

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TRACY J MOORE
Claimant

APPEAL NO. 08A-UI-01716-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**BOYS CLUB OF DES MOINES
BOYS & GIRLS CLUBS OF CENTRAL IOWA**
Employer

**OC: 01/06/08 R: 02
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

Tracy Moore filed a timely appeal from the February 8, 2008, reference 01, decision that denied benefits. After due notice was issued, a hearing commenced on March 25, 2008 and concluded on March 28, 2008. Ms. Moore participated and presented additional testimony from Art Ousley. Barb Hamilton of TALX UC eXpress represented the employer and presented testimony through Director of Operations Dave Klinkenborg, Logan's Club Director Dawn Narciss, and Logan's Club Assistant Director Lucas Sampson. Exhibits One through Eight and Exhibit A were received into evidence. At the request of the parties, the administrative law judge took official notice of the documents submitted for, or generated in connection with, the fact-finding interview and marked Department Exhibit D-1 for identification purposes.

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: Tracy Moore was employed by the Boy & Girls Clubs of Central Iowa as a part-time Youth Development Professional from January 23, 2006 until January 10, 2008, when Dave Klinkenborg, Director of Operations for the Boys & Girls Clubs of Central Iowa, discharged her. Ms. Moore's immediate supervisor was Dawn Narciss, Director of the Logan's Boys & Girls Club in Des Moines.

Ms. Moore ordinarily worked with children in the kindergarten to second grade age range, for whom she planned and led activities. On January 8, 2008, Ms. Moore was asked to work in the Teen Room. On January 9, Ms. Moore was again asked to work in the Teen Room. The Teen Room had a television viewing area, a ping-pong table, a pool table, and computers.

The final incident that prompted the discharge occurred on January 9, 2008. On that day, a teenage boy and teenage girl engaged in horseplay and then engaged in assaultive behavior

toward one another in the Teen Room. Ms. Moore was supervising the Teen Room at the time. One or two Junior Staff were also present in the Teen Room. The Junior Staff were TaeVon Harris, 17 years old, and Bryce Shabazz, 18 years old. Both Junior Staff members are still employed by the Boys & Girls Club, but did not testify at the appeal hearing. The Junior Staff were teenage members of the Boys & Girls Club. The Club employed the Junior Staff to assist the Junior Staff with gaining job skills. Thirty to thirty-five club members were present in the Teen Room.

That afternoon, the young man involved in the horseplay and assaultive behavior, Alonte, had been initiating verbal sparring matches with various club members. Ms. Moore had asked the young man to cease the behavior, but he continued the behavior. At some point Assistant Director Lucas Sampson passed through the Teen Room. Alonte and several other children were in the television viewing area of the Teen Room and were involved in a dispute over which channel to watch. Mr. Sampson put the matter to a vote and then exited the room. Ms. Moore was seated at a desk in the middle of the room and was able to see the television viewing area. Alonte began to tease a teenage girl, Kiera, while the two sat on a couch in the television viewing area. Alonte became rougher in his teasing/horseplay, which upset Kiera, who responded in self-defense by scratching Alonte's chest. Alonte presented himself at Ms. Moore's desk and indicated that he had been scratched by Kiera. Alonte also informed Ms. Moore that he was going to "beat [Kiera's] ass." Kiera and others had already exited the Teen Room. Ms. Moore directed Alonte to go to the office to receive first aid for the scratch on his chest. Instead, Alonte chased Kiera through the halls of the Boys & Girls Club.

Shortly thereafter, Alonte and Kiera both returned to the Teen Room and Alonte commenced assaulting Kiera. Kiera attempted to gain protection near Ms. Moore. Alonte continued to assault Kiera and Kiera continued to attempt to defend herself. Alonte's actions included pulling Kiera's hair, grabbing her head, and pushing her head into a table. Ms. Moore did not intervene to stop the altercation. One or more Junior Staff stepped in to stop the assault and escorted Alonte to the office. Kiera left the Boys & Girls Club and returned with her parents. Direct Dawn Narciss attempted to calm the parents and conducted an investigation of the matter. Pursuant to the investigation, Ms. Narciss obtained statements from the Junior Staff and from Ms. Moore. Another employee spoke with Kiera and her parents. Kiera provided a verbal statement which the employee reduced to writing.

Ms. Moore had received training to assist her with supervising and redirecting the younger child with whom she usually worked. Ms. Moore had not received training specific to dealing with teenagers in the Teen Room.

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 had the ability to produce more direct and satisfactory evidence than was actually produced. The employer had a record of video surveillance. The employer refused to make a copy of the video surveillance material available to the claimant. The administrative law judge notified the employer that, pursuant to the claimant's right to due process, the video surveillance material would not be received into evidence unless the claimant was provided a copy she could use to prepare for the hearing. Rather than provide the claimant with a copy of the material so she could use it to prepare for the hearing, the employer elected to withdraw the video surveillance material as a proposed exhibit. The Appeals Section returned the video surveillance material to the employer. The employer had the ability to present testimony from the Junior Staff personnel, who continue in the employ of the Boys & Girls Club. The employer

had the ability to present testimony from Kiera, who is now in the employ of the Boys & Girls Club. The employer has both refused to provide available direct and satisfactory evidence and failed to otherwise present available direct and satisfactory evidence. Under these circumstances, misconduct cannot be established. See 871 IAC 24.32(4).

The evidence in the record is sufficient to establish that Ms. Moore was negligent in supervising the Teen Room on January 9, 2008. However, this one incident of negligence would not constitute misconduct sufficient to disqualify Ms. Moore for unemployment insurance benefits. The evidence in the record does not establish negligence and/or carelessness so recurrent as to indicate a willful and/or wanton disregard of the employer's interests. The evidence indicates that the employer put Ms. Moore to work in the Teen Room with insufficient training and insufficient support.

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

DECISION:

The Agency representative's February 8, 2008, reference 01, decision is reversed. 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

jet/pjs