

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

VALERIE N MERRIDETH
Claimant

APPEAL NO. 15R-UI-12630-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ABCM CORPORATION
Employer

OC: 08/16/15
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

This matter was before the administrative law judge based on the Employment Appeal Board remand in Hearing Number 15B-UI-10697. Valerie Merrideth filed a timely appeal from the September 2, 2015, reference 01, decision that disqualified her for benefits and that relieved the employer of liability for benefits, based on an Agency conclusion that she had been discharged on August 18, 2015 for misconduct in connection with the employment. After due notice was issued, a hearing was held on December 11, 2015. Ms. Merrideth participated. The employer did not respond to the hearing notice instructions to register a telephone number for the hearing and did not participate.

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: Valerie Merrideth was employed by ABCM Corporation as a certified nursing assistant at Oakwood Care Center in Clear Lake from February 2015 until August 18, 2015, when the employer discharged her from the employment. Ms. Merrideth was assigned to the overnight shift. The incident that triggered the discharge concerned a post that Ms. Merrideth made to her Facebook page while on a break at work. In the post, Ms. Merrideth referenced a nursing home resident's initials without naming the resident. Ms. Merrideth mentioned in the post that the resident had attempted to slap her, that she had walked away, and that she had returned later to find the resident with a pleasant disposition. Ms. Merrideth was aware that the employer had a policy that prohibited employees from identifying residents by name on social media. Ms. Merrideth thought she was in compliance with the policy by referencing only the resident's initials. Ms. Merrideth's supervisor had authorized Ms. Merrideth and others to access their cell phones during the overnight shift. A fellow CNA was amongst Ms. Merrideth's Facebook "friends." The coworker noted the post and brought the post to the employer's attention.

The employer met with Ms. Merrideth on August 18 to discuss the post. As part of that meeting, the employer also referenced Ms. Merrideth completing computer training modules in an untimely manner. At the time of the meeting, Ms. Merrideth had been caught up on the computer training modules since August 1, 2015. The employer also referenced a policy prohibiting cell phone use. Ms. Merrideth advised the employer that the supervisor on the overnight shift had authorized employees to access their cell phones.

REASONING AND CONCLUSIONS OF LAW:

Because the employer did not respond to the hearing notice and did not participate in the hearing, the evidence in the record is limited to the testimony of Ms. Merrideth.

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.

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 employer did not participate in the hearing and, thereby, did not present any evidence to support the allegation that Ms. Merrideth was discharged for misconduct in connection with the employment. The evidence establishes that Ms. Merrideth posted to her Facebook page from her personal cell phone, that she did so from work, and that she referenced an interaction with a resident without identifying the resident. In the absence of evidence from the employer to establish a willful disregard of an established work rule, the evidence is insufficient to establish misconduct in connection with the employment.

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

DECISION:

The September 2, 2015, reference 01, decision is reversed. The claimant was discharged on August 18, 2015 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/css