IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

VALERIE A GINDULIS
Claimant

BOYS CLUB OF DES MOINES
Employer

APPEAL NO. 12A-UI-05077-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 03/25/12
Claimant: Respondent (2-R)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the April 23, 2012, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on May 23, 2012. Claimant Valerie Gindulis participated. Sarah Walker of Merit Resources represented the employer and presented testimony through Jodie Warth, Chief Professional Officer. Exhibit One was 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: Valerie Gindulis was employed by the Boys and Girls Club of Central Iowa as a three-quarter time Youth Development Professional from April 2011 until March 30, 2012, when Jodie Warth, Chief Professional Office Coordinator, and Tim Rickers, Chief Operations Officer, discharged her from the employment. Ms. Gindulis' immediate supervisor was Roger Dahl, Unit Director. Ms. Gindulis spent part of her workday assisting kindergarten students with reading and math in the classroom. Ms. Gindulis spent the other part of her workday assisting with the after school club, where she helped club members with homework and led physical education and art activities. The Boys and Girls Club where Ms. Gindulis worked was located inside an elementary school in downtown Des Moines.

The final incident that triggered the discharge occurred on March 28, 2012. On that day, Ms. Gindulis was supervising after school club members in the cafeteria when she allowed a club member to leave the cafeteria and the facility without making certain that the club member was leaving with an authorized person and without making certain that the club member was scanned out at the front desk. The employer's safety protocol required that Ms. Gindulis only allow club members to leave with an authorized person over the age of 12. The employer's safety protocol also required that Ms. Gindulis count the number of children in her care when she arrived at an area of the facility and required that she recount the number of children in her

care before she left that area. On March 28, Ms. Gindulis took her group of club members from the cafeteria to an outdoor area without accurately counting the number of club members present before she left the cafeteria and without accurately counting the number of club members once she and the club members arrived at the outdoor area. When the mother of the departed club member arrived to collect her child, the employer had difficulty determining where the child was. When the front desk staff contacted Ms. Gindulis and asked for a count of the number of club members in her care, Ms. Gindulis provided an incorrect number that suggested the departed student should still be present at the facility. The child had in fact left with the child's father, but it took extra time to figure that out because Ms. Gindulis had not monitored who the child was leaving with and had provided an incorrect club member count. Had Ms. Gindulis followed the safety protocol, there would have been no question where the child was. On the date in question, Ms. Gindulis had 25 club members in her care, rather than her usual 15. Ms. Gindulis had alerted her supervisor to the high number of children in her care, but had not received any assistance in supervising the children.

The incident on March 28 followed another safety incident the day before. On March 27, Ms. Gindulis was supposed to supervise nine club members. The club members in her care at the time were kindergarteners and first graders. Ms. Gindulis took seven of the children outside and left two inside, where they were later discovered roaming the hall with the binder Ms. Gindulis was supposed to use to keep track of the club members in her care.

The two incidents on March 27 and 28 followed another violation of the safety protocol on March 14. On that day, Ms. Gindulis took the club members in her care outside for a walk around the building as a physical activity. Ms. Gindulis knew that she was supposed to give notice to the other staff when she moved the children from one area of the facility to another or when she took club members outside, but Ms. Gindulis did not do that when she took the children outside on March 14. The employer was concerned that if parents had arrived to collect their children, the employer would not have been able to readily account for and locate the children.

In 2012, the employer perceived a systemic lapse in ensuring club member safety at the downtown Des Moines facility. For that reason, during spring break in March 2012, the employer shut down the club and provided an extensive retraining in child safety protocols. Ms. Gindulis participated in the training.

Ms. Gindulis was aware that a couple of coworkers had recently been discharged for failing to follow the child safety protocol.

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.
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> 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 employer makes a very valid point that the whole purpose of the Boys & Girls Club is to keep children safe. Ms. Gindulis was aware of that, but elected to cut corners. On March 14, Ms. Gindulis cut corners by not giving proper notice that she was taking children outside or from one area outside to another area outside. On March 27, after participating in extensive retraining, Ms. Gindulis left two young children unsupervised. In addition, she left them in possession of the notebook she was supposed to be using to keep track of the children. On March 28, Ms. Gindulis let a child leave the facility without knowing who the child left with and then failed to keep an accurate account of the children in her care. While the administrative law judge noted the number of children in Ms. Gindulis' care that day, that factor does not explain why Ms. Gindulis skipped a head count or why she reported an inaccurate head count to the

front desk. It also does not explain why, when the rest of the children were presumably safe in the cafeteria, Ms. Gindulis let another child leave without knowing who the child was leaving with or whether the child had been scanned out. The fact that the final two incidents were back-to-back, the fact that Ms. Gindulis had just been retrained, and that fact that Ms. Gindulis knew of at least two coworkers who had been recently discharged for violating the child safety protocol, each suggest a willful disregard of the employer's interests. There is sufficient evidence in the record to establish a pattern of negligence indicating a willful disregard of the employer's interests.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Gindulis was discharged for misconduct. Accordingly, Ms. Gindulis is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer's account shall not be charged for benefits paid to Ms. Gindulis.

Iowa Code section 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code section 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received would constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The Agency representative's April 23, 2012, reference 01, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements. The employer's account will not be charged.

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James E. Timberland
Administrative Law Judge

_____
Decision Dated and Mailed

jet/pjs