

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MELISSA WILLIAMS
Claimant

APPEAL NO. 11A-UI-06440-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

RES-CARE IOWA INC
Employer

**OC: 04/03/11
Claimant: Respondent (2-R)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
871 IAC 24.32(9) – Suspension

STATEMENT OF THE CASE:

The employer filed a timely appeal from the May 4, 2011, reference 01, decision that allowed benefits based on an Agency conclusion that the claimant was discharged on April 1, 2011 for no disqualifying reason. After due notice was issued, a hearing was held on June 27, 2011. Claimant participated. Pam Worcester, R.N., Administrator, represented the employer. Exhibits One through Four were received into evidence.

ISSUE:

Whether the claimant was discharged or suspended 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: Melissa Williams is employed by Res-Care Iowa, Inc., as a part-time home health aide and Licensed Practical Nurse. Ms. Williams started the employment in 2009. On April 2, 2011, Jennifer Fisher, Executive Director, suspended Ms. Williams based on an allegation of elder abuse involving substantial theft from a client. The client in question is in his eighties, struggles with memory issues, but has been deemed competent by a Veterans Administration hospital. The allegation of misconduct was lodged by the client's daughter. The employer deemed it necessary to suspend Ms. Williams from her employment while the employer investigated the allegation. The client in question was only one of five clients assigned to Ms. Williams at that time.

At the time Ms. Fisher suspended Ms. Williams on April 2, Ms. Fisher specifically directed Ms. Williams *not* to contact the client about the allegation of wrongdoing or otherwise. *Within half an hour*, Ms. Williams contacted the client to discuss her suspension and the basis for it. The contact was upsetting to the client and the client's daughter contacted the employer with a complaint that the client's health had been negatively impacted by the contact. The employer was sufficiently concerned with the contact and its impact on the client that that employer contacted the client to ensure that he did not require medical attention.

On April 4, 2011, Administrator Pam Worcester, R.N., met with Ms. Williams to discuss the allegation and collect a statement from Ms. Williams. Ms. Williams provided a written statement. In her statement, Ms. Williams referenced concerns she had about the client's neighbors and her belief that the neighbors had been taking advantage of the client. Ms. Williams had previously reported such concerns to the employer. Ms. Williams also referenced that once the neighbors were no longer available to run errands for the housebound client, she had begun to run the errands as part of her home health aide duties. Ms. Williams referenced that the client had written a \$2,500.00 check to her, for her to cash and bring the money back to the client. That incident dated from November 30, 2010. Ms. Williams wrote that the client has sent her on similar bank runs for cash on two other occasions. In August 2010, the client had written a \$200.00 check to Ms. Williams. In February 2011, the client had written a \$500.00 check to Ms. Williams. Ms. Williams also referenced that the client would give her cash to do his shopping and that she would place the receipts in a box in his home. It was these receipts that, at least in part, gave rise to the client's daughter's allegation of wrongdoing. Ms. Williams referenced that the client had told her that his daughters had contacted him recently in an attempt to get money for their mother, from whom the client was estranged. Ms. Williams referenced that the client's daughter had later contacted her to inquire why she was allowing the neighbors to take advantage of the client. Ms. Williams had referred the daughter to Ms. Williams' employer. Ms. Williams referenced that one of the client's daughters had brought a safe for the client to use for the cash he kept at home. When one of the daughters questioned Ms. Williams about the checks made out to her, the client advised his daughter that he had directed Ms. Williams to get money for him and that she had merely complied with his request.

As part of the April 4 meeting, Ms. Worcester told Ms. Williams that the client's daughter was to deliver receipts that documented what the daughter thought to be theft from the client. On April 6, the client's daughter delivered the three checks and 48 receipts from Wal-Mart. The receipts included items clearly not intended for the client, such as feminine products and toilet seats. Twenty-seven of receipts contained items intended for the client combined with items intended for Ms. Williams.

On April 12, Ms. Worcester met with Ms. Williams to review the receipts. The employer's written code of conduct required that business and personal matters not be intermingled and that appropriate professional boundaries be maintained. Ms. Williams had not followed company policy by combining her Wal-Mart purchases with the client's Wal-Mart purchases on the same receipt at least 27 times. Ms. Worcester concluded this was the extent of the wrongdoing, aside from Ms. Williams' immediate disobedience of Ms. Fisher's April 2 directive not to contact the client.

On April 25, Ms. Williams contacted the employer to complain about the extended suspension. The employer decided to allow Ms. Williams to return to the employment, subject to a reprimand, and a directive that she not handle client funds until the matter had been fully investigated by the Department of Human Services. The employer had previously reported the matter to DHS. The employer had concluded that the client's daughters' allegations of wrongdoing were motivated in large part by the daughters' interest in gaining control of the client's affairs. The employer expects DHS will reach the same conclusion. The DHS matter is still pending. Ms. Williams continues with the employer.

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).

Iowa Administrative Code section 871 IAC 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 weight of the evidence in the record establishes misconduct in connection with the employment on April 2, 2011 that disqualifies Ms. Williams for unemployment insurance benefits. While the client's daughter's telephoned allegation of misconduct was insufficient to establish misconduct in connection with the employment that would disqualify Ms. Williams for unemployment insurance benefits, Ms. Williams' intentional interference with the employer's investigation on April 2 was sufficient by itself to establish misconduct. The evidence establishes that immediately after Ms. Williams was specifically directed not to contact the client, so as not to compromise the employer's investigation, Ms. Williams willfully and wantonly disregarded the employer's interests by contacting the client. Ms. Williams is unable or unwilling to provide a reasonable explanation for this conduct because the only reasonable explanation is that she wanted to influence the employer's investigation by influencing the client's participation in the investigation. This final incident of misconduct is wholly in keeping with the evidence indicating, at minimum, an extreme pattern of negligence involving Ms. Williams comingling the client's merchandise with her own in connection with at least 27 Wal-Mart transactions. The administrative law judge finds Ms. Williams' explanation of those transactions, along with the testimony regarding the checks written to her, implausible and not credible.

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 May 4, 2011, reference 01, decision is reversed. The claimant was suspended for misconduct. Effective April 3, 2011, the claimant is disqualified for benefits until she has worked in and been paid wages equal to 10 times her weekly benefit amount, provided she is otherwise eligible. The employer's account will not be charged for benefits paid to the claimant for the period of April 3, 2011 through June 18, 2011.

This matter is remanded 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs