

**IOWA WORKFORCE DEVELOPMENT  
Unemployment Insurance Appeals Section  
1000 East Grand—Des Moines, Iowa 50319  
DECISION OF THE ADMINISTRATIVE LAW JUDGE  
68-0157 (7-97) – 3091078 - EI**

**JOLIE L SHEPHERD  
302 – 2<sup>ND</sup> ST  
PO BOX 202  
COLO IA 50056**

**STORY COUNTY  
ATTN AUDITOR  
NEVADA IA 50201**

**Appeal Number: 05A-UI-02578-A  
OC: 01-30-05 R: 02  
Claimant: Respondent (1)**

**This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4<sup>th</sup> Floor—Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

---

(Administrative Law Judge)

---

(Decision Dated & Mailed)

Section 96.5-2-a - Discharge for Misconduct  
871 IAC 24.32(8) - Current Act of Misconduct

STATEMENT OF THE CASE:

Story County filed a timely appeal from an unemployment insurance decision dated March 3, 2005, reference 01, which allowed benefits to Jolie L. Shepherd. After due notice was issued, a hearing was held in Des Moines, Iowa, on April 6, 2005. Ms. Shepherd participated with the assistance of Deb Groene, her union representative. Sheriff Paul Fitzgerald, Jail Administrator J.B. Hopkins and Chief Deputy Gary Foster participated for the employer. Claimant Exhibit A and Employer Exhibit 1 were admitted into evidence.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: Jolie L. Shepherd was employed by Story County from April 2, 2001 until she was discharged February 1, 2005. She worked as a detention officer at the Story County Jail. The incident which lead to her discharge occurred on November 30, 2004, more than two months prior to the discharge. On the day in question Ms. Shepherd gave two razors to an inmate known to be on suicide watch. Two razors were appropriate according to jail policy because the inmate shaved his head as well as his chin. Ms. Shepherd should have but did not closely monitor the inmate. She did not retrieve the razors within a half-hour as required by policy. While the inmate had the razors, Ms. Shepherd at some point viewed her personal bank records on her work computer provided by the county. When offered relief for a smoke break, Ms. Shepherd did not tell the relieving detention officer that the inmate was in the possession of razors. The inmate slashed himself, requiring sixty-seven stitches to suture the wounds.

Jail Administrator J.B. Hopkins was not at the facility on November 30, 2005. When he learned of the incident, he assigned Sergeant Scott Kickbush the task of investigating. Mr. Hopkins did not speak to Ms. Shepherd about the incident. Sergeant Kickbush did not interview Ms. Shepherd until December 21, 2004. He submitted his report to Mr. Hopkins on January 3, 2005. On January 12, 2005, Mr. Hopkins recommended to Sheriff Paul Fitzgerald that Ms. Shepherd be suspended for six days. The Sheriff requested further investigation by Chief Deputy Gary Foster. Deputy Foster reported back to Sheriff Fitzgerald on January 21, 2005. After reviewing the November 30 incident and prior disciplinary action, Deputy Foster recommended that Ms. Shepherd be discharged. Ms. Shepherd received the notification on January 28, 2005. From November 30, 2004 through January 21, 2005 Ms. Shepherd had continued her work with no change in schedules, duties or shifts.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that the claimant was discharged for disqualifying misconduct. The administrative law judge concludes that it does not.

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. See Iowa Code section 96.6-2. Among the elements it must prove is that the final incident leading directly to the decision to discharge be a current act of misconduct. See Greene v. EAB, 426 N.W.2d 659 (Iowa App. 1988) and 871 IAC 24.32(8). The evidence in the record establishes that the incident triggering the discharge occurred 63 days prior to the discharge. During this time Ms. Shepherd was allowed to continue her normal duties. She was interviewed on December 21, 2004 by Sergeant Kickbush, but the evidence does not establish that Sergeant Kickbush or anyone else advised her that her job was in jeopardy until late January 2005. In the Greene case cited above, the Court of Appeals ruled that an incident could still be considered current when discharge followed an investigation if the individual was promptly put on notice that termination might occur as the result of the investigation. The employer has not produced any evidence indicating that Ms. Shepherd was told of the possibility of discharge. Under these circumstances, the administrative law judge concludes that the final incident leading to the decision to discharge was not a current act.

Since the final incident was not a current act, the administrative law judge need not determine whether the act was one of misconduct. The employer's testimony indicates that it was. Some of its documentary evidence, in particular a report by Mr. Hopkins, is written in terms of Ms. Shepherd being unable to perform the essential functions of her job. This language appears to be borrowed from the Americans With Disabilities Act, and there is no evidence in the record that Ms. Shepherd suffers from any disability. Nonetheless, it raises a question in the administrative law judge's mind as to whether the discharge was for misconduct or for inability to perform a task to the satisfaction of the employer. As noted above, since the final incident was not a current act, the administrative law judge need not resolve that discrepancy. Even if the final incident was one of misconduct, no disqualification may be imposed because of the delay between the incident and the discharge.

DECISION:

The unemployment insurance decision dated March 3, 2005, reference 01, is affirmed. The claimant is entitled to receive unemployment insurance benefits, provided she is otherwise eligible.

tjc/pjs