

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RUTH M KROG
Claimant

APPEAL NO. 10A-UI-09367-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

JAMES F LEVY, GEN PARTNER ET AL
3801 GRAND ASSOCIATES LP
Employer

OC: 05/09/10
Claimant: Appellant (2)

Section 96.5-2-a – Discharge
Section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

Claimant filed an appeal from a representative's decision dated June 16, 2010, reference 02, which denied benefits based upon her separation from 3801 Grand Associates LP. After due notice, a telephone hearing was held on August 17, 2010. Claimant participated personally. Appearing on behalf of the claimant was Ms. Laura Jontz, Representative of the Legal Aid Society. The employer participated by Jodi Parson and Pete Long.

ISSUES:

The issue in this matter is whether the claimant was discharged for misconduct in connection with her work and whether the claimant's appeal was timely.

FINDINGS OF FACT:

Having considered the evidence in the record, the administrative law judge finds: Ruth Krog was employed as a certified medication assistant for the captioned employer from November 11, 2008 until May 14, 2010 when she was discharged from employment based upon the employer's belief that the claimant was intentionally sleeping on the job. Ms. Krog worked on a part-time basis and was paid by the hour. Her immediate supervisor was Jodi Parson.

The claimant filed her appeal on the matter beyond the statutory ten-day time limit as the decision was improperly addressed and sent to the wrong apartment number causing a delay in the claimant's filing of an appeal. As soon as the claimant was apprised that a decision adverse to her had been issued, she immediately filed an appeal in this matter.

The claimant was discharged after it was reported that she was sleeping on the job in a couch in the lobby area of a residential complex where tenant/clients reside. Because the claimant had previously been warned in November of 2009 for sleeping on the job, a decision was made to terminate Ms. Krog from her employment.

Prior to reporting to work on May 10, 2010, the claimant informed her employer via voicemail that she had prescribed medications for pain.

On the night that the claimant was observed sleeping in a common area, the claimant had dozed off due to the affects of prescription medication that she was taking. The claimant had not attempted to conceal her activities nor had the claimant been found sleeping in a manner that would suggest that she had intentionally reclined on the couch with the intention of sleeping on the job.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes sufficient intentional misconduct to warrant the denial of unemployment insurance benefits. It does not.

The administrative law judge finds that the claimant has established good cause for filing her appeal beyond the ten-day statutory time limit. The notice of decision had been sent to the wrong apartment address number and the claimant therefore was precluded from filing her appeal earlier.

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 insurance benefits. Misconduct that may be serious enough to warrant the discharge of an employee may not necessarily be serious enough to warrant the denial of unemployment insurance 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 a current act of misconduct, a discharge for misconduct cannot be based upon such past acts. The termination of employment must be based upon a current act. See 871 IAC 24.32(8).

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 evidence in the record establishes that Ms. Krog had informed the employer that she had been prescribed prescription pain medication and was discharged when she was later observed sleeping on a couch in a common area. The evidence does not establish that the claimant attempted to hide her conduct or that the claimant made preparations to sleep on the job. The claimant testified that she unintentionally dozed off due to the apparent affects of the medication and had not intended to violate the employer's rules by sleeping on the job. The administrative law judge finds the claimant to be a credible witness and finds that her testimony is not inherently improbable.

The question before the administrative law judge is not whether the employer had a right to discharge Ms. Krog for these reasons but whether the discharge is disqualifying under the provisions of the Employment Security Act. While the decision to terminate Ms. Krog may have been a sound decision from a management viewpoint, the evidence does not establish intentional disqualifying misconduct sufficient to warrant the denial of unemployment insurance benefits. The claimant did not intend to fall asleep but feel asleep due to the affects of prescription medication that she did not anticipate. Benefits are allowed providing the claimant is otherwise eligible.

DECISION:

The representative's decision dated June 16, 2010, reference 02, is reversed. Claimant was discharged for no disqualifying reason. Unemployment insurance benefits are allowed, providing the claimant is otherwise eligible.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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