

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BARNHART, CHRIS, A
Claimant

APPEAL NO. 10A-UI-13793-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

NIGHT INC
UNION FAMILY PHARMACY
Employer

OC: 08/22/10
Claimant: Respondent (2-R)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the September 27, 2010, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on December 3, 2010. Claimant participated personally and was represented by attorney Alex Kornya. Attorney Sheila O’Laughlin represented the employer and presented testimony through Linda Nightingale, Rich Woods, Jean Link, and Tanya Bagge. Exhibits One, Two, and A through I 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 owns and operates three pharmacies, located in Dyersville, Monticello, and Dubuque. The claimant worked primarily at the employer’s pharmacy in Dubuque, but toward the end of the employment filled in at times at the Dyersville location. Chris Barnhart was employed as a pharmacy technician from 2005 until August 23, 2010, when Linda Nightingale, owner, discharged her for accessing confidential personnel and business records without authorization and then disclosing that information to other pharmacy staff without authorization.

In July 2010, Ms. Barnhart revealed to contract pharmacist Rich Woods and to a fellow pharmacy tech that she had snooped through the employer’s business records to learn more about store operations. Ms. Barnhart told Mr. Woods that she now knew what everybody made per hour in the company and knew how much the owner paid her son. Ms. Barnhart told Mr. Woods specifically that she knew he was paid \$500.00 a day for his services. The information Ms. Barnhart divulged was information she could only have obtained by accessing confidential business records stored in a particular file contained in a filing cabinet at the Dyersville store. Ms. Barnhart would have no reason or authority to access the documents in question. Prior to Ms. Barnhart making unauthorized access to the documents and disclosing

information, pharmacy staff had no idea that the owner's son was involved in any way in the business or that he received compensation in connection with that involvement.

On August 20, 2010, Ms. Barnhart engaged in a similar discussion with pharmacist Jean Link, during which she again made an unauthorized disclosure of confidential information. Unlike pharmacist Rich Woods, who contracted his services to the employer, Ms. Link was an actual employee, who had worked for the employer more than a decade, and who was compensated differently than Mr. Woods. While Ms. Barnhart and Ms. Link were working together on August 20, Ms. Barnhart said to Ms. Link that if the employer was struggling for money, why did the employer keep Mr. Woods, when he made more money than Ms. Link and the other employee pharmacist at the Dubuque store. Ms. Barnhart did not at that time specifically say what Mr. Woods made, but made it clear that his compensation was greater than that of the other two employee pharmacists. This information was greatly upsetting to Ms. Link and prompted her to consider leaving employment. During the conversation, Ms. Barnhart stated specifically what the business was paying the owner's son. Prior to that conversation, Ms. Link had no personal knowledge regarding the owner's son's involvement in the business.

During the weekend of August 21-22, Mr. Woods mentioned to Ms. Nightingale the conversation that had occurred between him and Ms. Barnhart in July, concerning the disclosure of his compensation and Ms. Barnhart's admission to accessing confidential business records without authorization. This was Ms. Nightingale's first notice of the unauthorized access or the unauthorized disclosure. The information concerning the unauthorized access and disclosure was greatly disturbing to the employer.

On Sunday, August 22, Ms. Nightingale spoke to Director of Pharmacy Services, Tanya Bagge, regarding how Ms. Barnhart could have gained access to the information she was disclosing to other employees. Ms. Bagge, who was responsible for maintaining the records in question, confirmed that there would be no way for Ms. Barnhart to gain access to the information she had disclosed unless she went through a filing cabinet at the Dyersville store and accessed a particular file folder she would have no reason or authorization to access.

In the course of investigating the matter, Ms. Nightingale also contacted Ms. Link. Ms. Nightingale deemed Ms. Link, a long-term employee, irreplaceable. Ms. Nightingale was concerned that disclosure of the differences in compensation could prompt Ms. Link to leave the employment. Ms. Link confirmed to Ms. Nightingale that Ms. Barnhart had indeed revealed on August 20 that Mr. Woods received greater compensation for services.

The employer had previously counseled Ms. Barnhart not to open mail that was marked confidential or that had nothing to do with her specific duties as a pharmacy tech.

The employer had other concerns about Ms. Barnhart's demeanor and motivation, but had not documented any specific incident events relating to these issues.

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 weight of the evidence in the record establishes that Ms. Barnhart did indeed access confidential personnel and business records without authorization while working at the Dyersville store. The weight of the evidence indicates that the conduct at that time was motivated by a willful and wanton disregard of the employer's interests. The weight of the evidence indicates that in July 2010, Ms. Barnhart made an unauthorized disclosure of the confidential information to Mr. Woods and to a fellow pharmacy technician. The conduct was

again motivated by a willful and wanton violation of the employer's interests. The information was shared by Ms. Barnhart to indicate that she had somehow gained an advantage on her colleagues and on the employer through her cunning. The weight of the evidence indicates that Ms. Barnhart made yet another unauthorized disclosure of confidential information on August 20, 2010, when she told Ms. Link that Mr. Woods was paid more and made a second disclosure about the employer's son's involvement with and compensation from the business. The conduct was yet again motivated by a willful and wanton violation of the employer's interests. The information was shared with the intent to influence store operations in a way that would benefit Ms. Barnhart, perhaps by provoking dissension amongst the pharmacists and forcing the employer to break ties with Mr. Woods or risk losing Ms. Link.

The evidence makes clear that it was the unauthorized access and disclosure of confidential information that was the basis of the decision to discharge Ms. Barnhart from the employment. Whatever the concerns raised by Ms. Barnhart's demeanor, the employer demonstrated a willingness to continue to tolerate these issues, and they were not the basis for ending the employment. Nor does the evidence support the claimant's assertion that she was discharged for budgetary issues, rather than for the misconduct that occurred toward the end of the employment.

The evidence indicates that the misconduct that triggered the discharge started at the time Ms. Barnhart made the unauthorized access and continued through August 20, 2010, when Ms. Barnhart made the final unauthorized disclosure to Ms. Link. Whatever delay occurred between the conversation with Mr. Woods in July and Mr. Woods sharing that information with the employer on August 21-22 becomes much less significant in the context of the final incident of misconduct, which was the August 20 disclosure. The August 20 disclosure establishes a "current act" of misconduct.

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

Iowa Code section 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code section 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received would constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The Agency representative's September 27, 2010, reference 01, decision is reversed. 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.

This matter is remanded to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs