

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**KELLY J UPENIEKS**

Claimant

**APPEAL NO. 12A-UI-11388-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**THE IA ODD FELLOWS AND ORPHANS**

**HOME – MASON CITY**

Employer

**OC: 08/19/12**

**Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

Kelly Upenieks filed a timely appeal from the September 11, 2012, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on October 17, 2012. Ms. Upenieks participated personally and was represented by attorney Colin Murphy. Attorney Timothy Loudon represented the employer and presented testimony through Deb Haugen. Exhibits One through 13 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: Kelly Upenieks was employed by the Iowa Odd Fellows and Orphans home in Mason City as a certified nursing assistant from 2008 until August 23, 2012, when Debra Haugen, Administrator, Deana Larson, CCDI Nursing Director, and Kari Mentink, Alzheimer Coordinator, discharged her from the employment. Ms. Upenieks worked in the employer's 29-bed Alzheimer's dementia unit.

The final incident that triggered the discharge occurred on August 17, 2012. Ms. Upenieks had previously received a directive that a particular resident was not supposed to participate in unit activities, which Ms. Upenieks interpreted to mean that the resident was not supposed to go out into the unit courtyard for the weekly Friday noon picnic. Ms. Upenieks thought she was following the instructions given to her and did not check with the supervisor to see whether it was okay for the resident to participate in the weekly picnic in the courtyard. The resident in question suffers from Down Syndrome. Ms. Upenieks communicated to the resident that she could not go out to the courtyard by gesturing with her index finger to indicate no to the resident. Ms. Upenieks went forward with taking the other residents out to the courtyard. She attempted to take the other residents out and bring them back through a door that would not be in the immediate vicinity of the resident who did not get to go outside for the picnic. The resident left

behind became upset and started to cry. Other staff present on the unit concluded that Ms. Upenieks had been unduly harsh with the resident and reported the matter up the chain of command.

In making the decision to discharge Ms. Upenieks from the employment, the employer considered an incident from July 20, 2012. In that instance, Ms. Upenieks had several residents she needed to return to the unit after a large group activity in the dining room. Ms. Upenieks wheeled a particular resident back to the unit with the resident's wheelchair facing backwards. The resident would not cooperate with putting his feet up on the wheelchair foot rests and Ms. Upenieks wheeled the resident backwards in order to avoid injuring his legs or feet. When Ms. Upenieks got the resident inside the unit door, she handed him off to another staff member. Ms. Upenieks asked the other staff member to deal with the resident while she went to get additional residents. Ms. Upenieks told the other staff, "Here, you guys need to take care of him."

In making the decision to end the employment, the employer considered another incident from February 20, 2012. On that day another staff member reported that Ms. Upenieks was sitting at a table after breakfast reading a newspaper and not engaging residents in activities. Ms. Upenieks had been reading the newspaper aloud to two residents as breakfast wrapped up.

In making the decision to discharge Ms. Upenieks, the employer considered an incident from December 2011. Ms. Upenieks had worn a long sleeve sweater over a tank top. Ms. Upenieks told a nurse she was not feeling well. The nurse gave her permission to take the sweater off, so that Ms. Upenieks was just wearing the tank top. Another staff member took a picture of Ms. Upenieks with her cell phone and reported the incident to the employer.

In making the decision to end Ms. Upenieks' employment, the employer considered two additional incidents from 2010.

In connection with the August 17, 2012 final incident, the employer met with Ms. Upenieks the same day to issue a written reprimand. As part of the reprimand, the employer directed Ms. Upenieks to view a six-hour tape on dementia, and two additional videos concerning abuse and neglect and resident rights. The employer directed Ms. Upenieks to view the material on August 18 or 19, prior to returning to work on the Alzheimer's unit. Ms. Upenieks began reviewing the material at her earliest convenience. In connection with the reprimand, the employer indicated that Ms. Upenieks would be retrained on positive redirection and be required to refrain from using terms such as have to, can't, no, and must when interacting with residents. The employer indicated that the employer would follow up with Ms. Upenieks on August 20.

Ms. Upenieks had suffered a herniated disc in 2009 in connection with performing her work duties. Ms. Upenieks had undergone surgery in 2010 and 2011. As of the incident involving the Alzheimer's resident on August 17, Ms. Upenieks had recently provided the employer with updated medical restrictions. After the reprimand on August 17, Ms. Upenieks was absent due to illness properly reported for a couple days before returning to work on August 23. On the day she returned, the employer discharged her 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 employer has failed to present sufficient evidence, and sufficiently direct and satisfactory evidence, to establish misconduct in connection with the final incident that triggered the discharge. The weight of the evidence indicates that on August 17, Ms. Upenieks reasonably believed she was following a supervisor's directive by not having the resident in question participate in the weekly noon picnic. Ms. Upenieks did not exclude the resident from the activity out of any intention to be mean or hurtful to the resident. Nor was Ms. Upenieks' hand gesture to the resident intended to be mean or hurtful. Ms. Upenieks' conduct in connection with the incident arose out of one or more good faith errors in judgment. Ms. Upenieks' conduct in connection with the final incident that triggered the discharge did not involve intentional misconduct, carelessness, or negligence.

The employer has failed to present sufficient evidence, and sufficiently direct and satisfactory evidence, to establish misconduct in connection with the July 2012 incident that factored into the discharge. The weight of the evidence fails to support the allegation that Ms. Upenieks shoved the resident's wheelchair as she entered the unit or that she made derogatory remarks about the resident.

The employer argues there was a pattern of conduct indicating a willful disregard of the employer's interests and the interests of those residents in Ms. Upenieks' care. The employer argued that the pattern went all the way back to 2010, though it appears that Ms. Upenieks went 15 months without a reprimand between September 2010 and December 2011. The weight of the evidence in the record fails to support the employer's argument that there was a pattern of behavior indicating a willful or wanton disregard.

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

#### **DECISION:**

The Agency representative's September 11, 2012, reference 01, decision 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.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs