

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KYLA R CLARK
Claimant

APPEAL NO. 11A-UI-02101-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

GOOD SAMARITAN SOCIETY INC
Employer

**OC: 12/05/10
Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the February 17, 2011, reference 02, decision that denied benefits. After due notice was issued, a hearing was held on March 22, 2011. Claimant participated. Janice Foote represented the employer and presented additional testimony through Brenda Williams. The hearing in this matter was consolidated with the hearing in Appeal Number 11A-UI-02100-JTT. Exhibits 1 through 12 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: Kyla Clark was employed by Good Samaritan Society as a part-time dietary aide from 2006 until December 8, 2010, when Brenda Williams, dietary director, and Janice Foote, human resources director, discharged her for negligence in performing her job duties and for attendance. Ms. Williams was Ms. Clark's immediate supervisor at the end of the employment.

The final matters that triggered the discharge came to the employer's attention on or about December 6, 2010. At that time, Ms. Williams discovered that Ms. Clark had failed to document, during four consecutive shifts, nursing home resident food intake. Documenting resident food intake was an essential component of Ms. Clark's job duties. Ms. Clark was to record the food intake data via a handheld device. The data would then be uploaded to the employer's computer where it could be reviewed by the dietitian to be used to determine the health status of the resident. Ms. Clark had been appropriately trained in this process. Ms. Williams, who had only recently started with the employer, had not been trained in this process. Ms. Clark skipped inputting the food intake data for 36 to 40 residents during four consecutive shifts so that she could go on a cigarette smoke break. Ms. Clark did not have other duties that prevented her from documenting the food intake. Ms. Clark had not notified Ms. Williams that she was too busy to perform the food intake duties. Ms. Williams had not agreed to perform the work for

Ms. Clark. Failure to document the resident food intake could subject the employer to civil penalties. Other aides assigned to perform the same duties inputted the resident food intakes.

On December 6, Ms. Clark left work early for personal reasons without proper authorization. While Ms. Williams told Ms. Clark she could leave if another employee agreed to cover the rest of her shift, no other employee had agreed to do that. Ms. Clark left early nonetheless. Ms. Clark attempted to tell another employee that she would have to come in early to cover the rest of Ms. Clark's shift. When she left without proper authorization, Ms. Clark left the employer short-staffed. Ms. Clark had prior attendance matters, the most recent of which dated from June 20, 2010.

In making the decision to discharge Ms. Clark from the employment, the employer considered Ms. Clark's participation in a horseplay incident in August 2010. The employer also considered Ms. Clark's unauthorized accessing of the supervisor's desk in June 2010.

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 weight of the evidence establishes that Ms. Clark was negligent in performing her duties during four consecutive shifts when she failed to document resident food intake so that she could take a cigarette break. Ms. Clark was further negligent by failing to notify the employer that she had not documented the food intake. The failure during four consecutive shifts to perform this essential job function establishes a pattern of negligence indicating a willful and wanton disregard of the employer's interests and of the interests of the residents in Ms. Clark's care.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Clark was discharged for misconduct. Accordingly, Ms. Clark is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer's account shall not be charged for benefits paid to Ms. Clark.

DECISION:

The Agency representative's February 17, 2011, reference 02, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements. The employer's account will not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw