

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

DAWN M BRADISH
902 – 8TH AVE
BELLE PLAINE IA 52208-1717

COMFORT CARE INC
4027 GLASS RD NE
CEDAR RAPIDS IA 52402

Appeal Number: 06A-UI-03300-JTT
OC: 02/26/06 R: 03
Claimant: Appellant (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5(2)(a) - Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant Dawn Bradish filed a timely appeal from the March 21, 2006, reference 03, decision that denied benefits. After due notice was issued, a hearing was held on April 10, 2006. Ms. Bradish participated. Administrator Julie Tow represented the employer and presented additional testimony through Director of Finance Tammy Clarke. Exhibits One and Two were received into evidence. The administrative law judge took official notice of the Agency administrative file, which included the documents the parties had submitted for the fact-finding interview.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Dawn Bradish was employed by Comfort Care as a full-time scheduler from April 29, 2002 until

February 28, 2006, when Administrator Julie Tow asserted the employer was accepting a purported resignation. The employer is a home health care provider. Comfort Care and Comfort Care Medicare are the same business entity. Ms. Bradish was responsible for scheduling nurses and home health aides to provide health care services to clients in their homes. Ms. Bradish worked at the employer's Cedar Rapids office and worked with one other scheduler, Amanda. The two schedulers were responsible for scheduling home health care for approximately 140 clients. This number of clients was roughly double the number of clients serviced by four schedulers in the employer's Cedar Falls office. Ms. Bradish's position was a high-pressure position. Ms. Bradish was required to meet the expectations of multiple supervisors, the staff members she scheduled, and the clients served by the agency. Ms. Bradish worked long hours beyond a normal workweek.

On Friday, February 24, Ms. Bradish had an inappropriate outburst in the workplace over the noon hour. The events leading up to the outburst were as follows. On February 10, Administrator Julie Tow and Assistant Administrator Sue Keenan had relieved Ms. Bradish of her supervisory responsibilities within the scheduling area, ostensibly because Ms. Bradish had too strong and/or too close a relationship with the other scheduler whom she supervised. Ms. Tow and Ms. Keenan told Ms. Bradish that Homecare Aide Coordinator Tracie Moses would thereafter be the supervisor for the scheduling area.

Shortly before Ms. Bradish's outburst on February 24, scheduler Amanda had received a telephone call from a disgruntled home health care aide. The aide demanded to be relieved of a shift and threatened to quit. Prior to being relieved of her supervisory duties, Ms. Bradish would have assumed responsibility for dealing with this "escalated" call. However, in light of the administrators' directive that Ms. Moses was now the supervisor for the area, Ms. Bradish attempted to enlist Ms. Moses' assistance with the call. Ms. Moses told Ms. Bradish: "You guys are going to have to take the care of this shit." Ms. Moses further indicated that it was not her fault that Ms. Bradish was no longer the scheduling supervisor. This conversation took place in the break room area of the facility, with several others present. Ms. Bradish then announced in a raised voice, "I'm sick of this fucking place, I'm quitting." The comment was a general announcement and was not directed at a particular individual. There were no supervisors in the facility at the time, as both administrators were at a meeting in Cedar Falls. At the time of the outburst, Ms. Bradish was aware that another employee had recently erupted in a similar manner, had thereby attracted the employer's attention to the pressure that employee was under, and had continued in the employment.

After Ms. Bradish's outburst, Ms. Bradish left the workplace to cool down and returned approximately one hour later. Ms. Bradish did not immediately clock in. Instead, Ms. Bradish met with Ms. Moses. The two women discussed what had just occurred and resolved their differences. Ms. Moses took the opportunity to advise Ms. Bradish that she had been asked to supervise the scheduling area, but had declined. Ms. Bradish clocked back in at approximately 3:00 p.m. and continued to perform her work duties.

Before the end of the workday, Assistant Administrator Sue Keenan returned to the office. Ms. Keenan yelled at Ms. Bradish because scheduler Amanda was putting together her desk instead of assisting with processing paperwork. Ms. Keenan announced that Administrator Julie Tow was "going to come in here on Monday and take care of this shit once and for all." Ms. Keenan's comments were upsetting to Ms. Bradish. Ms. Bradish was scheduled to carry the "on-call" cell phone over the weekend and to respond to client and/or staff emergencies

after hours. Prior to Ms. Bradish leaving for the weekend, scheduler Amanda contacted Administrator Julie Tow, who decided that Assistant Administrator Sue Keenan would instead be responsible for the "on-call" cell phone over the weekend.

On Sunday, February 27, Ms. Bradish telephoned Administrator Julie Tow and reached Ms. Tow at her cell phone. Ms. Tow was at a dance recital and could not speak at length with Ms. Bradish. Ms. Bradish requested the coming week off. Ms. Tow responded, "yeah," and indicated that she and Ms. Bradish would speak further the following day. Ms. Bradish concluded that Ms. Tow had granted her request to take the week off. Ms. Bradish went to the workplace the same day and prepared the required written request for time off. Ms. Bradish indicated on the written request that Ms. Tow had verbally approved the request. Ms. Bradish spoke with scheduler Amanda the same day. Amanda advised Ms. Bradish that Ms. Keenan planned to persuade Ms. Tow to discharge Ms. Bradish from the employment. Ms. Bradish took her personal things from the workplace at the same time she completed her written request for the week off.

On February 27, Ms. Tow telephoned Ms. Bradish and told her, "We are going to accept your resignation." Ms. Tow was referring to Ms. Bradish's outburst on February 24. Ms. Bradish immediately advised Ms. Tow that she had not quit and intended to return to the employment after the approved week off. Ms. Tow told Ms. Bradish that if Ms. Bradish resigned the position, the employer would compensate her for three vacation days. Ms. Bradish again asserted that she had not quit the employment. Ms. Tow then told Ms. Bradish, "Maybe we can eliminate your position." The same day, Ms. Bradish drafted a letter to the employer, again asserting that she had not quit the employment and intended to return the following Monday, after her week off. Ms. Bradish further indicated that in her requested absence was not approved, the employer should notify her and she would return to work immediately. Ms. Bradish took this letter to the workplace and was provided with a letter from Ms. Tow, wherein the employer again asserted it had accepted Ms. Bradish's resignation.

REASONING AND CONCLUSIONS OF LAW:

The first question for the administrative law judge is whether the evidence in the record establishes a quit. It does not.

In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 698, 612 (Iowa 1980) and Peck v. EAB, 492 N.W.2d 438 (Iowa App. 1992). In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer. See 871 IAC 24.25.

The evidence in the record establishes that Ms. Bradish did not form an intent to quit the employment. Instead, the evidence indicates that Ms. Bradish uttered a statement out of frustration wherein she referenced quitting the employment. Ms. Bradish left for a short period and then returned and continued to perform her duties. At the time Ms. Bradish uttered her remark about quitting the employment, there was no one present with the authority to accept a resignation. Ms. Bradish's return to the employment the same afternoon indicated an intention to continue in the employment, as did Ms. Bradish's subsequent conduct. The employer waited four days after the utterance to attempt to treat the utterance as a bonafide resignation. In between Ms. Bradish's utterance and the employer's purported acceptance of a resignation, Ms. Bradish engaged in further contact with the employer that indicated she had not resigned

from the employment. Based on the evidence in the record, the administrative law judge concludes that Ms. Bradish did not quit the employment. The evidence indicates, instead, that the employer discharged Ms. Bradish.

The question, therefore, is whether the evidence in the record establishes that Ms. Bradish was discharged for misconduct in connection with the 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.

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).

An employer has the right to expect decency and civility from its employees and an employee's use of profanity or offensive language in a confrontational, disrespectful, or name-calling

context may be recognized as misconduct disqualifying the employee from receipt of unemployment insurance benefits. Henecke v. Iowa Department of Job Service, 533 N.W.2d 573 (Iowa App. 1995). Use of foul language can alone be a sufficient ground for a misconduct disqualification for unemployment benefits. Warrell v. Iowa Dept. of Job Service, 356 N.W.2d 587 (Iowa Ct. App. 1984). An isolated incident of vulgarity can constitute misconduct and warrant disqualification from unemployment benefits, if it serves to undermine a superior's authority. Deever v. Hawkeye Window Cleaning, Inc. 447 N.W.2d 418 (Iowa Ct. App. 1989).

The evidence in the record indicates that Ms. Bradish used offense language during an outburst on February 24. The outburst was little more than an expression of frustration, prompted by pressures inherent in the work and mixed messages received from the employer. The offensive language was not uttered in a confrontational, disrespectful, or name-calling context and did not serve to undermine the authority of a supervisor. The evidence fails to establish any other such outbursts on the part of Ms. Bradish. The evidence further indicates that profane utterances and other outbursts were part of the workplace environment and not unique to Ms. Bradish. Ms. Bradish exercised poor judgment in making the offensive utterance and the decision to discharge her was within the discretion of the employer. However, the evidence in the record fails to establish willful or wanton disregard of the interests of the employer or otherwise establish substantial misconduct that would disqualify Ms. Bradish for unemployment insurance benefits.

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

DECISION:

The Agency representative's decision dated March 21, 2006, 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.

jt/tjc