

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

DIANE M ROBBINS

Claimant

GOOD SAMARITAN SOCIETY INC

Employer

APPEAL 18A-UI-05531-DL-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 04/15/18

Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed an appeal from the May 2, 2018, (reference 01) unemployment insurance decision that allowed benefits based upon a discharge from employment. The parties were properly notified about the hearing. A telephone hearing was held on June 5, 2018. Claimant participated. Employer participated through human resources representative Brenda Maddison.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed as a full-time LPN. The separation date was April 18, 2018. The employer delayed the separation because of claimant's preplanned work-related surgical leave. She had a light-duty release to work on April 7 and tried to follow up with the employer about returning to work but no one would return her calls. Maddison investigated and interviewed claimant on April 18, the termination date.

Her last day of work was March 23, 2018, on the 6 a.m. to 6 p.m. shift, assigned to two halls (one is a locked dementia unit) with approximately 30 residents. She had asked for time off on the March 23 shift due to increased pain before surgery, without the ability to take pain medication. She had previously notified the employer of her increased pain since the shoulder injury in November 2017. Nurse manager Melissa Jordan, reported some issues on the March 24 shift of the same hours, with an intervening night shift. The employer accused claimant of having failed to give medications, giving an incorrect dose of antibiotics, not signing out medications of the medication administration record (MAR), not making notes about popping out the wrong dose of a medication, not charting, not following medical appointment orders, not making notes on respite residents, leaving a wound vacuum off, and other unspecified care issues. Claimant follows the MAR and keeps track of medications administered on a notepad but was interrupted by being called to the other unit. Because of construction, she had to go around the building to get from one hall/unit to another. She did not make discharge notes on respite residents, because she was called to other unit while passing medications on the skilled unit and forgot to go back and document later. She did not have time to document during the shift, and although she was paid for time after her shift to complete documentation, she could

not stand the shoulder pain. She did not turn off the wound vacuum. The employer had not previously warned claimant her job was in jeopardy for any similar reasons.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

Iowa Code section 96.5(2)a provides:

Causes for disqualification.

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 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. *Reigelsberger v. Emp't Appeal Bd.*, 500 N.W.2d 64, 66 (Iowa 1993); accord *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000).

Misconduct "must be substantial" to justify the denial of unemployment benefits. *Lee*, 616 N.W.2d at 665 (citation omitted). "Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of benefits." *Id.* (citation omitted). ...the definition of misconduct requires more than a "disregard" it requires a "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." Iowa Admin. Code r. 871-24.32(1)(a) (emphasis added).

Iowa Admin. Code r. 871-24.32(4) provides:

(4) *Report required.* The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. 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.

Iowa Admin. Code r. 871-24.32(8) provides:

(8) *Past acts of misconduct.* While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

A lapse of 11 days from the final act until discharge when claimant was notified on the fourth day that his conduct was grounds for dismissal did not make the final act a “past act.” Where an employer gives seven days’ notice to the employee that it will consider discharging him, the date of that notice is used to measure whether the act complained of is current. *Greene v. Emp’t Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct. App. 1988). An unpublished decision held informally that two calendar weeks or up to ten work days from the final incident to the discharge may be considered a current act. *Milligan v. Emp’t Appeal Bd.*, No. 10-2098 (Iowa Ct. App. filed June 15, 2011).

Whether an employee violated an employer’s policies is a different issue from whether the employee is disqualified for misconduct for purposes of unemployment insurance benefits. See *Lee v. Emp’t Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000) (“Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of benefits.” (Quoting *Reigelsberger*, 500 N.W.2d at 66.)).

Inasmuch as the employer knew about the issue on March 24, 2018, and did not confront or otherwise notify claimant she was the subject of an investigation that may result in disciplinary action, the delay of 27 calendar days indicates the employer has not established a current or final act of misconduct. Even had the final incident been current, the errors were largely related to having to go around the building to the other unit multiple times, and pain related to her work injury. Furthermore, given the denial of time off due to pain before the surgery, the proximity of the injury, the surgery and the separation from employment, coupled with a lack of prior warning about any of the issues, the record suggests that the separation was related, at least to some degree, to the claimant’s work injury. Overall, the employer failed to establish credible evidence of misconduct.

DECISION:

The May 2, 2018, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/rvs