

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**SHELLY J STRONG-COX**  
Claimant

**APPEAL NO. 17A-UI-01914-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**SKYLINE CENTER INC**  
Employer

**OC: 01/08/17**  
**Claimant: Respondent (1)**

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

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the February 9, 2017, reference 01, decision that allowed benefits to the claimant provided she was otherwise eligible and that held the employer's account could be charged for benefits, based on the claims deputy's conclusion that the claimant was discharged on January 9, 2017 for no disqualifying reason. After due notice was issued, a hearing was held on March 14, 2017. Claimant Shelly Strong-Cox participated. Lisa Hammond represented the employer. The administrative law judge took official notice of the agency's record of benefits disbursed to the claimant.

**ISSUE:**

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

Whether the employer's account may be charged.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Shelly Strong-Cox was employed by Skyline Center, Inc. as a full-time Day Habilitation Aide from 2005 until January 9, 2017, when the employer discharged her from the employment based on unsubstantiated allegations that Ms. Strong-Cox had engaged in dependent adult abuse. On November 28, 2016, a recently hired Day Habilitation Aide, Alyssa Naeve, alleged to Samantha Kress, Day Habilitation Program Manager, that Ms. Naeve had seen Ms. Strong-Cox slap the hand of an intellectually disabled client, restrain the hand of the client, and yell at the client. Ms. Strong-Cox had done none of these things. Rather, pursuant to a prior directive from Ms. Kress, Ms. Strong-Cox had sternly told the client "no" when the client attempted to grab a piece of paper upon which Ms. Strong-Cox needed to document that client's and other clients' participation in Day Habilitation program recreational activities. Other staff had been present at the time of the alleged incident, but did not corroborate Ms. Naeve's version of events.

On November 28, 2016, Ms. Naeve reported the alleged dependent adult abuse to the Iowa Department of Human Services. The employer notified Ms. Strong that she was suspended

pending the outcome of the DHS investigation. DHS subsequently concluded that the allegation of dependent adult abuse to be unfounded. On December 7, 2016, Ms. Strong-Cox was interviewed a DHS investigator and was advised by the investigator at that time that the allegation of abuse would be deemed unfounded. Ms. Strong-Cox immediately notified Lynn Hilgendorf, Department Director of Day Habilitation, of this information. Ms. Hilgendorf instructed Ms. Strong-Cox to execute a release of information authorization that would allow the employer to communicate with DHS about the investigation and Ms. Strong –Cox complied. During the last week of December 2016, the employer received confirmation that DHS had concluded the allegation of abuse was unfounded.

Despite the DHS conclusion, the employer proceeded with its own delayed investigation of the matter. On January 3, 2016, the employer interviewed Ms. Strong-Cox. Ms. Strong-Cox provided a detailed statement concerning her actions on November 28. The employer also interviewed Ms. Naeve and other employees. When the employer interviewed Ms. Naeve, Ms. Naeve made a new allegation regarding Ms. Strong-Cox allegedly verbally abusing a client on or about November 2, 2016, during a group outing to Wal-Mart. On the day of the alleged incident, Ms. Naeve had reported to a supervisor that Ms. Strong-Cox had been short with a client and asked to complete her training with another employee. The supervisor did not investigate the matter or take any action on the matter at that time, other than assigning Ms. Naeve to train with another employee. The employer did question Ms. Strong-Cox about the alleged early November incident as part of the investigation in January 2017.

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

Iowa Code § 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.

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).

The evidence in the record establishes a discharge that was based on unsubstantiated allegations of misconduct. The employer presented insufficient evidence, and insufficiently direct and satisfactory evidence, to establish misconduct in connection with the employment. The employer presented no testimony from Ms. Naeve regarding the purported abuse that she alone allegedly witnessed. The parties were in agreement that DHS had investigated the matter and had found the allegation of dependent adult abuse to be unfounded. Other staff present at the time of the alleged abuse incident had not witnessed any such abuse. The weight of the evidence establishes that Ms. Strong-Cox performed in duties on November 28 in keeping with prior training and directives and not violate the rights of the client or violate the employer's work rules.

At the time the employer commenced its investigation of the November 28 alleged incident in January 2017, the incident no longer constituted a "current act." The employer learned of the allegation on November 28, 2016, but elected to defer its investigation of the matter until January 2017. The employer's delay in investigating the matter was unreasonable. Contrary to the employer's assertion of an industry standard, the employer was under no obligation to defer its investigation of the matter until after DHS had completed its investigation of the matter. Nor was it prudent or reasonable to delay such investigation.

Likewise, the allegation regarding November 2, 2016, which came to the supervisor's attention that same day, was not a current act as of early January 2017. The employer had presented insufficient evidence to prove that the incident took place as Ms. Naeve alleged.

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

Nothing in this decision should be construed as suggesting that the administrative law judge does not take seriously allegations of dependent adult abuse or as suggesting that the rights of individuals with disabilities should not be safeguarded.

**DECISION:**

The February 9, 2017, reference 01, decision is affirmed. The claimant was suspended and 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

jet/rvs