

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

YUEPING ZHOU
Claimant

APPEAL NO. 12A-UI-13521-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MERCY HOSPITAL
Employer

OC: 10/14/12
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Yueping Zhou filed a timely appeal from the November 5, 2012, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on December 11, 2012. Ms. Zhou did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Karla Earnest represented the employer.

ISSUES:

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

Whether the discharge was based on a current act of misconduct. The administrative law judge concludes that the evidence is insufficient to establish a current act of misconduct and, therefore, that the claimant was discharged for no disqualifying reason.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Yueping Zhou was employed by Mercy Hospital in Iowa City as a full-time home health care aide from 2005 until October 15, 2012, when Karla Earnest, Nurse Manager, Home Health Care Services, discharged her from the employment. Laura Merritt, Assistant Nurse Manager, was Ms. Zhou's immediate supervisor. Ms. Zhou assisted clients with daily living activities in the clients' homes. The services Ms. Zhou provided to clients included bathing, cooking, reminding clients to take medications, and running errands.

The final incident that triggered the discharge was a client's complaint to the employer on October 10, 2012 about Ms. Zhou. Ms. Earnest, the employer's witness, did not receive the complaint from the client and was unable to provide the particulars of the complaint. Ms. Earnest believes that Ms. Merritt may have taken the complaint from the client. The client requested that Ms. Zhou not return. Ms. Earnest and Ms. Merritt met with Ms. Zhou to discuss the client's complaints and Ms. Zhou indicated that what the patient had said was true.

The next most recent incident that factored in the discharge occurred on October 2, 2012. On that date, Ms. Merritt met Ms. Zhou at a new client's home to establish services. Ms. Zhou appeared without her name tag and without her bag. Ms. Zhou discussed other client's business in front of the new client.

On October 1, 2012, Ms. Zhou left early without contacting a supervisor or the employer's office. The employer attempted to locate Ms. Zhou at a client's home, but was unable to locate Ms. Zhou. When Ms. Zhou appeared at the office later that day, Ms. Merritt met with Ms. Zhou to discuss the matter.

The next most recent incident that factored in the discharge occurred in June 2012, when Ms. Zhou documented that she had provided services to a client at time when the client was not home and could not have received services.

The next most recent incident that factored in the discharge occurred in April 2012, when Ms. Zhou neglected to help a client remember to take medication and failed to assist a client with putting in her hearing aids.

The employer considered additional earlier incidents in making the decision to discharge Ms. Zhou from the employment.

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 employer has presented insufficient evidence, and insufficiently direct and satisfactory evidence, to establish misconduct in connection with the final incident that prompted the discharge. The employer witness was unable to provide the particulars of the October 10, 2012 client complaint. The employer had the ability to present testimony through Ms. Merritt, or whoever else had firsthand knowledge of the client’s complaint. The next most recent incident that factored in the discharge occurred on October 2, 2012 and came to the supervisor’s attention at the time it occurred. The administrative law judge concludes that the evidence in the record is insufficient to establish a “current act” of misconduct.

The administrative law judge notes that the hearing notice was mailed to the employer on November 28, 2012, and that the employer responded to the hearing notice on December 3, 2012, by providing a number at which the employer could be reached for the hearing and naming Ms. Earnest and Angie Hoover as the persons who would participate on behalf of the employer. The employer knew the hearing date and time well before Ms. Merritt left for her vacation. The employer did not make arrangements for Ms. Merritt to testify. The employer did not have Ms. Merritt draft a statement for consideration at the hearing. The employer did not request postponement of the hearing.

Because the evidence fails to establish a current act of misconduct, the administrative law judge concludes that Ms. Zhou was discharged for no disqualifying reason. Because the evidence fails to establish a current act, the administrative law judge need not further consider the earlier matters or whether they involved misconduct. Ms. Zhou is eligible for benefits, provided she is otherwise eligible. The employer’s account may be charged for benefits.

DECISION:

The Agency representative's November 5, 2012, reference 01, decision is reversed. The discharge was not based on a current act. 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

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