

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

AMANDA L SCHROEDER
Claimant

APPEAL NO. 07A-UI-08681-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HOWARD COUNTY CHILD CARE ASSOC
Employer

**OC: 06/10/07 R: 04
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

Amanda Schroeder filed a timely appeal from the September 4, 2007, reference 02, decision that denied benefits. After due notice was issued, a hearing was held on September 26, 2007. Ms. Schroeder participated. Sue Russell, Director, represented the employer.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Amanda Schroeder was employed by Howard County Child Care Association as a full-time child care aide from September 20, 2006 until June 7, 2007, when Director Sue Russell discharged her. Ms. Russell had just joined the employer on May 31, 2007. Ms. Schroeder was assigned to work in the infant room.

The final incident that prompted the discharge occurred on June 4, 2007. Ms. Schroeder and a new coworker, Chris Van Denver, were caring for six or seven infants in an outside play area. Ms. Van Denver was still within the first week of her employment. Another coworker, Shannon Walters, was outside supervising other children. Ms. Van Denver remained outside with the infants as Ms. Schroeder took the infants inside one at a time for diaper changes and to otherwise prepare the infants to be picked up by their parents. Ms. Schroeder brought an infant, Boston, outside and secured Boston in a swing. Ms. Van Denver was nearby. Ms. Schroeder then took the next infant inside for diaper change et cetera. When Ms. Schroeder returned outside, she observed Boston on the ground. A three-year-old, Alyssa, was standing directly behind Boston. Alyssa told Ms. Schroeder that she had unhooked the child from the swing. Ms. Van Denver, who had been caring for other infants and talking to a coworker, had not observed Alyssa removing Boston from the swing or how Boston ended up on the ground. Ms. Schroeder grabbed Alyssa's hand and led her over to Ms. Van Denver. Ms. Schroeder collected Boston from the ground and began to head inside to complete an incident report and discuss the matter with the Assistant Director. Though Boston was not upset and showed no

sign of injury, Ms. Schroeder was concerned that Boston may have suffered injury and wondered how she would explain the incident to the infant's parents. As Ms. Schroeder headed inside, she had Ms. Walter lift Alyssa over a toddler gait, so she could take Alyssa and Boston to the Assistant Director's office. Once Alyssa was inside the building, she refused to go with Ms. Schroeder. Ms. Schroeder coaxed Alyssa into coming to the office. Ms. Schroeder took Boston to the Assistant Director and discussed the matter. Ms. Schroeder then went to another room to complete an incident report. The infant, Boston, was in fact unhurt and Ms. Schroeder made an appropriate report to Boston's parents, who continued to monitor the child over the next few days.

Alyssa's mother, Lisa Soblick, is also an employee of the child care center. Ms. Soblick observed all or part of Ms. Schroeder's response to the incident involving Alyssa and Boston. Ms. Soblick was concerned that Ms. Schroeder might have used unnecessary force when she grabbed Alyssa. That evening, Ms. Soblick checked her daughter's body for marks and found none. On June 6, Ms. Soblick noticed a couple bruises on Alyssa's upper arm and concluded, based on Alyssa's report, that Ms. Schroeder had caused the bruises. Ms. Soblick reported the matter to the employer on June 6. On June 7, Ms. Russell obtained a written statement from Ms. Van Denver. Ms. Russell received verbal statements from other employees. All of Ms. Schroeder's former coworkers continue in their employment, but none testified at the hearing.

On June 7, Ms. Russell summoned Ms. Schroeder to a meeting at the end of the day. The Assistant Director was also present. Ms. Russell advised Ms. Schroeder she had decided to discharge Ms. Schroeder from the employment. Ms. Russell cited the incident concerning Alyssa and prior reprimands for unrelated and dissimilar matters concerning attendance and allegations of rude behavior. Ms. Russell advised Ms. Schroeder that Alyssa had bruises on her arm and that the bruises had been photographed. Ms. Schroeder requested to review the photos, but the employer declined to make them available. Ms. Russell requested that Ms. Schroeder sign a termination document. Ms. Schroeder refused to sign the document and refused to return the document to the employer, citing the need to take the document to an attorney. Ms. Schroeder had received no prior counseling or reprimands concerning her interaction with the children in her care or present at the child care facility.

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 administrative law judge notes that the employer had the ability to present testimony from Ms. Van Denver, Ms. Walter, Ms. Soblick and others, but presented no such testimony. The administrative law judge further notes that the employer presented insufficient evidence to establish misconduct in connection with the prior counseling or reprimands that predated Ms. Russell's tenure.

The greater weight of the evidence fails to establish intentional misconduct in connection with the final incident that prompted the discharge. Ms. Schroeder provided the only firsthand testimony concerning the June 4 incident. While the evidence concerning the incident raises the question of whether Ms. Schroeder exercised poor judgment by leaving the infant in the swing at a time when she knew Ms. Van Denver was not paying attention to the child, the evidence indicates that Ms. Schroeder was juggling other responsibilities. Poor judgment in the

face of competing responsibilities would not constitute misconduct. See Richers v. Employment Appeal Board, 479 N.W.2d 308 (Iowa 1991). In addition, the weight of the evidence fails to establish a causal connection between Ms. Schroeder's contact with Alyssa on June 4 and bruises that Ms. Soblick noticed two days later. Ms. Soblick had checked the child after the incident and found no marks that would indicate that Ms. Schroeder had handled Alyssa roughly or in an abusive fashion. Any number of events, prior to, contemporaneous with, or subsequent to Ms. Schroeder's interaction with Alyssa may have been the actual source of the marks Ms. Soblick observed on her daughter two days later.

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

DECISION:

The Agency representative's September 4, 2007, reference 02, 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs