Dept. Of Job Services, 533 N.W.2d 573 (Iowa App. 1995).

The greater weight of the evidence in the record fails to establish substantial misconduct in connection with the employment that would disqualify Ms. Scott for unemployment insurance benefits. The weight of the evidence fails to establish that Ms. Scott threatened, or intended to threaten any of her coworkers. The greater weight of the evidence suggests that Ms. Scott was under personal stress and vented out of frustration. This does not wholly excuse the conduct. However, the evidence indicates that Ms. Scott's conduct was not based on a willful or wanton disregard of the employer's interests. The evidence suggests instead that Ms. Scott was experiencing some sort of mental health issue that was adversely affecting her work performance and demeanor. Ms. Scott essentially conceded this point to Ms. Bevans on May 28, 2008. Nor do the prior allegations of "rude and sassy" behavior indicate a willful or wanton disregard of the employer's interests. The evidence establishes an isolated incident of Ms. Scott neglecting to change a resident's wet brief in February. This past isolated incident would not constitute misconduct that would disqualify Ms. Scott for unemployment insurance benefits.

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

DECISION:

The Agency representative's June 25, 2008, 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css