

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

REBEKAH L TYLAVSKY
Claimant

APPEAL NO. 10A-UI-09324-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

COUNCIL BLUFFS COMM SCHOOL DIST
Employer

OC: 05/16/10
Claimant: Appellant (2)

Section 96.5(2)(a) – Discharge for Misconduct
871 IAC 24.26(21) – Quit in Lieu of Discharge

STATEMENT OF THE CASE:

Rebekah Tylavsky filed a timely appeal from the June 17, 2010, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on August 16, 2010. Ms. Tylavsky participated and presented additional testimony from Donna Thomas, licensed special education teacher. The employer submitted a written waiver of its right to participate before the hearing. Exhibits A through F and D-1 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: Rebekah Tylavsky was employed by the Council Bluffs Community School District as a full-time paraprofessional from August 2009 until April 15, 2010, when James Dermody, Assistant Principal at Thomas Jefferson High School, placed her on administrative leave. The employer's decision to place Ms. Tylavsky on administrative leave was prompted by numerous allegations concerning Ms. Tylavsky's work conduct. These included an allegation that she pushed a student, an allegation that she stuck out her tongue at a student, an allegation that she had raised her voice when addressing a coworker, and an allegation concerning telephone contact with parents of students. Ms. Tylavsky denied the numerous allegations.

On April 25, 2010, Janet Reiners, Executive Director of Human Resources, notified Ms. Tylavsky that she was recommending to the district superintendent that Ms. Tylavsky's employment be terminated.

On May 10, 2010, Ms. Tylavsky met with Martha Bruckner, Ph.D., Superintendent. Dr. Bruckner notified Ms. Tylavsky that she intended to recommend to the School Board that Ms. Tylavsky's employment be terminated.

On May 11, 2010, Ms. Reiners contacted Ms. Tylavsky and offered her the option of resigning from the employment in lieu of imminent discharge from the employment. Ms. Reiners advised

Ms. Tylavsky that her resignation would prevent adverse information about Ms. Tylavsky being published to the community. Ms. Tylavsky elected to resign in lieu of being discharged. On May 14, 2010, Ms. Tylavsky executed a resignation form. On May 17, Nicole Smith, Human Resources Specialist, notified Ms. Tylavsky that the district accepted her resignation. On May 18, Marvin Arnpriester, President, Board of Education, notified Ms. Tylavsky that the resignation, effective May 11, 2010, would be acted upon by the Board on May 25, 2010. Thus ended Ms. Tylavsky's employment with the Council Bluffs Community School District.

REASONING AND CONCLUSIONS OF LAW:

871 IAC 24.26(21) provides:

Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:

(21) The claimant was compelled to resign when given the choice of resigning or being discharged. This shall not be considered a voluntary leaving.

In analyzing quits in lieu of discharge, the administrative law judge considers whether the evidence establishes misconduct that would disqualify the claimant for unemployment insurance benefits.

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 a discharge 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 waived its presence at the appeal hearing and has presented no evidence to support the allegations that Ms. Tylavsky was discharged for misconduct in connection with the employment. The evidence in the record establishes multiple allegations of misconduct, but nothing more than allegations. Misconduct cannot be established. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Tylavsky was discharged for no disqualifying reason. Accordingly, Ms. Tylavsky is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Tylavsky.

DECISION:

The Agency representative's June 17, 2010, reference 01, decision is reversed. The claimant quit in lieu of being discharged from the employment. The claimant involuntarily separated from the employment 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