

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TRACY J CLAY
Claimant

APPEAL NO: 06A-UI-08633-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

JACKSON RECOVERY CENTERS INC
Employer

**OC: 07/23/06 R: 01
Claimant: Respondent (1)**

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

STATEMENT OF THE CASE:

Jackson Recovery Centers filed a timely appeal from the August 16, 2006, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on September 12, 2006. At the time of the hearing, claimant Tracy Clay was not available at the telephone number she had provided for the hearing and did not participate. Barb Buss of Cambridge Integrated Services represented the employer and presented testimony through Janelle Tomason. The administrative law judge took official notice of the Agency's records regarding benefits disbursed to the claimant.

The claimant contacted the administrative law judge at 1:35 p.m., after the hearing record had closed and the participants dismissed. The claimant indicated at that time that she had taken her child to a doctor appointment at 12:15 p.m., that the appointment had been scheduled two months in advance, that the clinic was running behind, and that the claimant was not able to get home in time to be available for the 1:00 p.m. hearing. In light of the fact that the claimant knew about the doctor's appointment at the time she received the notice for the hearing scheduled just 45 minutes later and had not acted reasonably by requesting a postponement of the hearing, the administrative law judge concluded that the claimant had not demonstrated good cause to reopen the record.

ISSUE:

Whether the claimant was discharged for misconduct that disqualifies her for unemployment insurance benefits.

Whether, in light of claimant's child's prior hospitalization after exposure to scabies and the claimant's concern about further exposing her child, the claimant's refusal to transport a patient suspected of having scabies amounted to insubordination that would disqualify her for benefits. It did not.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Tracy Clay was employed by Jackson Recovery Centers as a full-time Addiction Tech from August 26, 2004 until July 26, 2006, when Director Janelle Tomason discharged her. The employer is a residential substance abuse treatment facility for pregnant women or women with children.

The final incident that prompted the discharge occurred on the weekend of July 22-23, when Ms. Clay refused to transport a resident suspected of having scabies for treatment at a local clinic. The incident came to the employer's attention the same day, when another Addiction Tech telephoned Director Janelle Tomason at home. Ms. Tomason spoke with Ms. Clay the day of the incident. Ms. Clay indicated that she "drew the line" at scabies and would not transport the resident. Another Tech transported the resident for treatment.

On July 26, Ms. Tomason again spoke with Ms. Clay about the incident. At that time, Ms. Clay told Ms. Tomason that she had been unwilling to transport the resident because her own child had previously had a reaction to being exposed to scabies and had required hospitalization as a result of the exposure. Ms. Tomason told Ms. Clay that transporting residents was part of her responsibilities and discharged Ms. Clay from the employment.

Ms. Clay had not previously refused to provide services to a resident or follow the employer's instructions. In November 2005, Ms. Clay had expressed to another Addictions Tech her apprehension about providing care to a HIV positive resident and the resident's child. Ms. Clay had not refused to provide care to the resident. Thereafter, the employer provided Ms. Clay with information and training regarding transmission of HIV and universal precautions to prevent the spread of HIV or other communicable diseases. The employer made surgical masks, gloves, and gowns available to employees to prevent the spread of disease.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Clay was discharged for misconduct in connection with the employment. It does not.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 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).

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).

Continued failure to follow reasonable instructions constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See Woods v. Iowa Department of Job Service, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See Endicott v. Iowa Department of Job Service, 367 N.W.2d 300 (Iowa Ct. App. 1985).

The evidence in the record establishes that the employer's request that Ms. Clay transport the resident for treatment was reasonable. The resident was in the care of the facility and the facility had an obligation to facilitate appropriate medical care. However, under the circumstances, Ms. Clay's refusal to transport the resident was also reasonable. Ms. Clay did not simply refuse to perform an assigned duty. Instead, Ms. Clay weighed the employer's request that she transport the resident against the health of her child. Ms. Clay's concern about the health of her child was not based merely on a hypothetical possibility of her child becoming ill. Instead, Ms. Clay told the employer that her concern was based on the very real experience of her child previously being exposed to scabies and the exposure requiring that the child be

hospitalized. The evidence further establishes that this refusal to follow the employer's directive was an isolated incident, not part of an ongoing or continued refusal to follow the employer's instructions.

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

DECISION:

The Agency representative's August 16, 2006, 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

jet/pjs