

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LAURA C WALKER
Claimant

APPEAL NO. 09A-UI-07193-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FRIENDSHIP ARK INC
Employer

**Original Claim: 03/22/09
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 May 6, 2009, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on June 4, 2009. Claimant Laura Walker participated and presented additional testimony through Lynette Plander, Rehabilitation Counselor. Mary Beth Ostenbrug, Executive Director, represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One through Seven and A through F into evidence.

ISSUE:

Whether Ms. Walker 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: The employer operates group home facilities that serve disabled individuals whom the employer refers to as core members. Laura Walker was employed by Friendship Ark, Inc., as a part-time live-out assistant from November 19, 2007 until February 1, 2008, when Mary Beth Ostenbrug, Executive Director, discharged her from the employment. As a live-out assistant, Ms. Walker was responsible for supervising the employer's clients/core members and for working on the members' skill development based on the members' service plan.

Ms. Walker has a learning disability. Ms. Walker has received services from Lynette Plander, Rehabilitation Counselor, over an extended period that included the time when Ms. Walker was employed by Friendship Ark, Inc.

The final incident that prompted the discharge was Ms. Walker's attempt on January 30, 2008 to pick up weekday shifts and trade off weekend shifts. With this request to change shifts, the employer deemed Ms. Walker's schedule changes excessive. Most of Ms. Walker's prior requests to change her schedule had been prompted by coworker's asking Ms. Walker to cover their scheduled shift.

The employer had a policy that prohibited employees from working more than 16 hours per 24-hour period. Some of Ms. Walker's prior schedule changes had resulted in Ms. Walker exceeding the 16-hour daily work limit. Because one or more supervisors had been involved in the schedule

changes, Ms. Walker assumed the changes were approved. The employer expected Ms. Walker to point out to the supervisor(s) involved in any particular schedule change the impact the schedule change would have on Ms. Walker's 16-hour limit. On January 25, 2008, the employer had issued a reprimand in connection with Ms. Walker exceeding the 16-hour limit.

The employer considered additional matters in making the decision to discharge Ms. Walker from the employment. On January 30, the employer issued a verbal warning because Ms. Walker had failed to attend one of the three available training sessions in January. On January 15, the employer issued a verbal reprimand after Ms. Walker picked up a shift instead of appearing for a scheduled appointment to review the employer's handbook. Because the supervisor was present at the time Ms. Walker said she would pick up the shift, Ms. Walker assumed it was okay with the supervisor that she work the shift instead of appear for the meeting to review the handbook.

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 issues with Ms. Walker’s employment, but fails to establish misconduct in connection with the employment that would disqualify Ms. Walker for unemployment insurance benefits. The evidence indicates that the final incident that prompted the discharge, the request to pick up and trade off shifts, did not involve any misconduct. It was up to the employer to approve or disapprove Ms. Walker’s schedule requests. The evidence fails to indicate that Ms. Walker’s final schedule change request was anything but a request. The evidence fails to establish that Ms. Walker acted with willful or wanton disregard of the employer’s interests when she agreed to work coworkers’ shifts and ended up exceeding the 16-hour work limit. The evidence indicates that Ms. Walker reasonably concluded the shifts were approved because a supervisor was present. Likewise, the evidence indicates that Ms. Walker reasonably concluded it was okay to pick up a shift in lieu of appearing to review the handbook because a supervisor was present. While the evidence indicates Ms. Walker was negligent in failing to attend the training meeting in January, this failure was not motivated by a disregard of the employer’s interests. The weight of the evidence indicates that Ms. Walker needed more guidance and supervision than the employer provided in order to be successful in the employment.

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

DECISION:

The Agency representative’s May 6, 2009, reference 01, decision is affirmed. 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw