

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LORIE A SHIVER
Claimant

APPEAL NO. 07A-UI-09379-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CENTRAL IOWA RESIDENTIAL SVCS INC
Employer

**OC: 08/19/07 R: 02
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

Lorie Shiver filed a timely appeal from the September 28, 2007, reference 02, decision that denied benefits. After due notice was issued, a hearing was commenced on October 22, 2007 and concluded on October 23, 2007. Ms. Shiver participated and presented additional testimony through Lorna Gentz. Jeff Vance, Executive Director, represented the employer. Exhibits One through Four and A through L 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: Lorie Shiver was employed by Central Iowa Residential Services, Inc, (CIRSI) as a full-time overnight supported living employee from July 25, 2000 until August 23, 2007, when Executive Director Jeff Vance discharged her. Ms. Shiver's immediate supervisor was Rick Sisson, Assistant Program Administrator. Mr. Sisson carried out the discharge.

The final incident that prompted the discharge came to the attention of the employer on August 22, 2007, when Poweshiek County Case Manager Gina McKeag-Hall reported to Mr. Sisson that Ms. Shiver had contacted her about becoming a Medicaid-authorized service provider for a CIRCI client. Ms. McKeag-Hall reported to Mr. Sisson that Ms. Shiver had made assertions about the client's care that proved untrue. Neither Ms. McKeag-Hall nor Mr. Sisson testified at the hearing.

Ms. Shiver had provided assistance to the client in question, Kathy, throughout Ms. Shiver's employment until August 7, when Kathy moved out of the group home where Ms. Shiver worked and moved into her own apartment. Kathy suffers from cerebral palsy and has some degree of mental retardation. Kathy does not have a guardian who oversees her affairs. Over the course of Ms. Shiver's employment, she had established a positive, supportive relationship with Kathy that extended beyond her duties as a CIRCI employee. Ms. Shiver would invite Kathy and other

clients to family holiday events. Ms. Shiver had also established a positive relationship with Kathy's family, who valued the care and assistance Ms. Shiver provided Kathy. Ms. Shiver continued her relationship with Kathy after Kathy moved into her own apartment and after Ms. Shiver's work-related responsibility for Kathy had ended. On August 15, Kathy asked Ms. Shiver to take her to her mother's home and Ms. Shiver did so outside of work. On August 18, Kathy again asked Ms. Shiver to transport her to her mother's home and Ms. Shiver did so outside of work. On August 20, Kathy asked Ms. Shiver if she would have time in the next couple of days to assist Kathy with a bath. At this time, Ms. Shiver learned that Kathy had not bathed since she moved out of the group home. After Kathy moved out of the group home, another CIRSI employee was assigned to function as Kathy's case manager. Ms. Shiver asked Kathy whether her new case manager had had any discussion with Kathy about bathing and Kathy said she had not. Ms. Shiver suggested that Kathy speak to her case manager about the need for assistance with bathing. Kathy expressed that she did not feel comfortable with the CIRSI case manager. Ms. Shiver's concern for Kathy's well-being prompted her to pursue the possibility of becoming a Medicaid-authorized service provider. Kathy was open to the idea. Kathy's family supported the idea. If Ms. Shiver became a Medicaid-authorized service provider, she intended to quit her employment with CIRSI.

On August 21, Ms. Shiver contacted Poweshiek County Case Manager Gina McKeag-Hall for information on how to become a Medicaid-authorized service provider. Ms. Shiver made the call to Ms. McKeag-Hall while Ms. Shiver was off-duty. Ms. McKeag-Hall provided Ms. Shiver with a contact number for Medicaid. Ms. McKeag-Hall provided Ms. Shiver with general information regarding Consumer Directed Attendant Care (CDAC). Up to this point in the call, Ms. Shiver had not identified who she was and had said nothing about Kathy or CIRSI. Ms. McKeag-Hall asked for Ms. Shiver's name and Ms. Shiver provided it. Ms. McKeag-Hall asked Ms. Shiver if she had a particular consumer for whom she was interested in providing services and Ms. Shiver named Kathy. Ms. Shiver indicated that Kathy was a CIRSI client and that Ms. Shiver was a CIRSI employee. Ms. Shiver expressed a desire that the conversation between herself and Ms. McKeag-Hall remain confidential. Ms. McKeag-Hall asked Ms. Shiver if she had any particular concerns about Kathy. Ms. Shiver did not reference the hygiene issue. Ms. Shiver did indicate a concern about Kathy's diet and referenced that Kathy had reported to her that she ate a peanut butter sandwich for dinner one night and popcorn for dinner on another. Ms. McKeag-Hall treated these comments about Kathy's diet as a matter that needed to be investigated. Ms. McKeag-Hall went to Kathy's apartment and found that she had appropriate food.

On August 22, Ms. Shiver went to Kathy's house, cleaned Kathy's bathtub so Kathy could take a bath, and transported Kathy to her mother's home. Ms. Shiver did this while she was off-duty from CIRSI.

On August 22, Ms. McKeag-Hall reported to Mr. Sisson that Kathy had provided false information to her about the services Kathy received from CIRSI. Mr. Sisson notified Executive Director Jeff Vance of the contact with Ms. McKeag-Hall. On August 23, Mr. Sisson summoned Ms. Shiver to a meeting at which he accused Ms. Shiver of intentionally misleading Ms. McKeag-Hall about the care CIRSI provided to Kathy. Ms. Shiver denied that she made false statements to Ms. McKeag-Hall and asserted that she had only made truthful statements to Ms. McKeag-Hall. Mr. Sisson discharged Ms. Shiver from the employment.

CIRSI lacks a non-compete policy that would have prevented Ms. Shiver from becoming Kathy's Medicaid-authorized service provider. CIRSI lacks a policy that would address Ms. Shiver's off-duty conduct.

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 failed to present testimony from Ms. McKeag-Hall or Mr. Sisson despite the ability to do so.

The weight of the evidence fails to establish misconduct on the part of Ms. Shiver. The greater weight of the evidence indicates that Ms. Shiver's call to Ms. McKeag-Hall was motivated out of genuine concern for the well-being of Kathy. The greater weight of the evidence indicates that Ms. Shiver's call occurred in the context of the long-term relationship between Ms. Shiver and Kathy, which relationship extended beyond Ms. Shiver's employment with CIRSI. The greater weight of the evidence indicates that Ms. Shiver did not make false statements to Ms. McKeag-Hall about the services Kathy received from CIRSI and only commented on services provided by CIRSI when prompted to do so. The greater weight of the evidence indicates that Ms. Shiver at no time acted with willful or wanton disregard of the interests of the employer. Even if Ms. Shiver's conduct had amounted to misconduct, it would not have constituted misconduct "in connection with" the employment. See Iowa Code section 96.5(2)(a). The evidence indicates that Ms. Shiver's contact with Ms. McKeag-Hall occurred while she was off-duty and that the employer lacked a policy that addressed Ms. Shiver's off-duty conduct. In the absence of a policy regarding off-duty conduct, misconduct in connection with the employment cannot be established. Kleidosty v. Employment Appeal Board, 482 N.W.2d 416, 418 (Iowa 1992).

During the hearing, the administrative law judge indicated to the parties a concern about a breach of Kathy's confidentiality that occurred because Ms. Shiver had her telephone on speakerphone at the time she spoke with Ms. McKeag-Hall. While Ms. Shiver demonstrated poor judgment by allowing the breach of confidentiality to happen, the breach was unintentional and the employer was unaware of the breach of confidentiality at the time the employer discharged Ms. Shiver and it was not a factor in the decision to discharge.

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

DECISION:

The Agency representative's September 28, 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/css