

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ELIZABETH G MILSTER
Claimant

APPEAL NO. 12A-UI-10642-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

AXCESS STAFFING SERVICES LLC
Employer

OC: 08/05/12
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the August 23, 2012, reference 01, decision that allowed benefits based on an agency conclusion that claimant Elizabeth Milster had been discharged on August 2, 2012 for no disqualifying reason. After due notice was issued, a hearing was held on September 26, 2012. Ms. Milster did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Lesley Buhler of Talx represented the employer and presented testimony through Dennis Panosh and Nick Socratous. Exhibits One and Two were received into evidence.

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: The employer is a temporary employment agency that supplies temporary line workers to Rock Tenn in Iowa City. Elizabeth Milster started a full-time work line worker assignment at Rock Tenn in November 15, 2011. Dennis Panosh, Onsite Manager, was Ms. Milster's immediate supervisor. On July 20, 2012, Ms. Milster was promoted to a supervisor position. Ms. Milster last performed work for the employer on July 29, 2012. On August 2, 2012, Mr. Panosh discharged Ms. Milster from the employment based on her failure to disclose criminal convictions at the time she completed her initial job application.

Ms. Milster completed her job application on November 14, 2011. At that time, Ms. Milster was applying for a temporary production line worker position. Most of the full-page boilerplate application form consists of single-spaced text in extremely small font. In response to the question about whether she had been convicted of a crime, Ms. Milster marked the box that indicated she had been convicted of a crime. Ms. Milster marked another box indicating that the conviction had been for a misdemeanor offense. Ms. Milster indicated that the conviction had been entered on October 31, 2011. That date was just two weeks before Ms. Milster started the employment with Axxcess Staffing. In the limited space provided for details, less than two lines

on the document, Ms. Milster wrote: "Wrote a check without enough money to cover the amount." In other words, Ms. Milster indicated on the application that she had just been convicted of misdemeanor theft. In the fine print that appeared immediately below the question, there were instructions for providing information concerning multiple offenses. The instructions included a directive to exclude any conviction which had been "pardoned, statutorily eradicated, or judicially ordered sealed, annulled, or expunged."

In fine print at the bottom of the application form appeared the following language:

I hereby certify that the statements made by me in this new hire packet are true and accurate, and I further understand that Axxcess has and will rely upon the statements made by me in this new hire packet in securing a temporary or permanent job position as the case may be. In the event that Axxcess determines that I have made any false statements, misrepresentations or failure to disclose any information requested herein, Axxcess reserves the right in its sole and absolute discretion to rescind any job offer, terminate my employment or deny a worker's compensation claim, if appropriate.

Despite the information Ms. Milster had provided on the application indicating that she had just been convicted of a misdemeanor theft charge two weeks before commencing her employment, the employer hired Ms. Milster for the line worker position. The employer did not conduct a background check on Ms. Milster until she applied for promotion to the supervisor position. The employer did not have Ms. Milster fill out a new application for the supervisor position. The employer requested the background check on July 24, 2012 and received a report on July 31, 2012. The report indicated that Ms. Milster had been convicted of misdemeanor contempt of court in 1996. The report also indicated that Ms. Milster had been convicted of Theft in the Fifth Degree on October 31, 2011. This was the offense about which Ms. Milster provided information on the job application. The report also indicated that Ms. Milster had been convicted of an additional offense of Theft in the Fifth Degree in January 2012, based on an offense committed in 2010 and based on revocation of a deferred judgment that was in place up until January 2012.

In light of the information provided in the criminal history check, the employer discharged Ms. Milster from the employment on August 2, 2012 for failure to include the contempt conviction or the second theft conviction on the application she filled out in November 2011.

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(6) provides:

(6) False work application. When a willfully and deliberately false statement is made on an Application for Work form, and this willful and deliberate falsification does or could result in endangering 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, such falsification shall be an act of misconduct in connection with the employer.

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).

The evidence in the record is insufficient to prove, by a preponderance of the evidence, that Ms. Milster willfully and deliberately made false statements on the application form. The question posed on the form was: "Have you been convicted of a crime?" To which, Ms. Milster answered yes. Ms. Milster told the employer about her recent theft conviction. A reasonable person completing the application might not have known that a 15-year-old conviction for contempt might also fit the legal definition, or the employer's definition, of a crime. The employer's own directive for answering the question instructed Ms. Milster not to include the second theft matter for which she had received a deferred judgment. The employer's Exhibit Two indicates that the deferred judgment remained in place until early 2012. Thus, the employer's argument fails on the first prong of the test, whether there were willfully and deliberately false statements on the application form.

Even if there had been false statements on the application form, the evidence fails to establish that the omissions could have endangered the health, safety or morals of Ms. Milster or others, or resulted in exposing the employer to legal liabilities, or result in placing the employer in jeopardy. At the time Ms. Milster completed the application, she was applying for a temporary line production position. That type of work by its nature minimized any risk to coworkers or to the employer flowing from omission of additional reference to offenses on the application. The employer had ample notice that Ms. Milster had just been convicted of theft and needed no more prompting than that to conduct a criminal history check, if the employer was at all inclined to do so.

The application was not completed in the context of Ms. Milster being promoted to the supervisor position that might involve an enhanced level of trust. Had Ms. Milster completed a new application for that position in July 2012, and omitted criminal history information on the application, the employer might have a stronger case.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Milster was discharged for no disqualifying reason. Accordingly, Ms. Milster is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

DECISION:

The Agency representative's August 23, 2012, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs