

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TAMMY J KAPPEL
Claimant

APPEAL NO. 13A-UI-07077-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WESLEYLIFE
Employer

**OC: 05/19/13
Claimant: Appellant (1)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

Tammy Kappel filed a timely appeal from the June 7, 2013, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on July 17, 2013. Ms. Kappel participated. Barb Hamilton represented the employer and presented testimony through Kaylee Siebrecht and Brad Boatright.

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: Tammy Kappel was employed by WesleyLife as a full-time Director of Nursing from November 2012 until May 21, 2013 when the employer discharged her from the employment for stealing medication from residents. On May 21, 2013, law enforcement executed a search warrant on Ms. Kappel's home based on suspicion that she had stolen medication from WesleyLife residents. In Ms. Kappel's trash, law enforcement officers located empty packaging for hydrocodone prescriptions written for two WesleyLife residents. Ms. Kappel had misappropriated the medications, converted them to her personal use, and discarded the packaging in an unauthorized manner in an attempt to conceal her theft of the narcotic medication. The presence of the prescription medication packaging in Ms. Kappel's trash can also represented a violation of the HIPAA law. Ms. Kappel was subsequently arrested by law enforcement. Once Ms. Kappel was arrested, and despite the fact that the employer had turned off her work cell phone access, Ms. Kappel did not make further contact with the employer to inquire about the status of her employment. The employer had discharged Ms. Kappel from the employment.

The execution of the search warrant followed an incident in April wherein a resident's narcotic medication went missing. In connection with the investigation of that earlier incident, Ms. Kappel admitted to allegedly destroying a narcotic medication without having another nurse present to witness the destruction of the narcotic. When the employer spoke to Ms. Kappel about the alleged destruction of the narcotic, the employer had reinforced the need to have another nurse present to witness destruction of a narcotic.

Ms. Kappel engaged in additional unauthorized conduct and contact with WesleyLife residents to gain access to resident medication information.

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) alone. 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 in the record establishes that Ms. Kappel stole medications from WesleyLife residents and converted the medications to her personal use. The weight of the evidence establishes that Ms. Kappel engaged in a pattern of conduct in connection with the employment that indicated an ongoing attempt to gain unauthorized access to narcotic medications prescribed to WesleyLife residents. The conduct was in willful and wanton disregard both of the employer and of the WesleyLife residents and constituted misconduct in connection with the employment. Ms. Kappel is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer's account shall not be charged for benefits.

In the event that Ms. Kappel is convicted of a criminal offense at the serious misdemeanor level or above in connection with the conduct that triggered the discharge, the employer should contact Workforce Development with appropriate proof to aid in determining whether Ms. Kappel should be subject to additional unemployment insurance consequences for gross misconduct under Iowa Code section 96.5(2)(b) and (c).

DECISION:

The Agency representative's June 7, 2013, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements. The employer's account will not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs