

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LISA L CONNER

Claimant

APPEAL NO. 09A-UI-08985-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MIDWEST JANITORIAL SERVICE INC

Employer

OC: 07/06/08

Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Lisa Connor filed a timely appeal from the June 18, 2009, reference 06, decision that denied benefits. After due notice was issued, a hearing was held on July 31, 2009. Ms. Conner participated. Larry McDowell, District Manager, represented the employer.

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: Lisa Connor was employed by Midwest Janitorial Service as a full-time custodian from August 2008 until May 19, 2009, when Larry McDowell, District Manager, discharged her from the employment for theft. Ms. Conner had been assigned to perform work at CBE in Waterloo. A CBE employee reported to CBE that someone had taken prescription medication from the employee's desk drawer. CBE installed surveillance equipment. On May 18, a CBE representative contacted Mr. McDowell and reported that Ms. Conner had been observed on the surveillance equipment opening and closing the desk drawer where the prescription medication had been stored. Mr. McDowell and Ms. Conner's immediate supervisor, Doreen Davis, reviewed the surveillance record and observed Ms. Conner opening and closing the drawer where the prescription medication had been stored. When Mr. McDowell confronted Ms. Conner about the matter, Ms. Conner denied taking the prescription medication, but admitted taking ibuprofen from a first aid kit. Ms. Conner offered to reimburse the employer for the cost of the surveillance equipment. CBE had passed along the cost of the surveillance equipment to Midwest Janitorial Service.

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). 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 administrative law judge found the testimony of Larry McDowell more credible than the testimony of Lisa Connor. Mr. McDowell acknowledged that Ms. Conner had otherwise been a good employee and provided balanced, plausible, and persuasive testimony. Ms. Conner appeared to offer excuses as to why she would routinely access desk drawers at CBE and over argued that point in a way that undermined her credibility. The weight of the evidence indicates that the employer clearly observed Ms. Conner engaged in misconduct.

There is sufficient evidence in the record to establish by a preponderance of the evidence that Ms. Conner was indeed the person who accessed the CBE employee's desk drawer without authorization or justification and who took the CBE employee's prescription medication. The conduct was contrary to the interests of Midwest Janitorial Service and constituted misconduct in connection with the employment.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Conner was discharged for misconduct. Accordingly, Ms. Conner 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 paid to Ms. Conner.

DECISION:

The Agency representative's June 18, 2009, reference 06, 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