

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

APRIL GLAVE
Claimant

APPEAL NO. 15A-UI-11613-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

NISHNA PRODUCTIONS INC
Employer

OC: 09/20/15
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the October 8, 2015, reference 01, decision that allowed benefits to the claimant provided she was otherwise eligible and that held the employer's account could be charged for benefits, based on an Agency conclusion that the claimant had been discharged on September 23, 2015 for no disqualifying reason. After due notice was issued, a hearing was held on November 3, 2015. Claimant April Glave participated. Suzanne Bassler of Equifax represented the employer and presented testimony through Jodi Skinner, Wendy Davies and Marcie Bisbee. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One, Three, Four, Six, Eight, Nine, Ten, Thirteen, and Fourteen into evidence. The administrative law judge took official notice of the fact-finding materials for the limited purpose of determining whether the employer participated in the fact-finding interview and, if not, whether the claimant engaged in fraud or intentional misrepresentation in connection with the fact-finding interview.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Nishna Productions, Inc. provides residential and vocational services to people with disabilities. The employer primarily serves adults. April Glave was employed as a full-time Supported Community Living Specialist from 2012 until September 23, 2015; when Wendy Davies, Director of Residential Services, discharged her from the employment. Kaylin Plumlee, Team Leader, was Ms. Glave's immediate supervisor. Ms. Glave performed her duties at an eight-bed licensed residential facility, Oak Street House. During the last few weeks of the employment, Ms. Glave worked the overnight shift from 11:00 p.m. to 9:00 a.m. Prior to that, Ms. Glave worked the evening shift of 3:00 p.m. to 11:00 p.m.

The conduct that triggered the discharge was an email message that Ms. Glave sent to a junior coworker, Katie Wagaman, on the morning of September 20, 2015. Ms. Glave copied Ms. Plumlee on the correspondence. Ms. Glave wrote:

Katie,

Please stop talking about your co-workers when we are not around.

The Gossip and name calling has got to stop, please.

The clients can hear you.

I have heard that you think the clients are scared of me.

I have heard that you think Lexi is mean to the clients.

I have heard that you think the clients don't respect Gabbi.

I have heard you think Don did nothing on the nights that he works here.

I have heard that you do not think TJ helps you.

I am only pointing this out so you can see that they hear you and they manipulate the staff by telling them what they hear.

I respect your opinion but the clients do not. I have heard from a few clients that it pisses them off when you talk like that and they don't want to be around you. That is their opinion.

But, we do not need to disrespect each other with useless gossip of our opinions about each other.

We are all different and that is okay. How boring would it be if we were all the same.

I am not trying to be bossy, disrespectful, or rude. It is simply what it is. I am asking you to stop gossiping and name calling. I am not talking behind your back. I am asking you directly. Please.

Later that same morning, Ms. Plumlee sent Ms. Glave an email message in which she stated that Ms. Glave's message had been out of line and that Ms. Glave should have brought her concerns to Ms. Plumlee first. Ms. Plumlee asked Ms. Glave to apologize to the coworker. Ms. Glave sent an apologetic email to the coworker. Ms. Glave also sent an email response to Ms. Plumlee in which she defended her actions in sending the initial email and asserted that her email was in line with prior emails from Ms. Plumlee wherein Ms. Plumlee had attempted to address negative gossip amongst the staff at Oak Street House. The employer suspended Ms. Glave from the employment and discharged her from the employment a few days later.

In making the decision to discharge Ms. Glave from the employment, the employer considered prior alleged conduct wherein the employer believed Ms. Glave had taken a disrespectful, heavy-handed approach when interacting with clients. The allegations came to light in response to a coworker's emailed complaint on August 21, 2015. At that time, the employer solicited additional complaints about Ms. Glave from other staff. The employer documented the complaints but did not document Ms. Glave's participation in the investigation that occurred at the time. The employer directed Ms. Glave to prepare a list of things she was going to do differently going forward. Ms. Glave fully complied and delivered the list on August 25, 2015. At that point, the employer moved Ms. Glave to the overnight shift, where the employer believed Ms. Glave would have less interaction with clients and coworkers.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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.

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. Huntoon v. Iowa Dep't of Job Serv., 275 N.W.2d 445, 448 (Iowa 1979).

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 evidence fails to establish a current act of misconduct. The evidence fails to establish misconduct in connection with Ms. Glave's September 20 email to the coworker. In the email, Ms. Glave merely expressed her concerns about the negative impact of gossip on the workplace. Ms. Glave addressed her concerns to the person who she believed was the source of the gossip. Ms. Glave's email represented at worst an error in judgment. The email itself had not been disrespectful, harassing, or intimidating. When the employer directed Ms. Glave to make amends for the error in judgment, Ms. Glave immediately did so. Ms. Glave also pointed out to the employer that her email had simply been in keeping with prior emails sent by the supervisor. While Ms. Glave's error in judgment does not rise to the level of misconduct.

The employer's earlier concerns consisted of allegations of misconduct, absent proof of misconduct. The employer did not have a single witness with firsthand knowledge of the prior alleged misconduct testify at the hearing. The employer's testimony revealed a one-sided approach to investigating and addressing Ms. Glave's workplace conduct. The employer faulted Ms. Glave even when she was fully compliant. The employer described Ms. Glave's August 25, 2015 written statement concerning how she was going to change her approach in the workplace as "maliciously obedient." That characterization, as well as the employer's failure to document Ms. Glave's contribution to investigations of her conduct, reveals an disciplinary approach to Ms. Glave that was fundamentally unfair. While Ms. Glave may be faulted for taking an approach that is perhaps overly rule-oriented and rigid, those characteristics do not rise to the level of misconduct in connection with the employment.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Glave was discharged for no disqualifying reason. Accordingly, Ms. Glave is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The October 8, 2015, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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