

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JACEY N REES

Claimant

APPEAL NO. 16A-UI-07109-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

GRAPETREE MEDICAL STAFFING INC

Employer

OC: 05/29/16

Claimant: Respondent (2)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the June 16 2016, reference 01, decision that allowed benefits to the claimant provided she was otherwise eligible and that held the employer's account could be charged for benefits, based on an agency conclusion that the claimant had been discharged on May 27, 2016 for no disqualifying reason. After due notice was issued, a hearing was held on July 14, 2016. Claimant Jacey Rees provided written notice that she was waiving participating in the appeal hearing. Jeanenne Kinnetz represented the employer. The administrative law judge took official notice of the agency's record of benefits disbursed to the claimant and received Exhibits One, Two and Three into evidence. The administrative law judge took official notice of the materials submitted for and generated in connection with the fact-finding interview and marked a portion of those materials as Department Exhibits D-1 through D-4.

ISSUES:

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

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Jacey Rees was employed by Grapetree Medical Staffing, Inc., as a part-time, on-call certified nursing assistant (CNA) from November 2015 until May 28, 2016, when Jeanenne Kinnetz, Vice President of Human Resources, discharged her from the employment. The employer supplies health care professionals to health care facilities. The employer's written policies include a confidentiality policy. The policy acknowledges that Grapetree employees will have access to confidential information in connection with working in temporary work assignments. The policy obligates employees to maintain the confidentiality of such information.

On Sunday, May 22, 2016, Ms. Rees worked in a one-day assignment at Iowa City Rehab. During her shift that day, Ms. Rees observed a fellow CNA direct verbal abuse at a dependent

adult client. Ms. Rees believed the conduct to be dependent adult abuse. Ms. Rees was a mandatory reporter for child and dependent adult abuse. Ms. Rees had completed mandatory reporter training in September 2015, prior to commencing her employment with Grapetree. After Ms. Rees observed the conduct that she believed to be dependent adult abuse, she contacted Jenna Richter, a Staffing Specialist with Grapetree. Ms. Rees told Ms. Richter that she was worried about an abuse report. Ms. Richter told Ms. Rees that Ms. Richter did not need to know the details. Ms. Richter told Ms. Rees that she needed to follow her dependent adult abuse reporting. Ms. Rees told Ms. Richter that she was confused and did not know what to do. Ms. Richter asked Ms. Rees whether Ms. Rees had spoken with a nurse or with the Director of Nursing. Ms. Rees told Ms. Richter she had not yet spoken to a nurse or the Director of Nursing. Ms. Richter told Ms. Rees that she should approach a nurse or the Director of Nursing. Ms. Rees did not follow the guidance provided by Ms. Richter. Instead, Ms. Rees spoke to her father, Grant Rees, about the incident of suspected dependent adult abuse. Ms. Rees is 21 years old.

At about 3:00 p.m. on Monday, May 23, Mr. Rees telephoned Iowa City Rehab and spoke to Kara Merritts, Director of Nursing, to report the incident of verbal abuse. Mr. Rees told Ms. Merritts that he had heard from his daughter about a CNA verbally abusing a resident. Mr. Rees told Ms. Merritts, "The CNA screamed at a resident so loud they could see her vocal cords moving." Mr. Rees conveyed to Ms. Merritts that the patient involved in the incident was a patient who had been taken to the hospital. Mr. Rees did not communicate the name or the patient or indicate that Ms. Rees had communicated the name of the patient to him.

Laurie Collins, Iowa City Rehab Scheduler, and Ms. Merritts, contacted Jeanenne Kinnetz to express concern that Ms. Rees had failed to make a timely report of the alleged dependent adult abuse, that Ms. Rees had potentially a HIPAA violation in discussion the matter with her father, and to express concern that Ms. Rees had otherwise breached Iowa City Rehab confidentiality. Iowa City Rehab told Ms. Kinnetz that they did not want Ms. Rees to return to their facility for further assignments. When Ms. Kinnetz spoke to Ms. Rees about the matter, Ms. Rees initially asserted that she, not her father, had telephoned Iowa City Rehab on May 23 to report the alleged dependent adult abuse. That statement was untrue. Ms. Rees told Ms. Kinnetz that she had called Iowa City Rehab and her father had walked into the room and thereby was pulled into the telephone call. That statement was untrue. Ms. Rees then said that she made the call from her car, that her father had entered the car and thereby joined the phone call. That statement was untrue.

Ms. Rees established a claim for benefits that was effective May 29, 2016, but has not received benefits in connection with the claim.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

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 in the record establishes misconduct in connection with the employment based on Ms. Rees' untruthful statements to the employer at the time Ms. Kinnetz questioned Ms. Rees about the dependent adult abuse report Mr. Rees had made to Iowa City Rehab. The weight of evidence indicates that Ms. Rees knew her comments to the employer about who had reported the suspected abuse were untruthful at the time she made them. Ms. Rees' dishonesty in the context of the employer's investigation demonstrative a willful and wanton disregard of the employer's interests. The weight of the evidence fails to establish any HIPAA violation or any

other intentional violation of confidentiality. The evidence in the record fails to establish that Ms. Rees shared personally identifiable information pertaining to the resident victim when she spoke to her father. The mere fact that Ms. Rees, a young adult, spoke to her father concerning the particular incident without providing personally identifiable information pertaining to the resident victim is insufficient to establish any breach of confidentiality pertaining to the Iowa City Rehab. The employer's reliance, or Iowa City Rehab's reliance, on Iowa Code section 235E.2(3)(a) to assert that the delayed report to Iowa City Rehab caused Iowa City Rehab to violate the statute is not supported by the language of the statute. The statute provides:

If a staff member or employee is required to make a report pursuant to this section, the staff member or employee shall immediately notify the person in charge or the person's designated agent *who shall then notify the department within twenty-four hours of such notification.*

[Emphasis added.] The highlighted section of the passage clearly states that the 24-hour reporting deadline for Iowa City Rehab to report the matter to the State of Iowa was measured from the time the person in charge received notice of the incident, rather than from the time of the incident. However, that same passage imposed an obligation on Ms. Rees to immediately report the incident. The evidence indicates that Ms. Rees attempted to immediately report the matter to her employer, but failed to follow through on the directive to report it to the Iowa City Rehab Director of Nursing or another nurse at Iowa City Rehab.

Because the administrative law judge concludes that Ms. Rees' attempt to mislead the employer about who had reported the alleged abuse to Iowa City Rehab constituted misconduct in connection with the employment, Ms. Rees is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount. Ms. Rees must meet all other eligibility requirements. The employer's account has not been charged for benefits and shall not be charged for benefits. Because no benefits have been paid to the claimant, there is no overpayment issue to address.

DECISION:

The June 16 2016, reference 01, decision is reversed. The claimant was discharged for misconduct in connection with the employment. 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. The claimant must meet all other eligibility requirements. The employer's account shall not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs