

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

**TRENESE C JOHNSON**  
Claimant

**APPEAL NO. 18A-UI-00807-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**ACCESS INCORPORATED**  
Employer

**OC: 09/17/17**  
**Claimant: Appellant (1)**

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

**STATEMENT OF THE CASE:**

Trenese Johnson filed a timely appeal from the January 16, 2018, reference 07, decision that disqualified her for benefits and that relieved the employer of liability for benefits, based on the Benefits Bureau deputy's conclusion that Ms. Johnson was discharged on December 19, 2017 for misconduct in connection with the employment. After due notice was issued, a hearing was held on February 12, 2018. Ms. Johnson participated. Mary Knutson represented the employer and presented additional testimony through Darshan Miller. Exhibits 1 through 18 were received into evidence. With the agreement of the parties, the administrative law judge expunged the names of clients/consumers and their parents from the exhibits to adhere to HIPAA regulations. Instead, consumers were identified as ALM, AUM, CS, JF, and JS. Consumer parents were identified as CM, MM and KF.

**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: Access Incorporated provided home and community based support services to adults with intellectual disability and/or mental disorders. The purpose of those support services is to enable the agency's clients to live as independently as possible in the least restrictive environment. Trenese Johnson was employed by Access Incorporated as a full-time Direct Support Professional from September 27, 2017 until December 19, 2017, when Jennifer Baker, Executive Director, discharged her from the employment. Darshan Miller, Home and Community Based Services (HCBS) Assistant Coordinator and Direct Supervisor of the Linden Drive Medicaid waiver home, notified Ms. Johnson of the discharge decision. Becky Vietor, HCBS Coordinator was also present for the discharge meeting.

Throughout Ms. Johnson's employment, she was assigned to the Linden Drive home. Four young women, ALM, AUM, JF and JS, ages 18 to 19, reside at the Linden residence. Each young woman has special needs and goals that are addressed in her Individual Personal Plan

(IPP). ALM has intellectual ability that approximates that of same-aged non-disabled persons, receives services under the Medicaid Habilitation Services program, is working toward living independently, but requires 24-hour supervision. AUM has intellectual ability equivalent to a non-disabled 12 to 13 year old, receives services under the Medicaid Intellectual Disability (ID) Waiver program, and requires 24-hour supervision. ALM and AUM are sisters. JF receives services under the Medicaid ID Waiver program, requires 18 to 24 hour supervision, but is allowed two hours of “alone time” at the residence or in the community. The employer does not know JF’s intellectual function level. JF’s special needs include mood disorder issues that necessitate multiple psychotropic medications to stabilize her mood and an additional psychotropic medication to assist her with sleeping at night. JS has intellectual ability equivalent to a non-disabled 10 to 12 year old, receives services through the Medicaid ID Waiver program and requires 24-hour supervision. The supervision requirement is based on the need to keep the women safe, to coach them on social skills and other skills, and a concern that some or all of the women are unable to exercise appropriate personal boundaries with males.

The employer provided Ms. Johnson with a written job description at the start of the employment. The written job description summarizes Ms. Johnson’s duties as follows:

The (DSP) direct support professional has the overall responsibility of assisting and supporting members in their homes and community. This includes providing direct training to members and assisting them in meeting their needs on a day to day basis per their (IPP) individual program plan. Assures members formal goals and informal programs are carried out in harmony with their IPP. Provides guidance to members involved with (HCBS) Home and Community Based programming including, County funded Supported individuals, ID waiver, BI Waiver, and Habilitation services.

The job description goes on to list 24 “Essential Job Functions.” These include, amongst other essential functions, the following:

1. To assure necessary supervision, direct training, direction and support to carry out services identified in the members IPP.  
...
3. To document progress in members progress notes, data sheets, incident reports, observations, time sheets and other documents as applicable.  
...
7. To assist members with budgeting, balancing checkbooks, paying bills, menu planning and personal and grocery shopping.  
...
11. To respond professionally to members/guardians, families, and funders complaints, concerns and input.  
...
12. Immediately notify supervisor of customer complaints or problems.  
...
15. Must demonstrate good attendance and punctuality.  
...
17. Monitor member’s medications and assist the member with setting up medications if a medication manager. Secure medications properly. Complete medication logs.
18. To support the members in areas of general housekeeping and home cares.
19. Must promote members choices, maintain their dignify [sic] and rights and have a positive working relationship with the members.

Ms. Johnson was hired, in part, because she had prior similar experience in providing home and community based support services to persons with disabilities. Prior to commencing the employment, Ms. Johnson completed Medication Manager training and obtained Medication Manager certification. Ms. Johnson's Medication Manager certification remained in effect throughout her time with Access Incorporated. Ms. Johnson brought to the employment an understanding of Medicaid documentation of service requirements and an understanding of the need to timely and accurately document when she had administered medication to a member.

The final and primary concern that prompted the discharge was Ms. Johnson's failure to administer JF's bedtime prescription medication, Trazadone, on December 14 and 15, 2017. Ms. Johnson knew that she was to administer the medication every evening and to document that she had administered the medication. On December 14, JF requested the bedtime medication, but Ms. Johnson did not provide it. Ms. Johnson did not reference the medication in her daily log notes for the shift or on the Medication Administration Record (MAR) that was to be used to document administration of medications to JF. On December 15, 2017, Ms. Johnson again made no reference to the bedtime medication in her daily log notes or on the MAR. On December 15, the overnight staff person provided the medication to JF after Ms. Johnson failed to do so. The overnight staff person documented the medication administration on the MAR. While Ms. Johnson now asserts that she did not administer the medication on one of the dates in question because JF was under the influence of a controlled substance, she makes no reference to JF being under the influence of a controlled substance in her daily log notes from December 14 and 15.

Darshan Miller, HCBS Assist Coordinator, learned about the medication issue on December 16, 2017, when JF's mother, KF, called her to discuss the issue. During that contact, KF also asserted that JF had not received her bedtime medication on December 11, 2017. Ms. Johnson had documented both in the MAR and in the daily log notes that she had provided the medication to JF on December 11. As part of the employer's standard operating procedure at the Linden Drive home, the Medication Managers on staff at the home would transfer JF's medication from the original pill bottle to a medication planner/minder to ensure that JF received each of her daily medications. When Ms. Miller initially spoke to Ms. Johnson on December 16 about the medication concern, Ms. Johnson stated that she may have forgotten to give the bedtime medication one evening because JF was already sleeping. Ms. Johnson subsequently asserted that she had given the bedtime medications out of the pill bottle. That statement was not true.

In making the decision to discharge Ms. Johnson from the employment, the employer also considered a medication issue concerning AUM. AUM is prescribed Ritalin for attention deficit disorder (ADD) issues. AUM's Ritalin prescription ran out on December 12, 2017. Ms. Miller spoke to Ms. Johnson that day about the need to refill the prescription. Ms. Johnson subsequently asserted, at a time when she had not yet filled the medication, that she had in fact filled the medication.

There were other concerns during the final week of the employment that factored in the discharge decision. On December 15, Ms. Miller learned that a November utility bill that Ms. Johnson was supported to have ensured was paid by the members had not been paid, was late, and would result in assessment of a late fee. On December 15, JF contacted Ms. Miller at 2:45 p.m. to report that Ms. Johnson had not appeared for her shift. Ms. Johnson was scheduled to report to the Linden Drive home at 2:30 p.m. When JF contacted Ms. Miller, she reported that JS was suffering a mild panic attack due to the absence of staff. When Ms. Miller contacted Ms. Johnson, Ms. Johnson stated that she was on her way, but asserted that the members did not usually arrive home until 3:10 p.m. Ms. Miller told Ms. Johnson that that was

not correct and that Ms. Johnson needed to adhere to her scheduled start time. On the evening of December 15, Ms. Johnson called Ms. Miller to report that JF was not where she was supposed to be picked up. JF then appeared while Ms. Johnson was on the phone with Ms. Miller. Ms. Miller heard Ms. Johnson tell JF that she was sick of JF's attitude and that JF needed to knock it off. Ms. Miller counseled Ms. Johnson during the call that she could not speak to JF in that manner and could not treat the young adults like they were children.

The employer, the young women of the Linden Drive home, and their parents, had additional concerns about Ms. Johnson's demeanor, conduct, and utterances that factored into the discharge decision. Ms. Johnson sometimes took a demeaning, punitive approach to dealing with the young women that was inconsistent with their rights, support goals, the employer's policies, and the code of ethics the employer provided to Ms. Johnson at the start of the employment. At least three of the four young women provided the employer with statements prior to the discharge that supported this concern. The parents of AUM and ALM complained to the employer that Ms. Johnson was usually on her phone when they arrived at the home and would conspicuously busy herself with one of the young women once they arrived. The employer also had concerns, based on reports from the young women, that Ms. Johnson left them unsupervised. Such concerns usually arose when one of the young women would call Ms. Miller to assert that Ms. Johnson had left the vicinity.

Though Ms. Johnson asserts the employer referenced her ethnicity as an issue at the time of discharge, the weight of the evidence does not support that assertion. Ms. Johnson is African-American. The four young women in her care were Caucasian. Another African-American woman joined the staff at the Linden Drive home during Ms. Johnson's employment and continued with the employer at the time Ms. Johnson was discharged.

## **REASONING AND CONCLUSIONS OF LAW:**

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 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). 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).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa Ct. App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

The weight of the evidence in the record establishes misconduct in connection with the employment. The weight of the evidence establishes that Ms. Johnson on multiple occasions failed to dispense medications to JF. The weight of the evidence establishes that Ms. Johnson was on at least two occasions intentionally dishonest when speaking with Ms. Miller. One of those instances occurred in the context of renewing AUM's Ritalin. The evidence establishes several other conduct issues that also demonstrate substantial and intentional disregard of the employer's protocols and the disabled adult women's rights. The administrative law judge

specifically notes the consistency between the young women's statements, their parents' complaints to the employer, and the employer's investigative findings.

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

**DECISION:**

The January 16, 2018, reference 07, decision is affirmed. The claimant was discharged on December 19, 2017 for misconduct in connection with the employment. 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. The claimant must meet all other eligibility requirements. The employer's account shall not be charged.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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