

The incident that prompted the discharge occurred on July 15, 2005. Ms. Cain was one of two nursing assistants working at the time of the incident. Ms. Cain was summoning the other nursing assistant to help her with a resident, when another resident's body alarm sounded to indicate the resident was attempting to get out of bed. The motion detector in the resident's room was also sounding. Ms. Cain responded to the room where the alarms had been triggered. Ms. Cain found the resident lying in bed, propped on one elbow. The resident indicated that she needed to use the restroom. Ms. Cain had to speak loudly in order for the resident to hear her over the alarm. Ms. Cain asked or instructed the resident to lie down and advised that she would be right back. Ms. Cain had to dig around beneath the resident's shoulder to locate and deactivate the body alarm. Ms. Cain then reset the motion detector and exited the room to return to the resident for whom she had needed the other CNA's assistance. The other CNA, Katie Widmoyer, did not arrive to assist.

As soon as Ms. Cain had left the room of the resident whose body alarm had sounded, the resident summoned CNA Widmoyer and complained that Ms. Cain had hurt her shoulder. The resident reported to CNA Widmoyer that Ms. Cain had pushed her back into bed by her shoulder and told her that she needed to help someone else. Ms. Widmoyer immediately notified Charge Nurse Kris Mahlstedt. Ms. Widmoyer also advised Ms. Cain of the complaint. Ms. Cain responded, "All this from an Alzheimer's patient." Ms. Mahlstedt spoke to the resident, who advised that Ms. Cain had grabbed her shoulder and rolled her onto the bed. The resident indicated that the hurt shoulder did not hurt so much anymore. Ms. Mahlstedt inspected the portion of the resident's body allegedly harmed and noted no redness or bruising. Ms. Mahlstedt then approached Ms. Cain about the incident. Ms. Cain indicated that she had only reached around the resident to reconnect the body alarm and that the matter was being blown out of proportion. Ms. Cain further indicated that, "This is all getting blown out of proportion by an Alzheimer's resident." Ms. Mahlstedt then contacted Administrator Kathy Meyer Allbee, the Iowa Department of Human Services and the Iowa Department of Inspections and Appeals. Ms. Mahlstedt summoned Director of Nursing Andrea Silver to the facility. The director of nursing interviewed the complaining resident, who indicated she had a headache.

Based on the resident's statements to Ms. Widmoyer, Ms. Mahlstedt, and the director of nursing, Administrator Kathy Meyer Allbee concluded Ms. Cain had engaged in dependent adult abuse and immediately discharged Ms. Cain.

Ms. Cain's prior reprimands had been as follows. On April 9, 2005, Ms. Cain was reprimanded for failure to follow proper procedure in moving a resident who required two people to move him or her. On July 7, Ms. Cain was reprimanded for failure to answer or respond to resident alarms and was placed on a 90-day probation.

Ms. Cain was a mandatory dependant adult abuse reporter and most recently completed related training on February 20, 2005.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Cain was discharged for misconduct in connection with her employment. It does not.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

Since the claimant was discharged, 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 her 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).

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 in the record establishes a discharge based on an allegation of dependant adult abuse. Ms. Cain was the only first-hand witness to provide testimony regarding the incident and provided a reasonable explanation of her conduct in connection with the incident that prompted her discharge. Administrator Kathy Miller, who represented the employer at the hearing, is relatively new to her position. Ms. Miller has no personal knowledge of the incident that prompted Ms. Cain's discharge. Ms. Miller testified from statements prepared close in time to the incident by Ms. Cain, CNA Widmoyer, Charge Nurse Mahlstedt, and Director of Nursing Silver. The administrative law judge concludes that the employer had the ability to produce more direct and satisfactory evidence than was produced, and that it may fairly be inferred that the more direct evidence will expose deficiencies in the employer's case. The administrative law judge concludes that the employer has failed to sufficiently support and corroborate the allegation of misconduct and that the weight of the evidence in the record fails to establish substantial misconduct. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Cain was discharged for no disqualifying reason and is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Cain.

DECISION:

The Agency representative's decision dated September 14, 2005, reference 03, is reversed. 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 for benefits paid to the claimant.

jt/kjf