

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**KAYLEEN D DUNNING**  
Claimant

**APPEAL NO. 10A-UI-09733-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**CARE INITIATIVES**  
Employer

**OC: 06/06/10**  
**Claimant: Appellant (1)**

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

**STATEMENT OF THE CASE:**

Kayleen Dunning filed a timely appeal from the July 1, 2010, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on August 26, 2010. Ms. Dunning did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Tom Kuiper of TALX represented the employer and presented testimony through Sheila Moore and Nicole Bachman. The administrative law judge took official notice of the documents submitted for or generated in connection with the fact-finding interview.

**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 operates a nursing home in Ottumwa. Kayleen Dunning was employed by Care Initiatives as a part-time certified nursing assistant from July 2009 until May 20, 2010, when Donnetta Ware, Director of Nursing, discharged her from the employment. Ms. Ware was Mr. Dunning's supervisor, but charge nurses functioned as Ms. Dunning's immediate supervisors during work shifts.

The final incident that triggered the discharge occurred on May 19, 2010. Ms. Dunning violated the employer's resident transfer protocol, and deviated from a resident's care plan, when Ms. Dunning transferred the patient without assistance and without using a gait belt. The care plan required that the resident be transferred only with a two-person assist. The care plan and the employer's protocol required use of a gait belt. The resident suffered a skin tear in connection with the transfer. When Ms. Ware interviewed Ms. Dunning about the matter, Ms. Dunning indicated that she had been in a hurry and did not look at the care plan, which was conspicuously posted in the resident's room.

On April 2, 2010, a nurse had overheard Ms. Dunning refusing to provide assistance to a resident. Ms. Dunning had told the resident, "You can do it yourself." Ms. Dunning had then

slammed the door as she departed the resident's room. The resident had need assistance with washing her face and opening a bottle with a foil seal. The employer issued a reprimand in connection with this incident.

On December 1, 2009, the employer had issued a reprimand to Ms. Dunning after Ms. Dunning failed during rounds to make certain that a resident's ambulation alarm was turned on.

On October 2, 2009, the employer issued a reprimand to Ms. Dunning after she left a resident with a catheter line wrapped around the resident's legs, left the catheter/bag positioned so the catheter would not drain properly, and left the resident in feces-crusted briefs.

## **REASONING AND CONCLUSIONS OF LAW:**

Iowa Code section 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.

871 IAC 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.

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 weight of the evidence indicates that Ms. Dunning was negligent in multiple respects in connection with the final incident that prompted her discharge. The evidence also establishes negligence in connection with each of the prior incidents referenced above, when Ms. Dunning failed to conscientiously and reasonably perform her assigned duties. There is sufficient evidence in the record to establish a pattern of negligence indicative of a willful disregard of the employer's interest and the residents in Ms. Dunning's care.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Dunning was discharged for misconduct. Accordingly, Ms. Dunning is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer's account shall not be charged for benefits paid to Ms. Dunning.

**DECISION:**

The Agency representative's July 1, 2010, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements. The employer's account will not be charged.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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