

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

KELLY H TORRES
Claimant

JACKSON RECOVERY CENTERS INC
Employer

APPEAL NO. 19A-UI-06659-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 07/21/19
Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

Kelly Torres filed a timely appeal from the August 16, 2019, reference 02, decision that disqualified her for benefits and that relieved the employer's account of liability for benefits, based on the deputy's conclusion that Ms. Torres was discharged on July 5, 2019 for failure to follow instructions in the performance of her work. After due notice was issued, a hearing was held on September 16, 2019. Ms. Torres participated. Jessica Ward represented the employer. The hearing in this matter was consolidated with the hearing in Appeal Number 19A-UI-06660-JTT. Exhibits A, B and C were received into evidence. The administrative law judge took official notice of the Agency's administrative record of benefits disbursed to the claimant (DBRO).

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: Jackson Recovery Centers, Inc. provides treatment and recovery services to children and adults suffering from mental health and/or substance abuse issues. The employer provides both outpatient and inpatient services. Kelly Torres was employed by Jackson Recovery Centers as a full-time Recovery Counselor from September 2018 until July 5, 2019, when the employer discharged her from the employment. The employment did not require a college degree or professional credentials. The job title of Recovery Counselor was somewhat misleading in that Ms. Torres was not a therapist of any sort. Ms. Torres' duties involved monitoring adolescents at the employer's residential facility in Sioux City, leading group activities, providing one-on-one support to clients, and assisting with de-escalating dysfunctional and/or disruptive behaviors. During the course of the employment, the employer provided Ms. Torres with training to assist

Ms. Torres in understanding the nature of her role in the employer's treatment programming and to assist her carrying out her duties in a manner consistent with treatment programming.

The final incident that triggered the discharge occurred on July 3, 2019. On July 2, 2019, the employer became aware that Ms. Torres had a previous acquaintance with the mother of a particular adolescent boy in residence at the employer's residential facility. While Ms. Torres thought the connection was insignificant, the employer instructed Ms. Torres to refrain from working in the boys' unit until the particular youth was no longer in residence. The employer was concerned about maintaining confidentiality and maintaining professional boundaries. The employer had concerns based on Ms. Torres not fully maintaining appropriate professional boundaries on prior occasions. The employer temporarily reassigned Ms. Torres to the girls' residential unit. On July 3, 2019, a recovery counselor working on the boys' unit sent out a message via the walkie-talkie system asking for help with de-escalating a disturbance in the boys' unit. Ms. Torres was under the belief that such circumstances authorized and required her to deviate from the employer's directive to stay off the boys' residential unit. Ms. Torres responded to the boys' unit to assist with de-escalating the disturbance. Prior to entering the boys' unit, Ms. Torres made certain that the youth the employer wanted her to refrain from contacting was in another area of the unit and that she would not have contact with that youth. After Ms. Torres provided assistance with de-escalating the disturbance, she left the boys' unit. A short time later, Ms. Torres returned to the boys' unit to collect the boy whose emotional state had prompted the recovery counselor's earlier message. Ms. Torres took the youth for a short walk during which she counseled the youth one-on-one and then returned the youth to the boys' unit. No staff member had asked Ms. Torres to return to the boys' unit to retrieve or counsel the upset youth. On July 5, 2019, the employer discharged Ms. Torres after learning that Ms. Torres had gone on the boys' unit despite the employer's directive to remain off the unit.

The employer considered prior concerns in making the decision to discharge Ms. Torres from the employment. On June 18, 2019 Ms. Torres raised her voice to an upset female adolescent client. The employer further alleges that Ms. Torres uttered profanity at that time, but Ms. Torres denies that allegation. On June 19, 2019, the employer issued a written reprimand to Ms. Torres based on the alleged June 18 incident and other concerns. On June 17, 2019, Ms. Torres had brought flowers from home and had provided those flowers to adolescent boys under her supervision at the residential center. During a walk with the boys, the group encountered a group of adolescent girls at a picnic table and provided the flowers to the girls. The weight of the evidence establishes that Ms. Torres facilitated the interaction between the groups without regard to its impact on treatment programming. During the contact, one youth asked a girl whether she had received a note he had prepared for her. The employer was concerned that the ostensibly romantic social encounter undermined and distracted from treatment programming. The employer was also concerned about an incident wherein Ms. Torres had brought flowers from home and provided them to a youth in residence so that he could give the flowers to his mother, who was transitioning out of treatment in another treatment unit. The employer was also concerned that Ms. Torres had inserted herself into a transitioning event at the residential facility and had not clocked in to do so.

In December 2018, Ms. Torres had knowingly and intentionally deviated from the employer's work rules by fostering a personal relationship with a recently discharged client who was in residence at a halfway house. Ms. Torres had corresponded with the client via text message. Ms. Torres stated in the text messaging that the employer would not approve the contact and that Ms. Torres wished to prevent the employer from learning of the relationship.

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).

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.*

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 weight of the evidence establishes a discharge for misconduct in connection with the employment based on a pattern of behavior. With regard to the final incident that triggered the discharge, the employer had issued a clear and reasonable directive. While Ms. Torres may have had a good faith misunderstanding about the directive as it related to calls to assist de-escalating disturbances, once that situation was de-escalated, there was no such justification for subsequently returning to the unit to further counsel the upset youth. In that instance, Ms. Torres knowingly, intentionally and unreasonably deviated from the employer's reasonable directive to stay off the boys' unit while the other particular youth was in residence. This incident demonstrated Ms. Torres' propensity to create her own rules, rather than comply with the reasonable treatment programming parameters put in place by the employer. Ms. Torres clearly acted contrary to the employer's interests and actively undermined the treatment protocol in December 2018, when she engaged in subterfuge to foster a prohibited relationship with a recently discharged client. In light of the text message record, Ms. Torres' characterization of that incident is simply not credible. In June 2019, Ms. Torres undermined the treatment protocol by facilitating an ostensibly romantic interaction between the group of boys under her supervision and a group of girls. These incidents were together sufficient to demonstrate an intentional and substantial disregard of the employer's interests.

Because the evidence in the record establishes a discharge for misconduct in connection with the employment, Ms. Torres is disqualified for benefits until she has worked in and been paid wages for insured work equal to 10 times her weekly benefit amount. Ms. Torres must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

DECISION:

The August 16, 2019, reference 02, decision is affirmed. The claimant was discharged on July 5, 2019 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 10 times her weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs