

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SHANDA M MALEK
Claimant

APPEAL NO. 09A-UI-01517-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HCM INC
Employer

**OC: 07/2708 R: 02
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 January 23, 2009, reference 05, decision that allowed benefits. After due notice was issued, a hearing was held on February 19, 2009. Claimant Shanda Malek did not respond to the hearing notice instructions and did not participate. Diane Schaffner, Administrator, represented the employer and presented additional testimony through Dixie Flathers, Director of Nursing.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies her 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 facility that serves the general elder population. Shanda Malek was employed by HCM, Inc., on a part-time basis from March 27, 2008 until October 29, 2008, when Diane Schaffner, Administrator, and Dixie Flathers, Director of Nursing, discharged her from the employment. Ms. Malek started the employment as an environmental aid. Ms. Malek then participated in certified nursing assistance training sponsored by the employer. Ms. Malek earned her certification in July 2008.

The final incident that prompted the discharge occurred on October 29, 2008. Ms. Malek was assigned to provide care to a resident who had recently fallen and who was at risk of injury if he attempted to ambulate without assistance. Ms. Malek took the resident's meal tray to the resident's room. Ms. Malek left the meal tray in the resident's room while she went to look for a tray table for the resident. The resident was in his bed when Ms. Malek left the room. The food tray was across the room. Ms. Malek closed the resident's door when she left to look for the tray table.

Diane Schaffner, Administrator, encountered Ms. Malek in the hall as Ms. Malek was looking for a tray table. Ms. Schaffner does not know how long Ms. Malek had been out of the resident's room up to that point. Ms. Schaffner assisted Ms. Malek in locating a tray table. Ms. Schaffner

located a tray table and then requested the resident's tray from the dining room staff. At that time, Ms. Schaffner learned that Ms. Malek had already taken the food to the resident's room. Ms. Schaffner took the tray table to the resident's room. The resident's food had been sitting several minutes and was cold. It was approximately five minutes from the time Ms. Schaffner encountered Ms. Malek in the hall looking for the tray table to the time Ms. Schaffner entered the resident's room with the tray table.

Ms. Schaffner and Ms. Flathers concluded that Ms. Malek had violated the employer's standard of care policy/procedure by creating an incentive for the resident to attempt to walk unassisted from his bed across the room to where Ms. Malek had left his food tray. When Ms. Schaffner asked Ms. Malek why she had left the food tray in the room while she looked for the tray table, Ms. Malek indicated she did not know. There had been no other prior incidents of carelessness or negligent behavior on the part of Ms. Malek.

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. Malek exercised poor judgment in leaving the tray in the resident's room while she looked for the tray table. Given the resident's condition, Ms. Malek's training, and the employer's policy, Ms. Malek's conduct on October 29 rose to level of carelessness, but not above that. The evidence fails to establish that Ms. Malek intentionally disregarded any policy/procedure regarding standard of care, intentionally disregarded the employer's interests, or intentionally placed the resident at risk. This isolated incident of carelessness did not constitute misconduct in connection with the employment and would not disqualify Ms. Malek for unemployment insurance benefits. See 871 IAC 24.32(1)(a), above.

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

DECISION:

The Agency representative's January 23, 2009, reference 05, 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/kjw