

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

KRISTA J MOORMAN
Claimant

APPEAL NO. 18A-UI-02759-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

EASTERN STAR MASONIC HOME
Employer

OC: 01/21/18
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the February 21, 2018, reference 02, decision that allowed benefits to the claimant provided she was otherwise eligible and that held the employer's account could be charged for benefits, based on the Benefits Bureau deputy's conclusion that the January 23, 2018 discharge was not based on a current act of misconduct. After due notice was issued, a hearing was held on March 27, 2018. Claimant Krista Moorman participated. Rick Colby represented the employer. Exhibits 1 through 8, 10, 11, 12, A and B and Department Exhibit D-1 were received into evidence. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the January 23, 2018 discharge was based on a current act of misconduct.

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Krista Moorman was employed by Eastern Star Masonic Home as a full-time Clinical Services Coordinator until January 23, 2018, when Rick Colby, Executive Director, discharged her from the employment. Ms. Moorman started the employment in 2005 as a Certified Nursing Assistant (CNA). Mr. Moorman subsequently became a Licensed Practical Nurse. In 2009, Ms. Moorman became a Registered Nurse. Ms. Moorman commenced the Clinical Services Coordinator duties in December 2016 or January 2017 and received the title in March 2017. Throughout the employment, Cindy Flugstad was Ms. Moorman's immediate supervisor. Ms. Flugstad eventually became Director of Nursing.

Mr. Colby's decision to discharge Ms. Moorman effective January 23, 2018, was based on misconduct on the part of Ms. Moorman and Ms. Flugstad that occurred in 2016. In August 2016, Ms. Moorman completed the American Association of Nurse Assessment Coordinator's RAC-CT recertification examination on behalf of Ms. Flugstad. Ms. Moorman did so at Ms. Flugstad's request. Ms. Flugstad provided Ms. Moorman her personal login information so that Ms. Moorman could complete the 20-question recertification test under the guise that Ms. Flugstad was completing the test.

In November 2016, Mr. Colby's predecessor, Denny Bock, became aware of Ms. Moorman's misconduct and Ms. Flugstad's misconduct in connection with the recertification examination. Mr. Bock reviewed the matter and decided that no disciplinary action was necessary. In reaching that decision, Mr. Bock considered that the AANCA certification was not required for the employment and that no Eastern Star Masonic Home residents were impacted by the conduct. Mr. Bock and Ms. Flugstad were and are in a long-term cohabiting and intimate relationship. That personal relationship may have been a factor in Mr. Bock's decision not to take disciplinary action in 2016.

After Mr. Bock elected not to take disciplinary action in the matter in 2016, the matter appeared to go away. The matter came back to the foreground in May 2017, when one or more of Ms. Moorman's colleagues reported the misconduct to the Iowa Board of Nursing and the Iowa Board of Nursing commenced its investigation of the matter. Mr. Bock remained sympathetic and supportive of Ms. Moorman. Eastern Star Masonic Home, through Mr. Moorman and with acquiescence of the board of directors, hired an attorney to represent Ms. Moorman and Ms. Flugstad in connection with the matter pending before the Iowa Board of Nursing.

In July 2017, Mr. Colby succeeded Mr. Bock as Executive Director. In connection with that transition, Mr. Bock apprised Mr. Colby of the conduct in question and matter pending before the Iowa Board of Nursing. Mr. Colby continued the employer-arranged and employer-funded legal representation of Ms. Moorman and Ms. Flugstad and continued to express support for the two employees. Ms. Moorman and Mr. Colby first discussed the matter in July or August 2017.

In October 2017, the Iowa Board of Nursing filed a Notice of Hearing and Statement of Charges. The filing set a contested case hearing for January 12, 2018. Ms. Moorman received a copy of the filing. The employer promptly became aware of the filing. Despite the filing, the employer continued the status quo arrangement. The Iowa Board of Nursing matter did not proceed to hearing on January 12, 2018. In December 2017, the contested case hearing was rescheduled for a date in April 2018.

On or about January 11, 2018, Ms. Moorman and Mr. Colby again discussed the pending Iowa Board of Nursing matter. At that time, Ms. Moorman expressed a desire to put the matter behind her. At that time, Ms. Moorman also mentioned that prior to the incident in August 2016, the nursing staff at Eastern Star Masonic Home would take the open-book American Association of Nurse Assessment Coordinator's RAC-CT recertification examination as part of a round-table group, assisting each other in that endeavor.

Mr. Colby's support for Ms. Moorman and for Ms. Flugstad evaporated on January 23, 2018, when an assistant attorney general from the Iowa Attorney General's office notified Mr. Colby that subpoenas would soon be issued to compel additional Eastern Star Masonic Home staff to cooperate with the Iowa Board of Nursing's continued investigation of the August 2016 misconduct. On that day, Mr. Colby notified Ms. Moorman that she was being discharged from the employment for violation of multiple employer work rules. The employer ended Ms. Flugstad's employment the same day. The employer also terminated the employer-

arranged and employer-funded legal representation that day. Prior to the discharge date, the employer had not notified Ms. Moorman that the August 2016 misconduct or the ensuing Iowa Board of Nursing matter could or would result in termination of her employment.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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 a discharge that was not based on a current act of misconduct. The misconduct in question, including the particulars of the misconduct, came to the employer's attention in 2016. The employer elected not to take disciplinary action at that time. In connection with the change of Executive Directors in July 2017, Mr. Colby became aware of the misconduct and continued the status quo arrangement that preceded his employment. The weight of the evidence establishes that the board of directors was privy to the matter from 2016 onward. The employer continued the status quo arrangement until January 23, 2018, at which time the employer suddenly became concerned about increased involvement in the legal matter. At that point, the conduct in question had long ago ceased its "current act" status. While the employer was reasonably concerned about further involvement in the drawn-out matter pending before the Iowa Board of Nursing, the employer's election not to take any disciplinary action on the matter for over a year constituted unreasonable delay.

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

DECISION:

The February 21, 2018, reference 02, decision is affirmed. The claimant's January 23, 2018 discharge was not based on a current act of misconduct. 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/rvs