

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOHN B MCGOUGH
Claimant

APPEAL NO. 07A-UI-02231-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

S T L CARE COMPANY
Employer

**OC: 01/21/07 R: 03
Claimant: Respondent (1)**

Iowa Code section 96.5(2)(a) – Discharge for Misconduct
Iowa Code section 96.4(3) – Able and Available

STATEMENT OF THE CASE:

S T L Care Company (St. Luke's Living Center East) filed a timely appeal from the February 21, 2007, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on March 21, 2007. Claimant John McGough participated and presented additional testimony from his mother, Sandy Wilson. Amy Dudik, Human Resources Director, represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant. The parties waived formal notice on the issue of whether the claimant has been able to work and available for work since establishing his claim for benefits.

ISSUES:

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

Whether the claimant has been able to work and available for work since establishing his claim for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: John McGough was employed by St. Luke's Living Center East as a full-time housekeeping aide from July 18, 2003 until December 7, 2006, when Administrator John Haugen suspended him pending the outcome of a criminal prosecution based on off-duty conduct. The employer is a long-term care facility. On or about December 6, 2006, Mr. McGough was arrested and charged with felony sex abuse. Mr. McGough learned of the suspension on December 9, while he was in jail. Mr. McGough continued in custody on that charge until December 29, 2006. On January 7, 2007, Mr. McGough was arrested on one or more additional offenses and continued in custody until his release on January 24, 2007. None of the charges are based on conduct in the course of the employment. Mr. McGough had not been convicted of the charges and had not provided a written admission to any of the charges at the time Mr. Haugen suspended him. Mr. McGough still has not been convicted or provided a written admission to any of the charges.

The employer deemed the arrest on the sex abuse charge a violation of the employer's written conduct policy. The general policy statement is as follows:

Your conduct must be as such to inspire the complete confidence of our residents, visitors and outsiders with whom we come in contact. This requirement is especially important while on duty. You must always be mindful that your actions reflect favorably or unfavorably on the facility. Unbecoming conduct may become cause for dismissal. The facility reserves the right, in its sole discretion, to determine the appropriate level of discipline up to and including discharge.

After the general policy statement, the employer lists several means by which an employee might violate the policy. The only one remotely related to a charge of sexual abuse would be "acts of physical aggression." Mr. McGough was aware of the conduct policy.

Mr. McGough is a full-time student at Kirkwood Community College. On Mondays, Tuesdays and Thursdays, Mr. McGough is in class from 5:00 a.m. to 5:00 p.m. On Wednesdays and Fridays, Mr. McGough is in class from 5:00 a.m. to 1:00 p.m. Mr. McGough has a work-study job at Kirkwood as part of his financial aid package. Before Mr. McGough was suspended from the employment, the employer and Kirkwood Community College entered into arrangements with Mr. McGough to allow him to simultaneously pursue his full-time employment and full-time academics. However, the arrangement required Mr. McGough to work unusual hours in order to maintain full-time hours.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 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).

Suspensions are treated as discharges for purposes of determining eligibility for unemployment insurance benefits and misconduct must be established before a claimant will be disqualified for benefits. See 871 IAC 24.32(4).

The evidence in the record fails to establish, by a preponderance of the evidence, that Mr. McGough committed the sex abuse offense that was the basis of his arrest and that prompted the employer to suspend him on December 7. The evidence fails to establish that the employer had sufficient proof of Mr. McGough's guilt as of the December 7 to make the suspension a suspension for misconduct. Aside from the mere fact of the arrest, the employer provided no evidence to indicate it was more likely than not that Mr. McGough actually committed the offense or that the employer had such information at the time it suspended Mr. McGough.

If misconduct had been established, the evidence indicates it would properly be deemed misconduct "in connection with the employment," based on the employer's conduct policy, which addressed off-duty conduct. Violation of a specific work rule, even off-duty, can constitute misconduct sufficient to disqualify a claimant from unemployment insurance benefits. See Kleidosty v. Employment Appeal Board, 482 N.W.2d 416, 418 (Iowa 1992). The key is the existence of a work rule that addresses the off-duty conduct and such a rule existed here. The charge of sex abuse is by definition an act of physical aggression, as the victim either did not or cannot give legal consent to the perpetrator's conduct. The employer's policy addressed acts of physical aggression.

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

Iowa Code section 96.4-3 provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

871 IAC 24.22(2) provides:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(2) Available for work. The availability requirement is satisfied when an individual is willing, able, and ready to accept suitable work which the individual does not have good cause to refuse, that is, the individual is genuinely attached to the labor market. Since, under unemployment insurance laws, it is the availability of an individual that is required to be tested, the labor market must be described in terms of the individual. A labor market for an individual means a market for the type of service which the individual offers in the geographical area in which the individual offers the service. Market in that sense does not mean that job vacancies must exist; the purpose of unemployment insurance is to compensate for lack of job vacancies. It means only that the type of services which an individual is offering is generally performed in the geographical area in which the individual is offering the services.

871 IAC 24.23(5) provides:

Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.

(5) Full-time students devoting the major portion of their time and efforts to their studies are deemed to have no reasonable expectancy of securing employment except if the students are available to the same degree and to the same extent as they accrued wage credits they will meet the eligibility requirements of the law.

A person is deemed not available for work if he is in jail. See 871 IAC 24.23(12). Accordingly, Mr. McGough was not available for work December 6-29, 2006 and January 7-21, 2007. However, these periods of incarceration predate Mr. McGough's claim for benefits and,

therefore, would have no impact on his eligibility. In the event that Mr. McGough returns to custody, he would no longer be available for work or eligible for benefits. The evidence indicates that, insofar as Mr. McGough's studies are concerned, Mr. McGough is available to the same extent he was while he was accruing base period wage credits.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. McGough has been available for work since establishing his claim for benefits and, therefore, is eligible for benefits, provided he is otherwise eligible.

DECISION:

The claims representative's February 21, 2007, reference 01, decision is affirmed. The claimant was suspended for no disqualifying reason. The claimant has been able to work and available for work since establishing his claim for benefits. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs