

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**MICHELLE L MULGREW**  
Claimant

**APPEAL NO. 13A-UI-05901-VST**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**EXCEPTIONAL PERSONS INC**  
Employer

**OC: 04/21/13  
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

The employer filed an appeal from the representative's decision dated May 9, 2013, reference 01, which held that the claimant was eligible for unemployment insurance benefits. After due notice, a telephone hearing was held on June 25, 2013. The claimant participated personally. The employer participated by Kira Kapman, the program manager, and Lisa Paterno, the human resources manager. The record consists of the testimony of Kira Kapman; the testimony of Lisa Paterno; the testimony of Michelle Mulgrew; and Employer's Exhibits 1-14.

**ISSUE:**

Whether the claimant was discharged for misconduct.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a private non-profit agency that serves individuals with disabilities. The claimant was hired on February 11, 2010. Her job was direct support professional. She was a full-time employee. Her last day of work was April 19, 2013. She was terminated on April 24, 2013.

The claimant was terminated because the employer felt that she had violated the code of ethics. She had violated one of her consumer's rights and engaged in unprofessional conduct. The incident cited by the employer occurred on February 11, 2013. The claimant allegedly had taken the consumer to a karaoke event in the community and dropped a plate of cake in front of the consumer. She then supposedly told him that he had to leave before he was finished eating the cake,.

The employer was also concerned by reports received after a training session had been conducted by Dr. Tom Pomerantz, an expert in this field of health care and social service. The employer took statements from other employees concerning actions of the claimant, which were witnessed by the other employees. None of these witnesses testified at the hearing.

## 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.

Misconduct that leads to termination is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. In order to justify disqualification, the evidence must establish that the final incident leading to the decision to discharge was a current act of misconduct. See 871 IAC 24.32(8) See also Greene v. EAB, 426 N.W.2d 659 (Iowa App. 1988). The employer has the burden of proof to show misconduct.

The claimant is eligible for unemployment insurance benefits. The administrative law judge can understand why the employer chose to terminate the claimant, based on the information received by the employer from other staff members. The employer had every business right to terminate the claimant if it felt that she was not following the code of ethics. The issue in this case, however, is whether the claimant is eligible for unemployment insurance benefits and not whether the employer had good cause to terminate the claimant. The employer bears the burden of proof that the claimant was discharged for a *current* act of misconduct.

The employer chose to introduce statements from other employees rather than calling them as witnesses to testify during the hearing. The claimant denied most of the allegations contained in

those statements. This makes the employer's evidence on misconduct hearsay evidence. While hearsay evidence is allowed in administrative hearings, it has limited value in proving misconduct.

Findings must be based upon the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs. Iowa Code Sec. 17A.14(1). Allegations of misconduct 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 Iowa Court of Appeals set forth a methodology for making the determination as to whether hearsay rises to the level of substantial evidence. In Schmitz v. Iowa Department of Human Services, 461 N.W.2d 603, 607-608 (Iowa App. 1990), the Court required evaluation of the "quality and quantity of the [hearsay] evidence to see whether it rises to the necessary levels of trustworthiness, credibility and accuracy required by a reasonably prudent person in the conduct of their affairs." To perform this evaluation, the Court developed a five-point test, requiring agencies to employ a "common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better evidence; (4) the need for precision; (5) the administrative policy to be fulfilled." Id. At 608.

The employer's hearsay evidence was contradicted by the claimant in her sworn testimony. Because the employer's witnesses did not testify, the administrative law judge did not have the ability to weigh the sworn testimony. Even if the employer provided direct testimony, the claimant's discharge is based on incidents that happened well before the claimant was actually terminated. This raises a serious question of whether the claimant was terminated for a current act of misconduct. The karaoke incident occurred in February 2013. This would not qualify as a current act of misconduct. The administrative law judge concludes that the employer has not provided enough evidence that the claimant was terminated for a current act of misconduct. Benefits are allowed if the claimant meets all eligibility requirements.

**DECISION:**

The decision of the representative dated May 9, 2013, reference 01, is affirmed. Unemployment insurance benefits are allowed if the claimant meets all eligibility requirements.

---

Vicki L. Seeck  
Administrative Law Judge

---

Decision Dated and Mailed

vls/css