

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BRIGITTE K TOINGAR
Claimant

APPEAL NO. 13A-UI-00885-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HCM INC
Employer

**OC: 11/11/12
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 January 17, 2013, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on February 20, 2013. Claimant Brigitte Toingar participated. Joyce Graves, Director of Nursing, represented the employer.

ISSUE:

Whether Ms. Toingar was discharged for misconduct in connection with the employment that disqualifies her for unemployment insurance benefits. The administrative law judge concludes that Ms. Toingar was discharged for no disqualifying reason.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Brigitte Toingar was employed by HCM, Inc., as a full-time Registered Nurse from May 2012 until November 13, 2012, when Joyce Graves, Director of Nursing, discharged her from the employment for alleged falsification of her application for employment. Ms. Graves was Ms. Toingar's immediate supervisor and had hired Ms. Toingar. Ms. Graves had interviewed Ms. Toingar before she provided Ms. Toingar with an employment application. Prior to extending an offer of employment to Ms. Toingar, HCM, Inc., provided Ms. Toingar with the application materials. When Ms. Toingar completed the application, she did not list prior employment as a Licensed Practical Nurse at Willow Gardens from 2006 to 2007. Ms. Toingar did list two more recent employments. Ms. Toingar listed her employment as a Licensed Practical Nurse with Northbrook Manor from 2007 to 2008 and her employment as a Licensed Practical Nurse with Evergreen Estates from 2008 to 2010. Ms. Toingar had obtained her Registered Nurse licensure prior to beginning the employment at HCM.

Ms. Toingar had omitted reference to Willow Gardens in her application because of the circumstances under which she left that employment. Ms. Toingar had been discharged from Willow Gardens after she had witnessed another nurse stealing from that employer and had reported the theft to that employer. After she was discharged from the employment with Willow Gardens, Ms. Toingar had successfully sued that employer for wrongful termination. At the time

Ms. Toingar had completed her application for employment at HCM, Inc., she had signed that the information on the application was true and complete to the best of her knowledge, that she understood false or misleading information would result in discharge from the employment, and that she authorized her former employers to release information to HCM.

Ms. Grave's discharged Ms. Toingar after concluding that she could not trust Ms. Toingar in light of the omission of the prior employer from the written application.

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).

The weight of the evidence establishes that Ms. Toingar intentionally failed to disclose the prior employment with Willow Gardens when she completed the written application form for employment with HCM, Inc. The evidence also indicates that Ms. Toingar had a reasonable basis for excluding reference to that prior employment. After having successfully sued the prior employer for wrongful termination, Ms. Toingar had no reason to expect that that former employer would provide a fair reference or a reference that would be useful to her or to a prospective employer. Since that employment, Ms. Toingar had successfully completed two more recent employment spanning years, had completed her R.N. training, and had satisfied the Registered Nurse licensing requirements. In addition, Ms. Graves signaled the relative insignificance of the written application by interviewing Ms. Toingar prior to having her complete the written application form. The omission of reference to that employment had absolutely no bearing on the employment with HCM, Inc. The omission of reference to that prior employment on the application form did not endanger the health, safety or morals of Ms. Toingar, the employer, or the patients who would be in Ms. Toingar's care. Nor did the omission expose the employer to legal liabilities or penalties, or otherwise place the employer in jeopardy.

The omission of reference to the Willow Gardens' employment did not constitute misconduct in connection with the HCM, Inc., employment. Ms. Toingar was discharged for no disqualifying reason. Accordingly, Ms. Toingar is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The Agency representative's January 17, 2013, 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