

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TERESA RIVAS
Claimant

APPEAL NO. 10A-UI-09438-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

KNOWLEDGE LEARNING CORPORATION
Employer

**Original Claim: 05/09/10
Claimant: Appellant (2)**

Section 96.5-2-a – Discharge
871 IAC 24.32(8) – Current Act of Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from a representative's decision dated June 25, 2010, reference 02, which denied benefits. After due notice was issued, a telephone hearing was held on August 19, 2010. The claimant participated personally. Participating on behalf of the claimant was Ms. Erin Schneider, hearing representative Legal Aid Society. The employer participated by Ms. Linda Doty, director.

ISSUE:

At issue is whether the claimant was discharged for a current act of misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

Having considered all of the evidence in the record, the administrative law judge finds: Teresa Rivas was employed by the Knowledge Learning Corporation, doing business as KinderCare, from November 28, 2007, until May 5, 2010, when she was suspended and subsequently discharged on May 11, 2010. Ms. Rivas held the position of a pre-school lead teacher. The claimant was employed full-time and was paid by the hour. Her immediate supervisor was Jenny Seaton.

The claimant was suspended on May 5, 2010, and subsequently discharged based upon an allegation that the claimant had handled a child in a rough or unacceptable manner on April 14, 2010. On April 14, 2010, an anonymous caller had alleged that she had observed a KinderCare employee lifting a child from a tricycle by the child's arms. The caller indicated that she believed that the employee's actions were not appropriate. Although that information was conveyed to KinderCare's director at that time, the director did not act on the allegation. The claimant was not warned, counseled, or discharged by the employer until approximately 22 days later.

On April 14, 2010, Ms. Rivas and other daycare workers were in an outside playground area and were required to react to the conduct of a four-year-old boy who was endangering himself and other children. The child was operating a tricycle-like toy and repeatedly intentionally

running into other children with the object. While other workers attempted to remove children who were nearby, Ms. Rivas attempted to remove the child from the tricycle but was unable to do so, as the child grasped the tricycle-like toy with his hands and wrapped his legs around it as well. As Ms. Rivas attempted to lift the child away from the tricycle by his waist, the child squirmed, causing the tricycle toy to strike the back of the claimant's leg, causing her to stumble. It appears that the claimant's grasp on the child became dislodged momentarily, but Ms. Rivas prevented herself or the child from falling. Ms. Rivas believed that she was acting appropriately, believing that the extenuating circumstances of the incident required immediate action for the safety the child himself as well as other children who were nearby.

Although the director at the time of the April 14, 2010, incident was aware of the anonymous allegation against Ms. Rivas, Ms. Rivas was not warned or counseled and was allowed to continue in her employment. At a later date, another employee reported to management that the incident had occurred. Management believed that the previous director should have acted but did not do so. A decision was therefore made to terminate the previous director as well as Ms. Rivas. When questioned about the incident during the investigation, Ms. Rivas denied any wrongdoing.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes a current act of misconduct sufficient to warrant the denial of unemployment insurance benefits. It does not.

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 that may be serious enough to warrant the discharge of an employee may not necessarily be serious enough to warrant the 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 App. 1992).

While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based upon past acts. The termination of employment must be based upon a current act. See 871 IAC 24.32(8).

Allegations of misconduct without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling or unable 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 Department of Public Safety, 240 N.W.2d 682 (Iowa 1976).

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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

In this case, company management became aware of an allegation that Ms. Rivas had mistreated a child in the playground area on April 14, 2010. Although management was aware of the allegations at that time, no disciplinary action was taken against Ms. Rivas and the claimant was allowed to continue to work for the facility for approximately 22 more days before being suspended and subsequently terminated from employment. As the claimant was allowed to work and continue to perform her duties for 22 days after management was aware of the allegations, the administrative law judge concludes that the previous director either considered the matter and found no misconduct or chose not to act on the matter at all. The failure of management to take appropriate actions, however, cannot be attributed to the claimant. The administrative law judge therefore concludes that the claimant's subsequent suspension and discharge some 22 days later was not for a current act of misconduct.

The evidence in the record further establishes no disqualifying misconduct on the part of the claimant. The employer in this matter has chosen to rely solely on hearsay evidence in support of its position that Ms. Rivas acted inappropriately and should be discharged from employment under disqualifying conditions. In contrast, the claimant appeared personally and provided firsthand sworn testimony specifically denying any allegations of inappropriate conduct and providing reasonable explanations for the actions that she took on May 14, 2010. While hearsay is admissible in administrative proceedings, it cannot be accorded equal weight as

sworn, direct testimony. The administrative law judge finds the claimant to be a credible witness and finds that her testimony is not inherently improbable.

While the decision to terminate Ms. Rivas from employment may have been a sound decision from a management viewpoint, for the above-stated reasons the administrative law judge concludes that the claimant was not discharged for a current act of misconduct. Benefits are therefore allowed, provided the claimant meets all other eligibility requirements of Iowa law.

DECISION:

The representative's decision dated June 25, 2010, reference 02, is reversed. The claimant was discharged for no disqualifying reason. Unemployment insurance benefits are allowed, provided the claimant meets all other eligibility requirements of Iowa law.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

kjw/kjw