

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TAMARA L THOMAS
Claimant

APPEAL NO. 09A-UI-14182-VS

**ADMINISTRATIVE LAW JUDGE
DECISION**

SAC & FOX TRIBE
Employer

OC: 08/16/09
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

Employer filed an appeal from a decision of a representative dated September 18, 2009, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and began on January 29, 2010, in Cedar Rapids, Iowa. The hearing could not be concluded on the date and was continued to and completed on March 24, 2010, in Cedar Rapids, Iowa. Claimant participated. Employer participated by Ram Dhanwada, acting executive director; Becky Youngbear-Alvarado, purchasing and procurement; Mylene Wanatee, family recruiter; and Lucy Papaki, acting personnel director. The employer was represented by Charles Gribble, attorney at law. The record consists of the testimony of Ram Dhanwada; the testimony of Becky Youngbear-Alvarado; the testimony of Mylene Wanatee; the testimony of Lucy Papaki; the testimony of Tamara Beall-Thomas; Claimant's Exhibits A-HHH; and Employer's Exhibits 1-11. Employer's Exhibits 12, 13, and 14 are not properly part of the record as they represent after-acquired evidence.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is the Sac & Fox Tribe. The claimant was hired as a full-time social worker on August 5, 2002. The claimant was terminated on August 13, 2009. She was given a letter that outlined the reasons for termination. The reasons primarily included time card irregularities and violation of travel and purchasing policies. (Exhibit 1)

The events that led to the claimant's termination go back to February 2009. The claimant prepared a written request to attend a conference in Kansas City Missouri, beginning on March 24, 2009, and going through March 26, 2009. (Exhibit 11) The claimant was advanced the sum of \$720.08 on March 9, 2009. (Exhibit 11, p. 3) These funds were to be used, in part, to pay charges at the Marriot Hotel. The claimant paid in cash at the hotel. When she checked

out, however, the hotel gave her a refund. The claimant did not think this was correct. The Marriott discovered the mistake and sent the claimant a bill. The claimant paid by check. The hotel claimed it did not receive the check and so the claimant put a stop order on the check. There was a problem with the second check as well and the claimant placed a stop order on that check as well. The claimant then paid the bill on her VISA card on May 19, 2009.

Part of the reason for the claimant's problem with the bill and checks, was that she was going through a difficult divorce and her husband would not allow her access to her checking account. She did not know how much money was potentially available. The employer was pressuring her to take care of the matter but she did not tell her employer about her personal difficulties with her husband since she was concerned about her own privacy. The claimant also did not prepare her expense report within five days after the trip was done.

The next significant event occurred on or about June 29, 2009. The claimant's supervisor had been an individual named Larry Lasley. He was executive director of the tribe. Larry Lasley's sister, Laurie, was the human resources manager. On June 29, 2009, Larry Lasley went on vacation and never did return to his job as he was recalled from his position by a tribe referendum. Ram Dhanwada, who was the controller, became acting executive director and the claimant's supervisor. Mr. Dhanwada had had a long standing concern over the preparation of time cards in the claimant's department as those time cards contained handwritten entries as well as printed time card stamps. Ideally an employee would take his or her time card and use the time clock to stamp in and out of the work date. The claimant worked at various sites and did not always carry her time card with her. As a result she filled out her time card by hand and also pasted time clock entries onto her time card. She would take blank pieces of paper and feed them into the time clock if she did not have her time card with her and then cut and paste those stamps onto her time cards. This practice was approved by Mr. Lasley but not by Mr. Dhanwada. Mr. Dhanwada told Mr. Lasley to put a stop to the practice, but Mr. Lasley never told the claimant.

When Mr. Lasley effectively left on June 29, 2009, Mr. Dhanwada was the individual who began approving the claimant's time cards. The time card dated July 11, 2009, got his attention because it contained both handwritten entries and a pasted time stamp. The pasted time stamp was for Monday, but was pasted in for Wednesday. In addition, Mr. Dhanwada felt that the claimant's work hours were not accurate as he was under the impression that the claimant was at home on Wednesday and not working, based on a phone call between the claimant and Laurie Lasley. Mr. Dhanwada outlined his concerns to the claimant in an email on July 14, 2009 and told her "to correct these issues as soon as possible." (Exhibit 7)

The claimant went on vacation. While she was on vacation, questions came up concerning her time card on July 18, 2009, which also contained handwritten entries. Mr. Dhanwada was dissatisfied with the claimant's responses to these questions and felt there were discrepancies between what the claimant told someone named Allison Stewart and what was written on the timecard. Part of problem was due to the claimant working at home, something Mr. Dhanwada believed that the claimant was not authorized to work at home. The claimant had previously been given permission to work at home by prior supervisors.

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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

Misconduct that leads to termination is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. In order to justify disqualification, the evidence must establish that the final incident leading to the decision to discharge was a current act of misconduct. See 871 IAC 24.32(8). See also Greene v. EAB, 426 N.W.2d 659 (Iowa App. 1988). The employer has the burden of proof to show misconduct.

In this case, the employer terminated the claimant's employment on August 12, 2009. The reasons for the claimant's termination are outlined in a letter given to her on that date. A review of that letter shows that employer terminated the claimant's employment primarily for problems

the employer perceived with the claimant's time cards dating back as far as January 10, 2009. Mr. Dhanwada did not approve of the claimant's practice of handwriting entries on her timecard and using a time clock to cut and paste time entries. The claimant, however, credibly testified that none of these concerns were voiced to her directly and that her supervisor, Larry Lasley, had previously approved her timecards and the practices she employed when filling out her entries.

In July 2009, the claimant did receive information from the employer that should have alerted her to the fact that her timecards were being carefully scrutinized. However, the last timecard of concern goes back to the week ending July 18, 2009. The claimant did know that there were problems with her timecards on July 11, 2009, and July 18, 2009, by virtue of her communications with the employer. Despite these concerns, the employer did not terminate the claimant until August 12, 2009, and she was permitted to work even after the timecards were questioned.

The employer appears to have had some legitimate questions about the claimant's timecards and certainly Mr. Dhanwada was not going to permit the claimant to handwrite entries and cut and paste time card stamps. The claimant may not have been entirely accurate on some of her entries. The claimant did not keep traditional hours and the use of a timeclock presented some real problems to the claimant since she often worked at nights and weekends and did not work solely in an office. She had become accustomed to an informal way of keeping track of her hours that was not in keeping with new policies.

Even if the claimant's time recording was misconduct, however, there is no evidence of a current act of misconduct. An individual cannot be disqualified from receiving unemployment benefits unless there is a current act of misconduct. The length of time between the last problem with the timecard and the actual termination is such that any timecard misconduct is not a current act of misconduct.

This same analysis applies to the travel expense reimbursement with the Marriot Hotel bill. That occurred back in May 2009. The claimant was never disciplined for the length of time it took for her to pay the bill. Again, even if the claimant's conduct can be deemed misconduct, it was not current misconduct.

Finally, the employer asserted an act of misconduct with respect to the emergency removal of a child in June 2009, and a failure to notify the Tribal Court. This alleged improper removal was not given as a basis for termination and was what is termed "after acquired evidence." Information acquired after discharge cannot be considered in an unemployment case. The reason after acquired information will not be considered is because it could not have been the basis for the decision to discharge.

Because the employer has not carried its burden of proof that there was a current act of misconduct associated with the claimant's termination, benefits are allowed if the claimant is otherwise eligible.

DECISION:

The decision of the representative dated September 18, 2009, reference 01, is affirmed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs