

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KALLEE J MICHAEL
Claimant

APPEAL NO. 10A-UI-04521-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

S T L CARE COMPANY
Employer

**Original Claim: 02/21/10
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 March 17, 2010, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on May 6, 2010. Claimant Kallee Michael did not respond to the hearing notice instruction to provide a telephone number for the hearing and did not participate. Mark Beason, Program Director, represented the employer and presented additional testimony through Betsy McMullen, Human Resources Director. Exhibits One through Eight 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: Kallee Michael was employed by STL Care Company as a full-time Direct Support Professional from November 19, 2009 to February 23, 2010, when Mark Beason, Program Director, discharged her from the employment for alleged dependent adult abuse. The incident in question happened on February 16, 2010, while Ms. Michael was feeding a client. A coworker, Kari Gilrud, reported to the shift supervisor that Ms. Michael had grabbed the client's arm between the wrist and elbow. Ms. Gilrud also alleged that Ms. Michael was pulling the resident's hands away from his drinking glass and that Ms. Michael was "slapping at" the client's wrist. The employer suspended Ms. Michael while the employer investigated the allegation. The employer investigated and concluded that "the information was conflicting and not conclusive." The employer reported the matter to the Iowa Department of Inspections & Appeals as possible dependant adult abuse. The employer considered reports that Ms. Michael could get frustrated while interacting with clients. Out of an abundance of caution, the employer discharged Ms. Michael from the employment on February 23, 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 employer has failed to present sufficient evidence, and sufficiently direct and satisfactory evidence, to establish that Ms. Michael did indeed touch the client inappropriately or otherwise act in a manner indicating a willful or wanton disregard of the interests of the employer or the client. The employer had the ability to present testimony from Ms. Gilrud, the person who witnessed the alleged inappropriate conduct, but chose not to present evidence from Ms. Gilrud or anyone else who expressed concern about Ms. Michael. The need for such evidence before misconduct could be established was highlighted by Exhibit One, Mr. Beason's written statement, which indicated the information up to that point "was conflicting and not conclusive."

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

DECISION:

The Agency representative's March 17, 2010, 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

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