

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LORI R KING

Claimant

APPEAL NO. 11A-UI-14142-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ALCOHOL & DRUG DEP SVCS OF SE IA

Employer

OC: 10/02/11

Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Lori King filed a timely appeal from the October 24, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was started on December 6, continued on December 9, and concluded on December 14, 2011. Ms. King participated. Mary Kating of Sedgwick CMS represented the employer and presented testimony through Grace Cervantes. Exhibits One, Two, Three and B through N 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: Lori King was employed by Alcohol & Drug Dependency Services of Southeast Iowa (ADDs) as a full-time gambling addiction counselor from 2008 until October 7, 2011, when Richard Swanson, Ph.D., executive director, discharged her for alleged insubordination. Ms. King's immediate supervisor from July 6, 2011 onward was Grace Cervantes, supervising counselor.

The final incident that triggered the discharge was Ms. King's refusal to sign a "Gambling Counselor Supervision" form that Ms. Cervantes presented to Ms. King on October 4, 2011. Dr. Swanson had directed Ms. Cervantes to present and discuss the form with Ms. King to address Ms. King's low client count. Ms. King declined to sign the form because it contained the following language: "Lori will increase her client count to a minimum of 12 active clients by November 30, 2011, with a goal of a full caseload between 15-20 clients."

Ms. King received clients primarily through the 1-800-BETS OFF gambling addiction self-referral hotline. King was assigned a six-county area that did not include a casino or similar gambling establishment. Throughout the employment, Ms. King had never had 15 to 20 clients at a time. Prior to commencing a medical leave of absence in June 2011, Ms. King had averaged eight to ten clients at a time. Ms. King's ability to recruit clients was further limited by professional ethics.

Ms. King had returned to part-time work in July and started seeing clients again during the last week of July. Upon her return, Ms. King learned that a substitute counselor had engaged in conduct that alienated some of Ms. King's clients. Two months later, at the time of the discussion on October 4, 2011, Ms. King had three clients.

Ms. King refused to sign the "Gambling Counseling Supervision" form, because she believed it simply was not possible to obtain eight additional clients between October 4 and November 30, given the means by which prospective clients came to the agency and the lengthy evaluation and screening process involved once clients made contact with the agency. Ms. Cervantes erroneously interpreted Ms. King's objection to the language of the "Gambling Counseling Supervision" document as a refusal to work toward increasing the client count, but Ms. King was willing to continue to work to increase her client count. Ms. King requested that the language of the document be amended, but this request was discounted or disregarded by the employer.

The meeting on October 4, 2011 occurred in the context of the employer's ongoing concern about Ms. King's client count. In August and September 2011, Ms. Cervantes had assigned Ms. King to take specific networking and marketing steps with the goal of increasing the client count. Ms. Cervantes complied to the extent she was able, but some aspects of the directives were beyond her control. For example, Ms. Cervantes expected Ms. King to present at a community college class. Ms. King made the appropriate contacts, but was subject to the teachers' scheduling needs. With regard to some other directives, Ms. King sometimes took a different approach than Ms. Cervantes might have, but acted with the same goal. With regard to some other directives, Ms. King needed further assistance from Ms. Cervantes that did not come in a timely and effective manner.

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).

Continued failure to follow reasonable instructions constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See Woods v. Iowa Department of Job Service, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See Endicott v. Iowa Department of Job Service, 367 N.W.2d 300 (Iowa Ct. App. 1985).

In Gilliam v. Atlantic Bottling Company, the Iowa Court of Appeals upheld a discharge for misconduct and disqualification for benefits where the claimant had been repeatedly instructed over the course of more than a month to perform a specific task and was part of his assigned duties. The employer reminded the claimant on several occasions to perform the task. The employee refused to perform the task on two separate occasions. On both occasions, the employer discussed with the employee a basis for his refusal. The employer waited until after the employee's second refusal, when the employee still neglected to perform the assigned task, and then discharged employee. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990).

The employer reasonably expected Ms. King to work toward increasing her client caseload. Ms. King was willing to do that. In light of the nature of the work, professional ethics, and matters beyond Ms. King's control, it was not reasonable for the employer to demand that a roster of 12 clients be obtained by a date certain. It was that unreasonable requirement that Ms. King reasonably objected to. Ms. King reasonably concluded that she would be setting

herself up for further discipline and likely discharge from the employment if she signed an agreement to obtain a roster of 12 clients by a date certain. Under the circumstances, Ms. King's refusal to sign the document did not amount to insubordination. The weight of the evidence indicates that Ms. King took reasonable steps prior to the October 4 meeting toward meeting the expectations Ms. Cervantes has set in August and September. Ms. King did not engage in conduct that was in willful or wanton disregard of the employer's interests. Under the circumstances, Ms. King's failure to perform to employer's satisfaction did not constitute misconduct in connection with the employment that would disqualify her for unemployment insurance benefits.

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

DECISION:

The Agency representative's October 24, 2011, 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw