IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

TEE WILDER Claimant **DEVELOPMENTAL SERVICES OF IOWA** Employer	**APPEAL 17A-UI-06338-DL-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 05/21/17** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the June 16, 2017, (reference 01) unemployment insurance decision that denied benefits based upon a discharge from employment. The parties were properly notified about the hearing. A telephone hearing was held on July 6, 2017. Claimant participated. She registered LF as a witness, but he was not called due to privacy issues and his intellectual disability. Claimant also registered Linda Schultz who was not available when called. Claimant's registered witness Rhonda Collier was not available when called and did not respond to the ALJ's voice mail message until after the hearing record had closed. Employer participated through human resource manager Gina Klein. Employer's Exhibits 1 through 4 were received.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed as a full-time direct support professional (DSP) through March 10, 2017. Her last day of work was January 31, 2017, when she was suspended and told, for the first time, that she was being investigated for her alleged conduct with or neglect of adult individual LF on Saturday, September 24, 2016. Direct support professional Rachael Brockway notified the employer of an issue about alleged neglect of LF within two weeks of that date. The matter was assigned to internal investigator Cassie Haven who was responsible for other investigations but did not triage or prioritize them but handled them on a first-in-first-out basis. Haven interviewed claimant on February 2, 2017. The employer did not provide redacted notes of any interviews, investigation materials or Haven's report.

On September 24, claimant worked the 3 p.m. to 11 p.m. shift in the Rawlins house for dependent adults and relieved front-line supervisor Dareios Gilmore.[1] (Employer's Exhibit 4)

[1] Claimant consistently referred to DSP Tiffany as the responsible party working the shift before hers but Tiffany was separated from employment on September 16, 2016, and the Rawlins house schedule does not reflect that she worked that day. (Employer's Exhibit 4) Claimant called Linda Schultz as a witness but she was unavailable at the

There were two individuals, LF and MC, in the home with a single staff member on each shift. LF has intellectual and developmental disabilities, and his care plan requires 24-hour supervision without alone time. When claimant arrived, LF told her that he had been to the hospital because he and NK "got into it." NK was a former client and lived next door in a non-DSI house. LF had borrowed money from someone (not NK) at the non-DSI house. He left his house without supervision at an undetermined time and went to the non-DSI house to pay back the money that "morning." NK answered the door, told him not to "come to this house" and "popped him" in the nose. Rhonda Collier worked at another house during the morning shift that day. LF called and asked her to take him to the hospital. She told him she was working so could not. LF told claimant no one would take him to the hospital so he called the police to take him for treatment. After telling claimant this, LF told her he wanted to go to the hospital again because his nose still hurt. Manager/program coordinator (PC) Troy Stolt told claimant not to take him. Claimant did not because she had been told not to go above a PC's head. Brockway relieved claimant at 11 p.m. so claimant reported to her what had happened. Claimant did not leave LF alone during her shift and the injury to his nose occurred prior to her arrival at work. Brockway reported to the employer that LF's injury while unsupervised occurred on claimant's shift. LF was still complaining about his nose on Monday when claimant arrived. Claimant suggested he file a report with the police. He did.

Claimant admits that on January 15, 2014, she was warned about having taken individual NK to get a tattoo without notice to the employer and told NK to wear long sleeves and not to say anything about it. (Employer's Exhibit 1)

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

When the record is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. *Schmitz v. Iowa Dep't Human Servs.*, 461 N.W.2d 603, 607 (Iowa Ct. App. 1990). Both the quality and the quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See, Iowa Code § 17A.14(1). In making the evaluation, the fact-finder should conduct a common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be fulfilled. *Schmitz*, 461 N.W.2d at 608.

The decision in this case rests, at least in part, upon the credibility of the parties. The employer did not present a witness with direct knowledge of the situation. No request to continue the hearing was made and no written statement of the individual was offered. Given the serious nature of the proceeding and the employer's allegations resulting in claimant's discharge from employment, the employer's nearly complete reliance on hearsay statements is unsettling.

Claimant's memory about the persons involved in the incident and the chronology of events appears to be mistaken, rather than deliberate. Even so, claimant did not vary from her position that LF was supervised during her entire shift. Thus, the administrative law judge concludes that the claimant's recollection of the events is more credible than that of the employer.

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number provided. Schultz's separation was in September 2015. The employer did not call Brockway, Haven or Gilmore as witnesses.

Iowa Code section 96.5(2)a provides:

> **Causes for disqualification.**
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> 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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Reigelsberger v. Emp't Appeal Bd.*, 500 N.W.2d 64, 66 (Iowa 1993); *accord Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000).

Misconduct "must be substantial" to justify the denial of unemployment benefits. *Lee*, 616 N.W.2d at 665 (citation omitted). "Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of benefits." *Id.* (citation omitted). …the definition of misconduct requires more than a "disregard" it requires a "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." Iowa Admin. Code r. 871–24.32(1)(a) (emphasis added).

Iowa Admin. Code r. 871-24.32(4) provides:

> (4) *Report required.* The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. 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. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

Iowa Admin. Code r. 871-24.32(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.

A lapse of 11 days from the final act until discharge when claimant was notified on the fourth day that his conduct was grounds for dismissal did not make the final act a "past act." Where an employer gives seven days' notice to the employee that it will consider discharging him, the date of that notice is used to measure whether the act complained of is current. *Greene v. Emp't Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct. App. 1988). An unpublished decision held informally that two calendar weeks or up to ten work days from the final incident to the discharge may be considered a current act. *Milligan v. Emp't Appeal Bd.*, No. 10-2098 (Iowa Ct. App. filed June 15, 2011).

Inasmuch as the employer knew about the issue in early October 2016, did not prioritize the investigation among others, waited three months to notify claimant she was suspended and the subject of an investigation that may result in disciplinary action. From there, the delay of over two months indicates the employer has not established a current or final act of misconduct. Because the act for which the claimant was discharged was not current and the claimant may not be disqualified for past acts of misconduct, benefits are allowed. Furthermore, given the lack of credible evidence, the employer failed to establish misconduct even were it current.

DECISION:

The June 16, 2017, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

dml/rvs