

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

AMY J CAMPBELL
Claimant

APPEAL NO. 08A-UI-03167-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

A I D CENTER
Employer

**OC: 03/18/07 R: 12
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

Amy Campbell filed a timely appeal from the March 28, 2008, reference 04, decision that denied benefits. After due notice was issued, a hearing was commenced on April 15, 2008 and concluded on April 18, 2008. Ms. Campbell participated and presented additional testimony through Todd Traum, Jan Olson and Troy Trillman. Donna Jensen, Chief Financial Officer, represented the employer and presented additional testimony through Brenda Noll, Vice President. Exhibits A through F 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: Amy Campbell was employed by A I D Center as a full-time case manager/property manager from May 9, 2007 until March 10, 2008, when Brenda Noll, Vice President, and Jan Kliamiades, President and Chief Executive Officer, discharged her. Ms. Noll was Ms. Campbell's immediate supervisor. The employer is a non-profit social services agency. Ms. Campbell worked at the employer's Bridges West facility, a transitional living program for homeless adults and children. The Bridges West facility has 22 efficiency apartment type units. A bathroom is shared by two units and located between the units. Ms. Campbell's case management duties involved meeting with clients/residents to help them gain skills that would help them obtain a job and achieve self-sufficiency. Ms. Campbell's property management duties involved making certain rooms were clean and ready for residents to occupy, facilitating maintenance, and dealing with contractors. Ms. Campbell's duties also required her to be on-call outside of her regular working hours. Throughout most of her employment, Ms. Campbell was the only case manager/property manager at the Bridges West facility. At the end of January 2008, the employer hired a second case manager/property manager for the Bridges West facility, Jan Olson. The employer also employed a part-time maintenance person. The employer did not staff the facility with a case manager/property manager after 8:00 p.m. or on weekends. The employer contracted with a security agency to provide after-hours security services at Bridges West.

The final event that prompted the discharge concerned Ms. Campbell's handling of an after-hours incident at Bridges West during the weekend of Friday, March 7, through Sunday, March 9, 2008. Ms. Campbell was the designated on-call person for that weekend. At 11:00 p.m. on Friday, March 7, Security Coordinator Todd Traum telephoned Ms. Campbell to notify Ms. Campbell that there was a problem at Bridges West concerning a backed up bathroom sewer line on the lower level of the facility. Water had soaked the carpet in two or three units. A resident had brought the matter to Mr. Traum's attention. The problem was caused by a child putting too much toilet paper in a toilet. Ms. Campbell instructed Mr. Traum to tell the residents not to use any water. Ms. Campbell told Mr. Traum that she would contact Service Master and Roto-Rooter and have them come to the facility to address the problem. Roto-Rooter agreed to come out and address the plumbing issue and arrived in a timely manner. Mr. Traum and Ms. Campbell made several additional calls to one another throughout the night to update one another.

When Ms. Campbell contacted Service Master to remove water from the floors, that company refused to come to the facility because of a prior issue with the employer. Ms. Campbell continued to search for a company to come clean up the water that had collected on the carpeted floors, but had difficulty because of the lateness of the hour. Eventually, Ms. Campbell decided to call a company that had provided general carpet cleaning services at the facility. Ms. Campbell had Mr. Traum provide her with that company's telephone number from the rolodex at Bridges West. Ms. Campbell contacted the carpet cleaning company and it responded to the facility in a timely manner.

Mr. Traum was not troubled in any way by Ms. Campbell's handling of the matter. Mr. Traum had provided security services at Bridges West over an extended period. Though Mr. Traum was not on the Bridges West staff, Mr. Traum believed his security duties included assisting with after-hours maintenance emergencies, regardless of whether he was providing the service at Bridges West or another facility. Ms. Campbell told Mr. Traum that she had been ill and that she had her children with her for the weekend. Ms. Campbell has children who are ten and seven years old. The children were in bed asleep when Mr. Traum contacted Ms. Campbell. There was no one else available to care for the children on short notice. Ms. Campbell asked Mr. Traum whether he thought she needed to come to the facility. Mr. Traum indicated that it was necessary to get the contractors onsite, but that he did not think it was necessary for Ms. Campbell to come in. Mr. Traum was onsite and available to let the contractors into the facility.

During the evening, Ms. Campbell spoke with the affected residents by telephone. Ms. Campbell had given Mr. Traum instructions to re-settle the few affected residents in other units within the facility. One resident's child was at some point playing in the water on the floor. Ms. Campbell told the resident not to allow her child to play in the water. Others at the facility had provided the same directive. Ms. Noll had previously counseled Ms. Campbell to encourage the adult residents to be responsible, self-sufficient, and not to enable dependent behavior.

Ms. Campbell's final contact with Mr. Traum was at 4:00 a.m., when she contacted him for an update. Mr. Traum indicated that the contractors had come and gone and that the residents were sleeping.

During the evening of March 7, Ms. Campbell had twice attempted to contact her supervisor, Vice President Brenda Noll, to notify Ms. Noll of the incident and to ask for guidance/assistance in dealing with the incident. Ms. Campbell made the calls to Ms. Noll's personal cell phone.

Ms. Campbell made her first call to Ms. Noll at 11:38 p.m., but had to leave a message. Ms. Campbell told Ms. Noll that there was water on the lower level, that she was not sure where it was coming from, that Roto-rooter was onsite. Ms. Campbell asked whether she should have someone come to remove the water. Ms. Campbell asked this question because she knew it had been expensive to have water removed in connection with a prior incident. Ms. Campbell made a second attempt to reach Ms. Noll at 12:30 a.m. Ms. Campbell was not able to speak with Ms. Noll, but left a message. Ms. Campbell said she had unfortunately been forced to make the decision to summon someone to remove the water and believed this was necessary because the incident concerned sewer water.

Ms. Noll did not respond to either message until 7:12 a.m. on Saturday, March 8, when she contacted Ms. Campbell at the on-call cell phone. During this conversation, Ms. Noll asked Ms. Campbell if she had gone to the facility. Ms. Campbell said she had not, but that Mr. Traum had been at the facility to let the contractors in and that Mr. Traum had facilitated moving the affected residents. Ms. Noll told Ms. Campbell that it would have been more appropriate for a staff member to be onsite to address the incident. Ms. Noll asked Ms. Campbell if pictures had been taken and Ms. Campbell indicated pictures had not been taken. Ms. Noll told Ms. Campbell that Ms. Noll would be going to the facility. Ms. Noll did not direct Ms. Campbell to go to the facility. On Saturday afternoon, Ms. Noll went to the facility. While Ms. Noll was there, she took photos of the affected area and observed that the carpet cleaning company had fans running to dry out the carpet. Ms. Noll called Ms. Campbell after she visited the facility. During this conversation, Ms. Noll asked Ms. Campbell if she had gone to the facility yet. Ms. Campbell indicated she had not. At no point did Ms. Noll direct Ms. Campbell to go to the facility. On Sunday, Ms. Noll again went to the Bridges West facility. Ms. Noll observed that the fans were still running to dry the carpet. Ms. Noll did not speak with any residents. On Monday morning, Ms. Noll and Jan Kliamiades, President and Chief Executive Officer, decided to discharge Ms. Campbell because she had not gone to the facility over the weekend.

A month into her employment, Ms. Campbell had handled a flooding situation at the Bridges West facility. That incident occurred on a Sunday afternoon. There had been no security guard on duty. Ms. Campbell had gone to the facility to address the matter. After Ms. Campbell had been there that afternoon, she learned that a pizza had caught fire in an oven. By the time Ms. Campbell learned of that incident, the fire department had already been to the facility to address the matter and Ms. Campbell did not return to the facility.

The employer provided a copy of its updated attendance policy in response to a request from a Workforce Development representative in connection with the March 27, 2008 fact-finding interview. The employer had amended the attendance policy and procedure to add the following paragraph:

If an employee has a position with on-call duties, that employee must be on site in the event of an emergency unless previous arrangements have been made with their supervisor. Emergencies would constitute anything that would be harmful to the well-being of the clients or the building. Any absence without arrangements will be considered unexcused and disciplinary action may be taken, up to and including termination.

Though the amended policy indicates on its face that it was revised in January 2007, this amended policy did not appear in the handbook materials Jan Olson received when she started her employment at the end of January 2008. The employer had not distributed this amended policy to Ms. Campbell or Ms. Olson. In addition, the employer had not reviewed the policy statement with Ms. Campbell or Ms. Olson.

In making the decision to discharge Ms. Campbell, Ms. Noll considered prior reprimands that had been issued to Ms. Campbell. On November 12, 2007, Ms. Noll had placed Ms. Campbell on a performance improvement plan. At that time, the employer alleged that Ms. Campbell was deficient in meeting with clients, keeping records, following up with notices, keeping rooms ready, preserving confidentiality, relying on hearsay information rather than discerning facts, and following through with community relations issues. The reprimand consisted of a series of allegations without reference to particular incidents. On December 19, Ms. Noll had counseled Ms. Campbell that the employer's policy prohibited Ms. Campbell from having guests onsite during working hours. This counseling was prompted by a resident's allegation that Ms. Campbell had allowed an adult male to be onsite, that the resident was uncomfortable with the presence of the adult male. The resident further alleged that Ms. Campbell's guest was a resident in a residential treatment program at the time of the visit. Ms. Noll cannot recall additional details concerning the allegation. Ms. Campbell's boyfriend, Troy Trillman, had been at the Bridges West facility while Ms. Campbell was working approximately five times. The only extended visit occurred when Ms. Campbell had gone to work with an injured ankle and on crutches. The office had just been painted and furniture had been moved around. Mr. Trillman stayed to move the furniture to its proper place because Ms. Campbell was unable to move the furniture. On those occasions when Mr. Trillman visited, Ms. Campbell did not violate any client confidences. On one occasion, Ms. Campbell specifically asked Mr. Trillman to excuse himself while Ms. Campbell addressed a matter with a resident.

The relationship between Ms. Noll and Ms. Campbell had been tense during the two weeks that preceded the March 7 water incident. During February, Ms. Noll had changed Ms. Campbell's work hours from 9:00 a.m. to 6:00 p.m., Monday through Friday, to include some 11:00 a.m. to 8:00 p.m. shifts. The change was in response to Ms. Olson being hired. Ms. Noll thought it appropriate to have the two case managers/property managers alternate work times. Ms. Campbell thought it was unfair that her tenure with the employer did not provide her with any seniority rights vis-à-vis the work schedule.

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's allegation of misconduct is based on the employer's assertion that Ms. Campbell was negligent in performing her duties over the weekend of March 7-9, 2008 by failing to physically go to the Bridges West facility. The weight of the evidence in the record fails to support the employer's allegation. While the employer may have preferred that Ms. Campbell had gone to the facility to address the water backup, the employer failed to give a clear directive to Ms. Campbell. The evidence indicates that Ms. Campbell attempted to contact Ms. Noll for guidance and assistance, but that Ms. Noll was unavailable. The evidence indicates that Ms. Campbell was left to exercise her own judgment about how best to address the situation. Ms. Campbell could not disregard the needs of her young children, who had gone to bed for the evening and who had no one else available to care for them. The weight of the evidence indicates that Ms. Campbell considered both her work responsibilities and her home responsibilities, as well as the resource available to her through the presence of Mr. Traum at the Bridges West facility, and took responsible action to address both situations as well as she could under the circumstances. Perhaps Ms. Campbell should have summoned her family, who resided some 45 minutes away. However, if Ms. Campbell erred in failing to summon her family, this was but a good faith error in judgment and not misconduct. The weight of the evidence indicates that Ms. Campbell was diligent in facilitating the cleanup at Bridges West and continued to be diligent until she confirmed the matter had been resolved as much as it

could be. Ms. Noll had an opportunity on Saturday morning to instruct Ms. Campbell to go to the facility, but did not do that. Instead, Ms. Noll told Ms. Campbell that she herself would be going to the facility. Ms. Campbell reasonably relied upon Ms. Noll's statement. There was little for Ms. Noll to do when she arrived at the facility. This was a testament to Ms. Campbell's efforts overnight to address the matter. Ms. Noll had another opportunity to tell Ms. Campbell on Saturday afternoon that she should go to the facility, but she failed to do that. When Ms. Noll went to the facility on Sunday, there was nothing for her to do there. Yes, it would have been better if Ms. Campbell had gone to the facility at some point over the weekend. Her failure to do so was a good faith error in judgment, not negligence and not misconduct. See 871 IAC 24.32(1)(a). The evidence fails to present a "current act" of misconduct. See 871 IAC 24.32(8). Accordingly, Ms. Campbell was discharged for no disqualifying reason. Ms. Campbell is eligible for unemployment insurance benefits, provided she is otherwise eligible. The employer's account may be charged.

The weight of the evidence in the record indicates that the employer's allegations concerning prior incidents do not amount to anything more than allegations. The employer has presented insufficient evidence to support or corroborate its allegations that Ms. Campbell was negligent or careless in the performance of her duties.

DECISION:

The Agency representative's March 28, 2006, reference 04, 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/css