

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

NICOLE I SMITH
Claimant

APPEAL NO. 13A-UI-10409-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

COMMUNITY CARE INC
Employer

OC: 08/04/13
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Nicole Smith filed a timely appeal from the September 6, 2013, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on October 7, 2013. Ms. Smith participated personally and was represented by attorney Heather Carlson. Gery Oestern represented the employer and presented additional testimony through Angela Ganzer. Exhibits One and Two 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: The employer is a social services agency that provides services to disabled persons so that they can live as independently as possible in the community. Nicole Smith was employed by Community Care, Inc., as a full-time Home and Community Based Services (HCBS) Supervisor until August 9, 2013, when the employer discharged her for negligent performance of her work duties. Ms. Smith had started with the employer in 2008 as a Direct Support Professional and had been promoted to the HCBS Supervisor position in November 2011. Ms. Smith last performed work for the employer on May 17, 2013, at which time she commenced an approved maternity leave. Until June 2013, Ms. Smith's immediate supervisor was Tina McQuiston, HCBS Manager. In June 2013, Angela Ganzer, Director of HCBS, became Ms. Smith's immediate supervisor.

Ms. Smith's duties as HCBS Supervisor involved developing programming for 20 intellectually disabled clients, preparing an annual plan for the client, preparing quarterly reports to document each client's progress toward programming goals. Ms. Smith's duties included monitoring the health of clients and making certain that the homes were clean, safe and appropriate. Ms. Smith's duties included communicating with the families of clients. Ms. Smith was responsible for providing one-on-one training to subordinates regarding the needs of individual clients and she was responsible for facilitating other training of staff. Ms. Smith was responsible

for recruiting and disciplining staff. Ms. Smith was responsible for ensuring that client-related documentation and staff-related documentation was up to date.

At the time Ms. Smith commenced her maternity leave on May 17, 2013, she left 75 percent of her annual programming plans and quarterly reports regarding clients' progress undone. Ms. Smith made no other arrangements for the reports to be completed. At the time Ms. Smith commenced her maternity leave, she left dozens of incident reports on her desk, though she was responsible for forwarding those and following up on those in a timely manner.

When Ms. Ganzer took over as Ms. Smith's supervisor, three other HCBS Supervisors came to her with concerns about Ms. Smith's work performance and their additional concern about the substandard services clients would receive, and substandard supervision staff would receive, if Ms. Smith was allowed to return to the employment at the end of her approved leave. Ms. Ganzer interviewed one of Ms. Smith's subordinates, who complained of not being able to get a hold of Ms. Smith, lack of training and feedback, and lack of documentation of the goals the Direct Support Professional was supposed to be working on with the clients. Ms. Ganzer interviewed a fourth HCBS Supervisor who echoed the concerns raised by the other three supervisors.

On or about July 10, 2013, Ms. Ganzer met with Gery Oestern, Human Resources Director, and William Bonnes, Chief Executive Officer. The trio reviewed Ms. Smith's history of reprimands for failure to perform work, including a performance improvement plan, and decided to discharge Ms. Smith upon her return from the approved leave of absence on August 9, 2013. When Ms. Smith arrived for her first day back on August 9, 2013, the employer did indeed discharge her from the employment.

Ms. Smith was initially scheduled to return to work on June 29, 2013, but requested that the employer extend her leave to August 9, 2013 due to medical problems her newborn child was facing.

In making the decision to discharge Ms. Smith from the employment, the employer considered multiple prior reprimands for failure to complete duties, including documentation, in a timely manner. The prior reprimands included a performance improvement plan.

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).

The employer has presented sufficient evidence to establish that Ms. Smith engaged in a pattern of negligence in the performance of her duties. The problems came to the employer's attention in mid-June 2013. The problems included Ms. Smith leaving 75 percent of the annual plans and quarterly progress reports undone when she commenced her leave of absence. That information came out in the hearing upon cross-examination by the employer, after Ms. Smith had testified that the number of reports left undone was substantially less. The weight of the evidence indicates that Ms. Smith initially misrepresented the amount of work she left undone when she started her leave. The weight of the evidence indicates that Ms. Smith also left dozens of incident reports unaddressed when she started her leave. The amount of work

Ms. Smith left undone is a fairly clear indication that she had not been performing essential duties for some time. The work Ms. Smith left undone directly affected the clients she was supposed to be serving and the staff she was supposed to be supervising. The problems that came to the employer's attention in mid-June occurred in the context of multiple prior warnings for similar work deficiencies. The weight of the evidence indicates that Ms. Smith had the ability to perform the work, but elected not to do so in a timely and efficient process. The pattern indicates a willful disregard for clients', staff's, and the employer's interests.

The employer has provided a reasonable basis for the delay in discussing the final concerns with Ms. Smith. Had Ms. Smith returned from her leave on June 29, 2013, there would be no question that the discharge was for a current act, since the conduct only came to the employer's attention in the middle of June and the employer needed time to investigate. The delay beyond June 29, 2013 to August 9, 2013 was attributable to Ms. Smith's request to extend her leave while she dealt with her child's medical issues.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Smith was discharged for misconduct. Accordingly, Ms. Smith 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.

DECISION:

The agency representative's September 6, 2013, reference 01, decision is affirmed. 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs