

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BOBBIE L ROCKWELL
Claimant

APPEAL NO. 07A-UI-02611-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MAINSTREAM LIVING INC
Employer

**OC: 01/07/07 R: 02
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

Bobbie Rockwell filed a timely appeal from the March 6, 2007, reference 02, decision that denied benefits. The parties met for pre-hearing conference on April 3, 2007 and April 13, 2007. After due notice was issued, a hearing commenced on April 27, 2007, continued on May 4, 2007 and concluded on May 7, 2007. Mr. Rockwell participated and presented additional testimony through Lequan Edwards, Nathan Underkofler, David Solomon, and Linda White. Attorney Gary Fischer represented the employer and presented testimony through Human Resources Director Marcanne Lynch, Certified Medication Aide Nathan Harrington, former cook Shondra Geisinger, and Assistant Director of Admissions Andy Dietz-Swenson. Employer's Exhibits One through 18 and Claimant's Exhibits A through T and V were received into evidence.

Issuance of the present decision has been delayed by the need to carefully review the copious amount of evidence in the record.

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: Bobbie Rockwell was employed by Mainstream Living as a full-time Supported Living Tech from March 28, 2006 until July 11, 2006, when he was suspended by Louanne Wingfield, Vice President of Operations and Acting Administrator for Mental Health Services, and Andy Dietz-Swenson, Assistant Director of Admissions. Mr. Rockwell worked with mentally ill and/or disabled clients who needed daily support and guidance. Mr. Rockwell paired with another coworker to provide services to 26 clients. On July 9, Certified Medication Aide Nathan Harrington reported to Ms. Wingfield that he had observed Mr. Rockwell attempt to massage Mainstream cook Shondra Geisinger against her will. Mr. Harrington was in the kitchen speaking with Ms. Geisinger while she prepared dinner for Mainstream Living clients and staff. Mr. Rockwell came up behind Ms. Geisinger, touched her on top of her shoulders, began to rub

her upper back just behind her neck. This lasted for approximately five seconds. Ms. Geisinger indicated she was not interested in the touch. Mr. Rockwell ceased touching Ms. Geisinger. Ms. Geisinger went on to tell Mr. Rockwell and Mr. Harrington about being sexually harassed in a prior employment. When Mr. Rockwell left the kitchen, he uttered a remark to the effect that he would not want Ms. Geisinger to think he was a sexual predator. There is a significant age difference between Mr. Rockwell, who was 54 at the time, and Ms. Geisinger, who was 28.

Mr. Rockwell has a background and formal training in neuromuscular therapy. Mr. Rockwell is not licensed to provide such services in Iowa. The employer and Mr. Rockwell's coworkers were aware of Mr. Rockwell's background in neuromuscular therapy. The employer had not given Mr. Rockwell permission to apply neuromuscular therapy techniques to staff or the employer's clients. Mr. Rockwell had previously discussed his background in neuromuscular therapy with Ms. Geisinger, who suffers from chronic back pain. Approximately a month after Mr. Rockwell started working with Ms. Geisinger, he came up behind Ms. Geisinger and put his hand on her shoulder as he said, "Hi." This contact was disconcerting to Ms. Geisinger, but she did not make this known to Mr. Rockwell. On another occasion, Ms. Geisinger shared with Mr. Rockwell that she was experiencing problems with her lower back. Ms. Geisinger told Mr. Rockwell that she had gone to a physical therapist and chiropractor without achieving any relief. Mr. Rockwell offered to demonstrate "pressure points" on Ms. Geisinger's lower back that could "detrigger" the pain. Mr. Rockwell then touched points on Ms. Geisinger's lower back, while he named the "pressure points" and what each could do to help relieve Ms. Geisinger's pain. Ms. Geisinger told Mr. Rockwell that she did not want him to show her the pressure points because she was in pain. Mr. Rockwell touched Ms. Geisinger's lower back for 20 seconds. Ms. Geisinger knew that Mr. Rockwell was just trying to help, but was uncomfortable with the contact. A week after this incident, Mr. Rockwell came into the kitchen while Ms. Geisinger was working and tried to massage her for five to 10 seconds. Mr. Rockwell had come to the kitchen to get his meal. Ms. Geisinger told Mr. Rockwell that she did not like to be touched. The final incident of Mr. Rockwell touching Ms. Geisinger occurred on July 9 while Mr. Harrington was present and led to Mr. Harrington making his report to Ms. Wingfield. Ms. Geisinger had discussed each of the prior incidents with Mr. Harrington, who had immediately reported the incidents to Ms. Wingfield. Ms. Geisinger had not reported any of the incidents to the employer.

On July 10, Andy Dietz-Swenson officially commenced his duties as Assistant Director of Admissions and thereby became Mr. Rockwell's immediate supervisor. A few weeks before, the Director of Admissions, Patricia Yavetz, had mentioned to Mr. Dietz-Swenson concerns other staff had raised about Mr. Rockwell touching Mainstream Clients so that Mr. Dietz-Swenson would be aware of the issue. On July 10, Mr. Dietz-Swenson and other staff observed Mr. Rockwell applying neuromuscular therapy technique to a client, D.B. Mr. Rockwell had come upon D.B., who had been in the lunch line with his head in his hands. Mr. Rockwell believed D.B. had a headache or was otherwise in distress. Mr. Rockwell escorted D.B. to a seat. Mr. Rockwell then applied pressure to one or more "pressure points" on D.B.'s hand to help "center" him. To Mr. Dietz-Swenson, D.B.'s body language indicated he was uncomfortable with the physical contact. When Mr. Dietz-Swenson observed the behavior, he was reminded of the prior discussion with Ms. Yavetz. Mr. Dietz-Swenson went to speak with Ms. Yavetz, who instructed him to counsel Mr. Rockwell regarding the inappropriateness of the conduct. The employer did not deem the matter to concern dependent adult abuse. Outside the prohibition against dependent adult abuse, the employer did not have a policy that prescribed parameters for acceptable versus unacceptable contact between staff and clients. Mr. Dietz-Swenson pulled Mr. Rockwell aside and explained why Mr. Rockwell's actions vis-à-vis D.B. were inappropriate. These included that the client may not be able to advocate against the touch, that the contact may be uncomfortable or confusing to the consumer, and that the conduct could confuse the boundaries of the professional relationship between staff and

clients. Mr. Dietz-Swenson also explained that the conduct was outside the scope of the services the employer provided, that Mr. Rockwell was not licensed to provide the service, and that the service was not authorized by a supervisor. Mr. Rockwell indicated that he understood.

Later that day, either Ms. Wingfield or Ms. Yavetz directed Mr. Dietz-Swenson to investigate possible inappropriate contact between Mr. Rockwell and other staff and/or Mainstream clients. Mr. Dietz-Swenson spoke with a Ms. Jackson, who indicated that Mr. Rockwell had once offered her a back rub, that she had declined, and that that was the end of the matter. Mr. Dietz-Swenson spoke to a Ms. Wagner, who indicated she had observed Mr. Rockwell walking hand-in-hand with a female client, but provided no other details. There were circumstances under which it would be appropriate for a staff member to walk hand-in-hand with a client in the context of providing Supported Living services. Mr. Dietz-Swenson also spoke with Mr. Harrington regarding Ms. Geisinger. Mr. Dietz-Swenson did not speak directly with Ms. Geisinger, as that was left for Ms. Wingfield.

On July 11, Ms. Wingfield and Mr. Dietz-Swenson informed Mr. Rockwell that he was being suspended pending an investigation prompted by one or more female staff members reporting to the employer that Mr. Rockwell had initiated non-consensual physical contact with them. In reality the suspension was based on Mr. Harrington's complaint and Ms. Wingfield's follow up with Ms. Geisinger. Ms. Wingfield and/or Mr. Dietz-Swenson advised Mr. Rockwell that he would be suspended without pay, but that if the allegations proved unfounded, Mr. Rockwell would be paid for any missed shifts. Ms. Wingfield and Mr. Dietz-Swenson did not say that Mr. Rockwell's job was in jeopardy. Ms. Wingfield and Mr. Dietz-Swenson made an appointment with Mr. Rockwell to meet again on July 13.

Mr. Rockwell made an audiotape of the July 13 meeting without the employer's knowledge. Mr. Rockwell, Ms. Wingfield and Mr. Dietz-Swenson were present for the meeting. Mr. Dietz-Swenson told Mr. Rockwell that the employer's investigation gave rise to two concerns and that due to these concerns Ms. Wingfield and Mr. Dietz-Swenson needed to involve the Human Resources staff. Ms. Wingfield told Mr. Rockwell that she and Mr. Dietz-Swenson had not had sufficient time to speak with everyone they wanted to interview or to fully consult with the Human Resources staff. However, Ms. Wingfield and Mr. Dietz-Swenson had in fact concluded their investigation and conducted no further investigation. Ms. Wingfield referenced Mr. Rockwell's background in neuromuscular therapy, but added that Mr. Rockwell's "therapeutic touch" made people in the workplace very uncomfortable.

Ms. Wingfield and Mr. Rockwell then discussed a prior conversation that had occurred between the two in May. At that time, Mr. Rockwell had suggested program changes in response to a request by Ms. Wingfield to do so. Mr. Rockwell had suggested to Ms. Wingfield that certain of Mainstreams' clients were deprived of their basic need for touch and suggested that an outside entity be enlisted to provide weekly massage to clients. Ms. Wingfield had indicated to Mr. Rockwell at the time that it was "risky business" to touch clients. Ms. Wingfield had welcomed Mr. Rockwell providing neuromuscular therapy outside the workplace, but had indicated that it would not be appropriate to provide such services to Mainstreams' clients. During the conversation on July 13, Ms. Wingfield told Mr. Rockwell that when it came to other staff, the therapeutic touch was only a problem if others perceived it to be a problem and were reporting it as a problem. Ms. Wingfield indicated this was the case. Ms. Wingfield indicated that she believed Mr. Rockwell was massaging people or at least massaging a shoulder. Ms. Wingfield indicated that Mr. Rockwell should not engage in physical touch beyond a handshake.

Ms. Wingfield reminded Mr. Rockwell that he had requested a transfer to the employer's Home and Community Based Services (HCBS) program a month earlier. Ms. Wingfield told Mr. Rockwell that placing him back in the Supported Living program would not work. Ms. Wingfield told Mr. Rockwell that the employer just wanted to bring Mr. Rockwell in for a discussion about what they had learned before the employer transferred Mr. Rockwell to the HCBS program. Ms. Wingfield told Mr. Rockwell that the employer just wanted Mr. Rockwell to be clear about the employer's role and Mr. Rockwell's role when he transferred to the HCBS program so that he could be successful in the new position. Ms. Wingfield indicated that perhaps she had not been clear enough up to that point.

At the end of the July 13 meeting, Ms. Wingfield and Mr. Dietz-Swenson made arrangements for a meeting between Mr. Rockwell and the human resources staff on Monday, July 17. The employer had wanted Mr. Rockwell to meet with the Human Resources staff on Friday, July 14. Mr. Rockwell later requested to reschedule the meeting with the Human Resources Staff and the meeting took place on July 19.

After the meeting on July 13 had ended, Mr. Rockwell indicated to Ms. Wingfield a desire to collect his glasses from the workplace. Ms. Wingfield approved the trip to the workplace, but directed Mr. Rockwell to check in with Patricia Yavetz upon arrival. Mr. Rockwell made contact with Ms. Yavetz, but not immediately upon his arrival. Mr. Rockwell collected his glasses. Mr. Rockwell also collected a book he had loaned to Mainstream client Linda W.

At some point on July 13, Mr. Rockwell had been heading to lunch at Hy-Vee when he noticed and waived to Ms. Geisinger. Mr. Rockwell did not know that his suspension had been prompted by the report from Mr. Harrington about his contact with Ms. Geisinger. Mr. Rockwell thought the report had come from another female coworker with whom he had recently had a disagreement. After Mr. Rockwell waived to Ms. Geisinger, he turned into the Hy-Vee parking lot and Ms. Geisinger went on to her shopping destination. Ms. Geisinger later called the employer and reported the contact with Mr. Rockwell. Ms. Geisinger's report led the employer to believe that Mr. Rockwell had been following her and/or harassing her, which was not the case.

Mr. Rockwell appeared for the meeting on July 19. Also present for the meeting were Marcanne Lynch, Human Resources Director and Reed Hammonds, Vice President of Operations for Mainstream Living in Ames. Mr. Hammonds opened the discussion by indicating that Ms. Wingfield and Mr. Dietz-Swenson had "looked into things" and had provided the Human Resources staff with the information they had gathered. Mr. Hammonds and Mr. Rockwell entered into a discussion regarding the distinction between massage and "neuromuscular therapy." Mr. Rockwell specified that neuromuscular therapy was not massage and that any touch occurred only when the recipient was clothed. Mr. Hammonds then referenced two additional allegations that had arisen during the course of the employer's investigation. The first was an allegation that Mr. Rockwell had told a coworker that disparate work duties were assigned by the lesbians in charge. The second was an allegation that Mr. Rockwell had attempted to manipulate a female client into discontinuing contact with Planned Parenthood. Mr. Rockwell denied making the allegation about the lesbians. Mr. Rockwell avoided providing the employer with direct responses regarding the discussion he had had with a female client while he was transporting her back from a visit to Planned Parenthood. At the end of the meeting, Mr. Hammonds indicated that investigation would continue and that the employer would need to re-interview the other staff.

On July 20, Ms. Lynch interviewed Kristin Wagner, who indicated she had seen Mr. Rockwell holding hands with a female consumer. Ms. Wagner raised an allegation that consumer Pam D.

had awakened to Mr. Rockwell rubbing her back. Ms. Wagner had not observed the behavior or spoken to the client, but heard the allegation from another staff member. Ms. Wagner reiterated that Mr. Rockwell had offered her a massage on their first day working together, that she had declined and that had been the end of it. Ms. Wagner indicated that client Linda W. had mentioned that Mr. Rockwell would work on her legs. Mr. Rockwell had shown Linda W. two pressure points on his lower leg. Ms. Geisinger told Ms. Lynch that she did not want to get Mr. Rockwell in trouble, but that as the touching incidents continued she got "creeped out." Mr. Harrington repeated his prior statement.

After these interviews, Ms. Lynch spoke with Ms. Wingfield regarding any prior clarification she had given Mr. Rockwell regarding touching clients or staff. Ms. Wingfield said she knew Mr. Rockwell brought a counseling background to the employment and initially thought that was okay. Mr. Rockwell had in fact worked in several different environments that impacted his approach to his work for Mainstream.

Ms. Lynch then consulted with Mr. Hammonds. The employer was still trying to discern whether harassment occurred, either in violation of the employer's written policy or of the law. The employer's policy prohibited unwelcome conduct based on a person's "protected status" and includes gender as a protected class. One concern the employer had was Ms. Geisinger's ability to appropriately interpret Mr. Rockwell's conduct. Mr. Rockwell had on one occasion told Ms. Geisinger, "I owe you." This was in response to Ms. Geisinger making Mr. Rockwell's lunch. Ms. Geisinger had never been on the receiving end of the idiom and thought it implied something improper.

On August 1, Ms. Lynch and the Assistant Human Resources Director met with Mr. Rockwell and discharged him. The termination document cited two reasons for the discharge. The first was "violation of the harassment policies, especially touching other staff, asking to touch other staff, and comments made in that context." The second reason was "not following the supervisor's directive to refrain from touching consumers."

Mr. Rockwell established a claim for benefits that was effective January 7, 2007.

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).

Workforce Development rule 24.32(9) provides as follows:

Suspension or disciplinary layoff. Whenever a claim is filed and the reason for the claimant's unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as discharged, and the issue of misconduct must be resolved. Alleged misconduct or dishonesty without corroboration is not sufficient to result in disqualification.

The evidence in the record indicates that Mr. Rockwell's claim for unemployment insurance benefits was not filed in response to a suspension or disciplinary layoff. Rather, Mr. Rockwell did not establish a claim for benefits until months after separating from the employment as a

result of the discharge that occurred on August 1, 2006. The claimant's suspension between July 11 and the August 1 discharge was not of a disciplinary nature, but instead, according to the employer, was necessary to facilitate the employer's investigation. Thus it was August 1, 2006 that must be considered as the separation date, not July 13, 2006, as was erroneously listed in the claims representative's decision.

The greater weight of the evidence in the record indicates that the final incidents that prompted the investigation-related suspension and subsequent discharge came to the employer's attention on July 9 and 10, but that the employer did not advise Mr. Rockwell that these matters placed his employment in jeopardy until August 1, when Ms. Lynch discharged Mr. Rockwell from the employment. On July 13, Ms. Wingfield specifically stated to Mr. Rockwell that the employer merely wanted to have a clear understanding with Mr. Rockwell before he transferred into a new position. Thus, there was a lapse of at least 22 days between 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. The evidence indicates that the employer had completed its first investigation by July 13. The evidence indicates the employer had completed its second investigation by July 20. Aside from the meeting with Mr. Rockwell on July 19, the employer's second investigation merely duplicated the first. The employer unreasonably delayed in notifying the claimant that his employment was in jeopardy. The conduct in question no longer constituted a "current act" by the time the employer finally advised Mr. Rockwell that the conduct subjected him to discharge. Accordingly, the conduct in question cannot serve as a basis for disqualifying the claimant for unemployment insurance benefits. See 871 IAC 24.32(8). See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988). Because there was no current act, the administrative law judge need not determine whether the conduct in question constituted misconduct.

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

DECISION:

The Agency representative's March 6, 2007, reference 02, decision is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs