

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**KAREN Y SCHOENING**  
Claimant

**APPEAL NO. 12A-UI-00365-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**IA DEPT OF HUMAN SVCS/GLENWOOD**  
Employer

**OC: 12/11/11  
Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

Karen Schoening filed a timely appeal from the January 10, 2012, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on February 8, 2012. Ms. Schoening participated. David Williams of TALX represented the employer and presented testimony through Tricia Austin and Kim O'Connor. Exhibits One through Six were received into evidence.

**ISSUES:**

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

Whether the discharge was based on a current act.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Karen Schoening was employed by the Iowa Department of Human Services as a full-time food service worker at the Glenwood Resource Center from 2001 until December 12, 2011, when the employer discharged her from the employment. The Glenwood Resource Center serves persons with intellectual disabilities and other disabilities. Ms. Schoening worked in the employer's ingredient room and cafeteria. Ms. Schoening last performed work for the employer on November 5, 2011, at which time she was suspended with pay pending completion of an investigation. Ms. Schoening's immediate supervisor was Peggy Sukup, Food Production Supervisor.

On September 28, 2011, Tricia Austin, Food Service Director, was in the process of investigating alleged abuse of a client when she learned of an allegation that Ms. Schoening had mistreated a coworker, Carl Tackett. The allegation was that Ms. Schoening had used a mean tone of voice toward Mr. Tackett, who worked in the dish hall area of employer's kitchen. Mr. Tackett was known in the workplace to be an insecure, emotionally fragile, easily upset and easily overwhelmed person. Mr. Tackett was prone to crying and prone to utterances indicating that he felt overwhelmed by work. Mr. Tackett was an intellectually "slow" person.

Once Ms. Austin learned of the allegation concerning Ms. Schoening and Mr. Tackett, she notified Investigator Kim O'Connor. On October 2, Ms. O'Connor interviewed Mr. Tackett, who indicated that Ms. Schoening had spoken to him in a mean tone at times. Mr. Tackett could not be specific about what Ms. Schoening had said, but indicated that she would tell him what to do. Ms. Schoening had no supervisory authority over Mr. Tackett's employment.

On October 12, Ms. O'Connor received the formal directive to commence an investigation into the allegation concerning Ms. Schoening. Ms. O'Connor developed a questionnaire to use when questioning employees.

On October 21, Ms. O'Connor interviewed six employees. Several of those employees told Ms. O'Connor that they had seen or heard Ms. Schoening and others mocking Mr. Tackett. Employees interviewed on October 21 indicated that Ms. Schoening would mockingly rub her eyes, act like she was crying, and mockingly protest that the work was never going to get done. The employees interviewed on October 21 indicated that others engaged in similar mocking behavior directed at Mr. Tackett, but that Ms. Schoening was the worst.

On October 24, Ms. O'Connor resumed her investigation and interviewed two additional employees. One of the employees initially indicated no knowledge of Ms. Schoening mistreating Mr. Tackett. That employee then indicated that Ms. Schoening treated Mr. Tackett differently, that she used a different tone of voice with him and told him what to do. The second employee interviewed on October 24 alleged fear of Ms. Schoening based observations of Ms. Schoening's conduct.

On October 26, Ms. O'Connor interviewed one additional employee. That employee indicated that Ms. Schoening tended to use a harsh tone with Mr. Tackett.

On November 1, Ms. O'Connor resumed her investigation and interviewed four employees. On November 2, Ms. O'Connor interviewed nine employees. Some reported having little contact with Ms. Schoening and Mr. Tackett, but most indicated having heard Ms. Schoening and others making crying gestures directed at Mr. Tackett.

Ms. Schoening had been off work the last week of October and returned on November 1 or 2.

On November 5, Peggy Sukup, Food Production Supervisor, notified Ms. Schoening that she was suspended with pay. Ms. Sukup served Ms. Schoening with written notice of the suspension. Ms. Sukup told Ms. Schoening that she did not know why Ms. Schoening was being suspended.

On November 7, when Ms. O'Connor resumed her investigation and interviewed Ms. Schoening and one other employee. Ms. O'Connor told Ms. Schoening that she was investigating employee's interactions with Mr. Tackett, but did not tell Ms. Schoening that she was a focus of the investigation. Ms. Schoening told Ms. O'Connor that she did have contact with Mr. Tackett and that she had engaged with others in mocking Mr. Tackett. Ms. Schoening told Ms. O'Connor that she was not tolerant of Mr. Tackett's emotional behavior and that no one would stand by and say that it was okay. Ms. Schoening told Ms. O'Connor that she would tell Mr. Tackett to stop it, to get a grip, and to calm down. Ms. Schoening told Ms. O'Connor that 50 percent of the employees acted the same toward Mr. Tackett.

On November 14, Ms. O'Connor submitted her investigation report for review by DHS administration. On or about November 28, Ms. O'Connor met with Ms. Austin and Superintendent Kelly Brodie. They wanted Ms. O'Connor to conduct further interviews.

On November 30, Ms. O'Connor recommenced her investigation and interviewed additional staff. These included supervisors and regular staff. One person interviewed was another employee alleged to have mistreated Mr. Tackett. That person denied having engaged in such conduct, but alleged that she had been the victim of Ms. Schoening's bossing earlier in her employment. Ms. O'Connor interviewed a supervisor, who indicated there had been previous problem interactions between Ms. Schoening and Mr. Tackett more than a year earlier that had been handled by verbally counseling Ms. Schoening. Ms. O'Connor interviewed a cook, who indicated that a few other employees besides Ms. Schoening had engaged in the mocking crying gesture directed at Mr. Hackett.

On December 1, Ms. O'Connor interviewed or re-interviewed people. One of these was a food service worker who admitted to mocking Mr. Tackett. Ms. O'Connor re-interviewed Mr. Tackett. Mr. Tackett said that Ms. Schoening had yelled at him and made fun of him. Mr. Tackett said he understood that he was a "slow" person and that this was why he would become upset in the workplace. Mr. Tackett said that Ms. Schoening would make fun of him when he would lose his temper. Mr. Tackett said that Ms. Schoening would come into his work area to say things to him even when they were not assigned to work together. Mr. Tackett told Ms. O'Connor that he would suffer repercussions as a result of sharing information with Ms. O'Connor. Ms. O'Connor interviewed another supervisor who said that Mr. Tackett would refer to Ms. Schoening as "boss."

On December 1, Ms. O'Connor re-interviewed Ms. Schoening. Ms. Schoening said that she had mocked Mr. Tackett's crying because he would get upset over nothing. Ms. Schoening provided the example of Mr. Tackett crying if he dropped a dish. Ms. Schoening told Ms. O'Connor that she thought Mr. Tackett's actions were juvenile and that she would tell him that. Ms. Schoening told Ms. O'Connor that she would mock Mr. Tackett by telling him the work would never get done. Ms. Schoening told Ms. O'Connor that she would go into the dish hall area, though she was not lead worker or Mr. Tackett's supervisor. Ms. Schoening told Ms. O'Connor that she had become frustrated with Mr. Tackett because she had previously complained to the employer about his inappropriate or disruptive behavior and nothing had been done about it.

Ms. O'Connor then re-interviewed Ms. Austin regarding a verbal counseling issued to Ms. Schoening a year earlier based on her treatment of Mr. Tackett.

Finally, on December 8, Ms. O'Connor interviewed an employee suspected of mistreating Mr. Tackett. That person had previously been off work due to health issues. That person told Ms. O'Connor that she would get agitated with Mr. Tackett on occasion, but denied additional conduct.

After Ms. O'Connor completed these additional interviews, she submitted an investigation report for final review by DHS administration. Ms. Austin, Ms. Brodie, Ms. Sukup and a representative of the Department of Administrative Services met to review the matter and decided to move toward discharging Ms. Schoening from her employment.

On December 9, Ms. Austin, Ms. Brodie and Ms. Sukup met with Ms. Schoening for a Loudermill hearing. Ms. Schoening indicated she was remorseful, indicated she did not fully

understand the issue with her interactions with Mr. Tackett, and offered to attend a class if that would help.

On December 12, the employer notified Ms. Schoening that she was discharged from the employment. The employer served Ms. Schoening with written notice of the discharge. The notice cited several work rules that employer deemed Ms. Schoening to have violated. These included engaging in “inappropriate discussions and behavior,” using “abusive, profane, argumentative, offensive or threatening language” or attempting to inflict mental anguish, failing to treat other employees with dignity, and mistreating or abusing another employee. In 2010, Ms. Schoening had received an updated copy of the Employee Handbook and State Policies. In August 2010, Ms. Schoening had been issued a final warning after the employer concluded she had lied in connection with use of sick leave.

### **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 evidence in the record fails to establish a current act of misconduct. The evidence indicates that the employer became aware of the alleged misconduct on September 28. On October 2, the employer interviewed the alleged victim, who provided vague, generalized information concerning Ms. Schoening’s conduct. The employer then waited *10 days*, until October 12, to formally launch an investigation. Then there was a *nine-day* break until October 21 before the employer commenced employee interviews. The interviews were still in progress on November 5, when the employer suspended Ms. Schoening with pay but without revealing to her the basis for the suspension or the possible consequences to her employment. The employer interviewed Ms. Schoening on November 7 without revealing that Ms. Schoening was the focus of the employer’s investigation or revealing the potential consequences to her employment. On November 14, Ms. O’Connor submitted her investigation report. The employer then waited *two weeks* to decide that further interviews were necessary. Those additional interviews commenced on November 30. At this point, it had been *more than two months* since the alleged misconduct had come to the employer’s attention. The employer waited until December 9—*72 days* after the alleged misconduct came to light—not notify Ms. Schoening that the conduct in question subjected her to discharge from the employment. While reasonable delay may have been necessary in the context of removing a state employee, the evidence indicates multiple instances of unreasonable and unjustified delay on the part of the employer. The employer’s delay of *approximately two and one-half months* from initial allegation to notice to the claimant that her employment was in jeopardy was unreasonable and prevents the conduct in question from constituting a current act for purposes of determining Ms. Schoening’s eligibility for unemployment insurance benefits. Having reached the conclusion that the discharge was not based on a current act, the administrative law judge need not reach the question of whether the claimant’s conduct rose to the level of misconduct that would disqualify her for unemployment insurance purposes.

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

**DECISION:**

The Agency representative’s January 10, 2012, reference 01, decision is reversed. The discharge was not based on a current act. 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.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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