

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ALICE M BURKMIRE
Claimant

APPEAL NO: 06A-UI-08865-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ACTION WAREHOUSE CO LTD
Employer

OC: 11/20/05 R: 02
Claimant: Respondent (1)

Section 96.5-2-a – Discharge
Section 96.7-2-a(2) – Charges Against Employer’s Account

STATEMENT OF THE CASE:

Action Warehouse Company, Ltd. (employer) appealed a representative's August 21, 2006 decision (reference 10) that concluded Alice M. Burkmire (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on September 20, 2006. The claimant participated in the hearing. Matt Wilson appeared on the employer's behalf. During the hearing, Employer's Exhibit One was entered into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The employer is a temporary employment firm. The claimant began taking assignments with the employer on March 1, 2006. She had a series of about five assignment periods with the same business client as a full-time general laborer for the business client's convention and meeting business. Her primary duties were laying out floor covering and setting up tables and chairs. Her final assignment period began on July 24 and ended on August 3. The assignment ended because the business client felt the claimant was standing around and underperforming that day.

The claimant was not doing work when the business client's representative saw her because the employee who had the instructions as to what she was to do had left. There had not been any prior issues regarding the claimant's work. The employer had no direct information regarding what happened on August 3, but was sufficiently satisfied with the claimant's overall work performance that it wished to find another business client to which the claimant could be assigned.

On August 4 a representative of the employer told the claimant that the employer wished to have the claimant placed at a particular business client, but that before that could happen, per the business client's specifications the claimant would need to pass a criminal background check. The claimant responded that she already knew she would not pass a background check as she had a January 2001 conviction for third degree burglary, a class "D" felony.

The employer's representative then reviewed the claimant's job application completed and signed on February 10, 2006. For the question asking, "have you ever been convicted of a felony or misdemeanor?" the box labeled "No" was marked and there was no information on the line stating, "If so, please explain." The employer's representative scratched out the mark in the "No" box and marked the "Yes" box, and then wrote "Burg 3rd – 5 or 6 yrs ago," with her initials and the date, August 4.

On August 8 another employer's representative told the claimant that the employer could no longer represent her or place her on assignments because the conviction had not been reported. The representative told the claimant if she had reported the conviction on the application then perhaps the employer could have done something different.

The claimant asserted that she had not attempted to conceal the conviction, that she had always reported it when asked, and that she did not recall marking the question "No." Mr. Wilson, the employer's senior staffing manager, argued that it would not have mattered if the claimant had reported the conviction or not, that while the application stated, "a prior conviction will not necessarily bar you from employment, however the type of conviction and when it occurred will be considered," the employer's practice was not to hire persons who had convictions for theft, burglary, or assault, as the employer would only hire persons who were bondable and he understood that the employer's bonding company would not bond persons with convictions for theft, burglary, or assault. He did not know whether the employer's bonding company did any type of background check itself before providing bond coverage; however, he had believed that the claimant's work for the initial business client since March 1 had been protected by bond. The claimant provided information that there were at least some programs under which she could be bonded, that the only positions for which she would not qualify were positions involving the direct handling of money.

The claimant established an unemployment insurance benefit year effective November 20, 2005. She filed an additional claim effective August 6, 2006.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

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.

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 focus of the definition of misconduct is on acts or omissions by a claimant that "rise to the level of being deliberate, intentional or culpable." Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer's interest, such as found in:
 - a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
 - b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:
 - a. Manifest equal culpability, wrongful intent or evil design; or
 - b. Show an intentional and substantial disregard of:
 1. The employer's interest, or
 2. The employee's duties and obligations to the employer.

Henry, supra. The reason cited by the employer for discharging the claimant is the alleged falsification of her job application. It is clear that the claimant did not mark the "Yes" box to the question on a prior conviction or fill in the details of her conviction on the application. However, she denies answering "No." The original application was sufficiently defaced by the employer's representative that it is not possible to say with certainty that the mark in the "No" box was in the claimant's hand. It is not an uncommon practice for persons with convictions to leave such a question blank so that when questioned they can provide a direct explanation. It is reasonably possible that someone with the employer's office failed to ask the claimant about the question but rather assumed it was an oversight and marked the "No" box themselves.

Even if the claimant had marked the "No" box herself, that does not end the inquiry. The false statement must endanger the health, safety or morals of the applicant or others or result in exposing the employer to legal liabilities or penalties or result in placing the employer in jeopardy. The employer did not establish that the claimant would have access to money or valuable property. While it asserted the claimant could not be bonded, the claimant provided at least some evidence that she could be bonded, and the employer's assertion was based on an assumption, without objective evidence to support its position, such as a written policy from the bonding company.

Finally, the employer has not established that there has been a current act of misconduct as required to establish work-connected misconduct. 871 IAC 24.32(8); Greene v. Employment Appeal Board, 426 N.W.2d 659 (Iowa App. 1988). Assuming the claimant made the false statement, it occurred on February 2, 2006, and she worked, apparently covered by the employer's bonding company, for over five months prior to the employer's discharge of the claimant. The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

The final issue is whether the employer's account is subject to charge. An employer's account is only chargeable if the employer is a base period employer. Iowa Code § 96.7. The base period is "the period beginning with the first day of the five completed calendar quarters immediately preceding the first day of an individual's benefit year and ending with the last day of the next to the last completed calendar quarter immediately preceding the date on which the individual filed a valid claim." Iowa Code § 96.19-3. The claimant's base period began July 1, 2004 and ended June 30, 2005. The employer did not employ the claimant during this time, and therefore the employer is not currently a base period employer and its account is not currently chargeable for benefits paid to the claimant.

DECISION:

The representative's August 21, 2006 decision (reference 10) is affirmed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive

unemployment insurance benefits, if she is otherwise eligible. The employer's account is not subject to charge in the current benefit year.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs