

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TAMMY L CRONK
Claimant

APPEAL NO. 07A-UI-08769-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

GOOD SAMARITAN SOCIETY INC
Employer

OC: 08/12/07 R: 04
Claimant: Respondent (1)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
871 IAC 24.32(8) – Current Act Requirement

STATEMENT OF THE CASE:

Good Samaritan filed a timely appeal from the September 6, 2007, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on October 6, 2007. Claimant Tammy Cronk participated. Dave Hjortland, Administrator, represented the employer and presented additional testimony through Brenda Johnson, Director of Nursing for the Postville Center. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One, Two, and Four through Thirteen into evidence.

ISSUE:

Whether the claimant was discharged for a "current act" of 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: Tammy Cronk was employed by Good Samaritan Society as a full-time registered nurse until August 14, 2007, when Brenda Johnson, Director of Nursing, discharged her. The employer is a long-term care facility that provides services to the frail elderly.

The final incident that prompted the discharge came to the employer's attention on July 30, 2007 and concerned Ms. Cronk's conduct during her overnight shift on July 26-27. During the shift, Ms. Cronk recorded that she had checked the employer's overnight patient safety monitoring system when she had in fact not checked the system. The system was inoperable during Ms. Cronk's overnight shift because the battery in the Wandergard Signaling Device Tester was dead. Amy Pfiester, L.P.N., had worked the evening shift immediately prior to Ms. Cronk's July 26-27 overnight shift. Ms. Pfiester had noted that the Wandergard system was inoperable due to the dead battery, had intended to replace the battery, had become busy with other duties and had forgotten to change the battery before the end of her evening shift. Ms. Pfiester realized her error shortly after she left the workplace, but concluded that the overnight nurse, Ms. Cronk, would discover and replace the dead battery when she performed

her mandatory nightly check of the system. Ms. Pfiester returned to the workplace the next morning and discovered that the battery in the Wandergard Signaling Device Tester had not been changed and was still dead. Ms. Pfiester also noted that Ms. Cronk had documented that she had performed the nightly test of the Wandergard Signaling Device Tester and that it had been functional. Ms. Cronk's failure to test the device left multiple residents at risk of injury by removing the means by which the staff would be alerted that an at-risk resident had left his or her bed. Ms. Pfiester drafted a memo to the director of nursing and slid it under the director of nursing's door on July 27. Ms. Johnson did not see the letter until July 30. The July 26-27 incident followed prior allegations concerning Ms. Cronk neglecting her resident care duties and/or reporting that she had performed resident care duties that she had not performed.

On July 30-31, Ms. Johnson completed her interview of other employees who had been on duty during the July 26-27 overnight shift. On August 1, Ms. Johnson reviewed the employee handbook to discern what work rules Ms. Cronk had violated. On August 2, 2007, Ms. Johnson reviewed Ms. Cronk's discipline record. On August 3, Ms. Johnson continued her review of the employer's established procedures. On August 6-8, Ms. Johnson reviewed the care plans of the residents affected by Ms. Cronk's failure to test the Wandergard Signaling Device Tester. On August 9-10, Ms. Johnson committed her findings to writing. Throughout the investigation and documentation process, Ms. Johnson did not deem following up with Ms. Cronk to be an urgent matter. On August 13, Ms. Johnson spoke with Ms. Cronk for the first time concerning the matter that had come to her attention on July 30 and notified Ms. Cronk that she was discharged from the employment.

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 weight of the evidence indicates that the final incident that prompted the discharge came to the employer’s attention no later than July 30, but that the employer did not notify Ms. Cronk that the conduct subjected her to possible discharge, or actual discharge, until August 13. The evidence indicates that the employer unreasonably delayed a full two weeks between learning of the final conduct that prompted the discharge and notifying Ms. Cronk of the potential consequences to her employment. The administrative law judge concludes that the evidence fails to establish a “current act” upon which a disqualifying discharge must be based. See 871 IAC 24.32(8). Because the evidence fails to establish a current act, the administrative law judge need not consider whether the conduct in question was misconduct. Likewise, the administrative law judge need not consider prior conduct.

While the decision to discharge Ms. Cronk was within the discretion of the employer, the administrative law judge concludes that Ms. Cronk was discharged for no disqualifying reason. Accordingly, Ms. Cronk is eligible for benefits, provided she is otherwise eligible. The employer’s account may be charged for benefits paid to Ms. Cronk.

DECISION:

The Agency representative's September 6, 2007, 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