

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

NINA N BURRAGE

Claimant

APPEAL NO. 14A-UI-13229-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SOUTHWEST PAYROLL SERVICES LLC

Employer

OC: 11/23/14

Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the December 11, 2014, reference 01, 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 an Agency conclusion that the claimant had been discharged for no disqualifying reason. After due notice was issued, a hearing was held on January 21, 2015. Claimant Nina Burrage participated. Eka Otu represented the employer and presented testimony through Dottie Williams. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One and Two into evidence.

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: The employer is St. Mary's Healthcare and Rehab. Nina Burrage was employed as a full-time dietary aide from 2012 until November 19, 2014, when the employer discharged her for alleged insubordination. Dottie Williams, Dietary Supervisor, was Ms. Burrage's immediate supervisor.

The final incident that triggered the discharge was the claimant's alleged insubordination on November 14, 2014. That day, Ms. Burrage complied with Ms. Williams' directive not to plate the cake any earlier than necessary so as to avoid having the cake dry out before it was served to residents at lunch. Ms. Burrage dished up coleslaw from the fresh batch of coleslaw the cook had made that day. Ms. Williams checked the temperature of the coleslaw and determined that it was not sufficiently chilled. Ms. Williams erroneously concluded that Ms. Burrage had taken the coleslaw from the cooler and had allowed it to sit too long so that it was out of temperature. Ms. Burrage attempted to explain to Ms. Williams that the cook had just made the coleslaw, but that explanation was not satisfactory to Ms. Williams. Ms. Williams decided to further chastise Ms. Burrage in front of other employees and directed her in a heavy-handed, demeaning manner to report to where Ms. Williams was standing in the kitchen. Ms. Burrage was in the

process of performing other duties in preparation for lunch. Ms. Burrage responded to Ms. Williams in a tone similar to that Ms. Williams had used and told Ms. Williams that she did not have time. Ms. Williams reported this incident up the chain of command as alleged insubordination. When Ms. Burrage returned on November 19, 2014 after a period of time off, the employer discharged her from the employment.

The next most recent incident that factored in the discharge occurred on November 10, 2014. On that day, the south, main kitchen was out of individual jelly packets. Ms. Burrage needed to take trays to the smaller, north serving area. There were jelly packets at the north serving area. Ms. Burrage told Ms. Williams that she would just grab and plate the jelly packets when she got to the north serving area. Ms. Williams insisted that Ms. Burrage go to the north serving area, bring the jelly packets back to the south serving area, plate the jelly there, and then take the completed trays to the north serving area. Ms. Burrage initially questioned the logic of Ms. Williams' approach, but followed the instructions given to her.

Another incident that factored in the discharge concerned occurred in April 2014, on a day when Ms. Burrage was the employee designated to hold over beyond her shift if another employee was absent. Ms. Burrage had a sick 11-year-old son she had had to leave at home unsupervised while she worked her shift that day. Ms. Burrage told Ms. Williams about her sick child and that she could not stay beyond the end of her scheduled shift. Ms. Williams insisted that Ms. Burrage work the additional shift or find someone else to replace her. Ms. Burrage did not work the shift.

There were additional prior similar interactions between Ms. Williams and Ms. Burrage.

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) alone. 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).

Continued failure to follow reasonable instructions constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See Woods v. Iowa Department of Job Service, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See Endicott v. Iowa Department of Job Service, 367 N.W.2d 300 (Iowa Ct. App. 1985).

In Gilliam v. Atlantic Bottling Company, the Iowa Court of Appeals upheld a discharge for misconduct and disqualification for benefits where the claimant had been repeatedly instructed over the course of more than a month to perform a specific task and was part of his assigned duties. The employer reminded the claimant on several occasions to perform the task. The employee refused to perform the task on two separate occasions. On both occasions, the employer discussed with the employee a basis for his refusal. The employer waited until after the employee's second refusal, when the employee still neglected to perform the assigned task, and then discharged employee. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990).

The evidence in the record fails to establish misconduct in connection with the employment. Ms. Williams demonstrated a basic disrespect for Ms. Burrage in her interactions with Ms. Burrage. Ms. Williams erroneously concluded that Ms. Burrage had left the coleslaw sitting out when the coleslaw was instead freshly made. Ms. Williams elected to continue with a heavy-handed approach to reprimanding Ms. Burrage in front of coworkers and Ms. Burrage, who was busy with her pre-lunch duties told Ms. Williams she was too busy. This impasse was of Ms. Williams' making. There was no need to take an accusatory, heavy-handed approach with Ms. Burrage. A reasonable supervisor would not expect a self-respecting employee to submit to the public verbal flogging. Ms. Burrage could have been more tactful in her attempt to avoid the uncomfortable situation Ms. Williams put her in, but her options were limited. This situation and the others appears to have more to do with the personality conflict between Ms. Williams and Ms. Burrage, as it has to do with any purported insubordination on Ms. Burrage's part.

The November 10 incident further illustrates the dysfunction in the relationship. Ms. Burrage reasonably proposed the more efficient approach of taking the trays to their destination at the north serving area and plating the jelly that was located at the north serving area. While Ms. Williams had logical reasons for wanting the jelly plated at the south end serving area, she seems to have too easily slid into a mindset whereby she concluded the mere suggestion of a different approach to solving a problem was insubordination. It was not.

The April incident with an absent coworker and sick child further illustrates the disorder in the relationship. The employer unreasonably expected Ms. Burrage to stay and work longer despite having information from Ms. Burrage that she had a sick child at home that needed her attention. Despite the policy that designated Ms. Burrage as the employee to stay beyond her shift that day, Ms. Burrage had good cause for not being able to do that.

Ms. Williams' assertions that Ms. Burrage was routinely argumentative must be taken with a grain of salt in light of her handling of the incidents in question. Ms. Williams appears to have unnecessarily created interpersonal conflict in her dealings with Ms. Burrage. The fact that Ms. Burrage stood her ground does not indicate circumstances that rise to the level of insubordination.

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

DECISION:

The December 11, 2014, 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/pjs