

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MICHELLE L PROTHEROE
Claimant

APPEAL NO. 14A-UI-13214-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MANOR OF LAKE CITY INC
DBA SHADY OAK CARE CENTER
Employer

OC: 11/30/14
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Michelle Protheroe filed a timely appeal from the December 15, 2014, reference 01, decision that disqualified her for benefits and that relieved the employer of liability for benefits, based on an Agency conclusion that she had been discharged for failure to follow instructions in the performance of her job. After due notice was issued, a hearing was held on January 21, 2015. Ms. Protheroe participated. Thomas Kuiper of Equifax Workforce Solutions represented the employer and presented testimony through Kate Smith.

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 Protheroe was employed by Manor of Lake City, Inc., d/b/a Shady Oak Care Center, as a full-time certified nursing assistant from July 2013 until November 19, 2014, when Kate Smith, People Development Coordinator, and Jennifer Blair, Director of Nursing, discharged her from the employment. Ms. Protheroe's duties included work in the Alzheimer's ward with patients in various stages of dementia.

The final incident that triggered the discharge occurred during Ms. Protheroe's final shift. During the shift, Ms. Protheroe left a resident unattended on the toilet in violation of the resident's care plan and established protocol. The care plan indicated that the resident was to be monitored while in the restroom to prevent a fall. Ms. Protheroe knew she was required to daily review and follow the care plan of any resident in her care. Ms. Protheroe also knew that the same resident had fallen a month earlier. Ms. Protheroe left the resident unattended while she went to relieve another employee in the Alzheimer's area who needed to go on break. Ms. Protheroe knew that before she left the resident in the restroom she needed to get another staff member to take over monitoring the resident.

The employer considered two additional incidents when making the decision to discharge the claimant from the employment. On November 9, 2014, Ms. Protheroe was working when a resident fell as the resident was getting ready to sit down in a chair in the resident's room. At the time of the fall, Ms. Protheroe was caring for other residents in the Alzheimer's area. The resident in question was ambulatory without assistance and generally roamed the halls of the care center. Because the resident had not been in bed, the resident had not been fitted with an alarm that would have sounded if the resident had then gotten out of bed.

The other incident that the employer considered had occurred in January 2014. In that instance, Ms. Protheroe and a coworker had each thought the other had provided a resident with access to a call light when the pair assisted the resident into bed. But neither had provided the resident with a call light. The resident's care plan required that the resident be provided with a call light when the resident was in bed.

Ms. Protheroe had also been involved in a resident's fall. Ms. Protheroe's discharge from the employment followed written warning for failure to follow a resident's care plan.

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).

The evidence in the record establishes two instances of carelessness and/or negligence on the part of Ms. Protheroe. The most recent incident occurred during the final shift, when Ms. Protheroe failed to read the resident's care plan and then left the resident unattended in the restroom. The other incident of carelessness and/or negligence occurred in January 2014, when Ms. Protheroe and her coworker failed to provide the resident with access to a call light in violation of the care plan.

The evidence fails to establish carelessness and/or negligence in connection with the November 9, 2014 incident. There was no reason to place an alarm on the resident who had been moving about and had not been assisted to bed. Ms. Protheroe had no control over the resident's fall. Ms. Protheroe responded in a timely manner to assist the resident.

The two instances of carelessness and/or negligence are insufficient to establish a pattern indicating willful and wanton disregard of the employer's interests. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that the claimant was discharged for no disqualifying reason. Accordingly, the claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The December 15, 2014, 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

jet/pjs