

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MELISSA GLEASON

Claimant

APPEAL NO. 17A-UI-04209-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

GOOD SAMARITAN SOCIETY INC

Employer

OC: 03/19/17

Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Melissa Gleason filed a timely appeal from the April 7, 2017, reference 01, decision that disqualified her for benefits and that relieved the employer of liability for benefits, based on the claims deputy's conclusion that Ms. Gleason voluntarily quit on March 14, 2017 in response to a reprimand. After due notice was issued, a hearing was held on May 9, 2017. Ms. Gleason participated. Lori Treangen represented the employer and presented additional testimony through Marsha Moestchen. Exhibits 1, 3, 4, and 5 were received into evidence.

ISSUE:

Whether Ms. Gleason separated from the employment for a reason that disqualifies her for 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: Melissa Gleason was employed by Good Samaritan Society, Inc. as a full-time Certified Nursing Assistant (CNA). Ms. Gleason began the employment in 2013 and last performed work for the employer on March 14, 2017. Ms. Gleason performed her work at a nursing home in Waukon. Marsha Moestchen, Nurse Manager, was Ms. Gleason's supervisor. On March 14, 2017, Ms. Gleason was scheduled to work from 6:00 a.m. to 11:00 a.m. Dona Louder, Interim Director of Nursing, indefinitely suspended Ms. Gleason at 9:30 that morning pending investigation of alleged neglect of a resident. On that morning, Charge Nurse Brooklyn Adams alleged to Ms. Moestchen and to Ms. Louder that Ms. Gleason had neglected a particular resident, RR. Ms. Gleason's duties that morning involved getting 11 to 12 residents out of bed, cleaned up and to breakfast. RR is a disabled adult male in his sixties. RR could be non-cooperative with the younger nursing assistants, including Ms. Gleason, but responded better to older nursing assistants. RR would sometimes refuse to get out of bed and would pull the blankets up in an effort to remain in bed. RR was capable of ambulating from his bed to the restroom, but was deemed a fall risk. On the morning May 14, Charge Nurse Brooklyn Adams located Ms. Gleason in another resident's room and told Ms. Gleason that she needed to get RR ready. Ms. Gleason was at that time assisting another resident. Ms. Gleason was waiting for another CNA, Pam Schultz, to become available to assist with getting RR ready. Ms. Adams asserted

to Ms. Moestchen and to Ms. Lounder that she had returned 40 minutes later to remind Ms. Gleason to assist RR. Ms. Adams alleged that RR at that point was urine soaked. Ms. Gleason assisted RR in getting ready and he was ready in time for breakfast.

At about 9:30 that morning, Ms. Lounder summoned Ms. Gleason to a meeting and told her that she was being suspended for neglect of RR. Ms. Gleason denied neglecting RR and asserted that she had been assisting another resident when Ms. Adams spoke to her about assisting RR. Ms. Lounder asserted there had been other similar incidents. Ms. Gleason felt that Ms. Lounder was not listening to her. When the employer told Ms. Gleason that she was being suspended, Ms. Gleason said she was giving her “two weeks.”

On March 21, 2017, Ms. Lounder contacted Ms. Gleason to summon her to a meeting. Ms. Gleason agreed to appear for the meeting. At the start of the meeting, Ms. Lounder told Ms. Gleason that she had decided to terminate Ms. Gleason’s employment based on the finding of the investigation. Ms. Gleason asserted that the employer had not asked her side of the story. Ms. Gleason also asserted that she had already given the employer a two-week notice that she was going to quit. Ms. Lounder then asserted that Ms. Gleason had engaged in inappropriate behavior on multiple occasions. Ms. Gleason asked for the particulars of the alleged inappropriate conduct, but Ms. Lounder did not provide any particulars. Prior to meeting with Ms. Gleason, Ms. Lounder had solicited statements from two other employees. Those employees had alleged prior incidents of inappropriate behavior without providing dates or details of the alleged inappropriate behavior.

REASONING AND CONCLUSIONS OF LAW:

A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, or failure to pass a probationary period. 871 IAC 24.1(113)(c). A quit is a separation initiated by the employee. 871 IAC 24.1(113)(b). In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 698, 612 (Iowa 1980) and *Peck v. EAB*, 492 N.W.2d 438 (Iowa App. 1992). In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer. See 871 IAC 24.25.

The weight of the evidence establishes a discharge, not a voluntary quit. Ms. Gleason uttered her “two weeks” comment in frustration. The employer did not accept or treat the utterance as bona fide notice of a quit. Neither the employer’s conduct nor Ms. Gleason’s conduct subsequent to the March 14 meeting and suspension is consistent with a voluntary quit. The evidence indicates instead that Ms. Gleason was indefinitely suspended on March 14, 2017. That by itself was effectively a discharge from the employment. The employer merely formalized the discharge on March 21, 2017.

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 a discharge 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 had presented insufficient evidence, and insufficiently direct and satisfactory evidence, to establish misconduct in connection with the employment. The employer's evidence consists of hearsay allegation of neglect of a resident on March 14, 2017. Ms. Gleason

provided candid and credible evidence that refuted that allegation. Employer witness Marsha Moestchen provided testimony that supported Ms. Gleason's decision to prioritize other residents over the difficult resident, RR, as Ms. Gleason got the several residents in her care ready for breakfast on March 14, 2017. The employer had the ability to present testimony through Ms. Adams regarding the alleged neglect from March 14, but the employer elected not to present such testimony. The employer presented insufficient evidence to substantiate, to any meaningful degree, the allegations of earlier inappropriate behavior.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Gleason was discharged effective March 14, 2017 for no disqualifying reason. Ms. Gleason is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The April 7, 2017, reference 01, decision is reversed. The claimant was discharged on March 14, 2017 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/scn