

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

PAMELA K RAITT
Claimant

APPEAL NO. 11A-UI-02552-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

COMMERCIAL RESOURCES INC
Employer

**OC: 12/05/10
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 February 22, 2011, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on April 25, 2011. Claimant participated and presented additional testimony through Candice Duffey. Rachel Hoffman represented the employer and presented additional testimony through Laura Lyons, Cheryl Campbell, Tara Kessner and Pat McAfee. Exhibits One through Fifteen and A through F were received 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: Pamela Raitt was employed by Commercial Resources as a part-time residential aide from 2008 until November 24, 2010, when Laura Lyons, Health Coordinator, discharged her from the employment for medication errors. Ms. Lyons was Ms. Raitt's immediate supervisor. Ms. Raitt cared for residents in the employer's locked dementia unit.

The final incidents that triggered the discharge was Ms. Raitt's alleged failure on November 18, 19, 22 and 24, 2010 to give a particular medication, Spiriva, to a resident in her care. The employer based the conclusion on the number of unused pills remaining on those dates. However, the nurse responsible for refilling the medication had restocked the medication on November 17, 2010 and this threw the medication count off for the days that followed. The employer also believed Ms. Raitt could not have administered the medication because the new inhaler to be used to dispense the medication had not been opened, but Ms. Raitt had used the old inhaler and directed the employer at its location on November 24, 2010. The employer considered earlier medication errors that had occurred weeks or months earlier in making the decision to discharge Ms. Raitt 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 evidence fails to establish, by a preponderance, of the evidence that Ms. Raitt failed to give the medications on November 18 through 24, 2010. If Ms. Raitt had indeed failed to give the medication, one wonders why the employer would have stood by while the same medication error occurred four times in as many shifts. The evidence indicates that the employer had restocked the medication, apparently forgot that had occurred, and that this undermined the employer faulty method for tracking whether the medication had been given. The evidence fails to establish a current act of misconduct. Because the evidence fails to establish a current act of misconduct, the administrative law judge need not consider the prior reprimands.

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

DECISION:

The Agency representative's February 22, 2011, 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