

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DONNA M THOMAS
Claimant

APPEAL NO. 13A-UI-12755-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ABCM CORPORATION
Employer

OC: 10/13/13
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Donna Thomas filed a timely appeal from the November 5, 2013, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on December 9, 2013. Ms. Thomas participated. Mary Banse represented the employer and presented additional testimony through Brooke Harlan.

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: Donna Thomas was employed by ABCM Corporation as a certified nursing assistant at the employer's Dumont Wellness Center from 2006 until October 17, 2013, when Mary Banse, Administrator, discharged her from the employment. Ms. Thomas' primary duties involved assisting persons with developmental disability with activities of daily living. The employer's decision to discharge Ms. Thomas from the employment was based on Ms. Thomas' decision to take a jacket from a profoundly intellectually disabled resident and convert the resident's jacket to her own use. When Ms. Thomas took the jacket, it was located in the resident's closet in the resident's room. The jacket had resident's name on the label the employer uses to identify resident's clothing. The resident did not consent for and was incapable of consenting to Ms. Thomas' use of his jacket. The employer had a written work rule that specifically prohibited "taking property belonging to others without their consent." That same work rule subjected employees to immediate discharge if they engaged in such activity. Ms. Thomas was well aware of the work rule and the express prohibition on using resident's property, but elected to help herself to the jacket nonetheless. Ms. Thomas took the jacket home and wore it back to work. Ms. Thomas possessed the jacket for several days. When the employer located the resident's jacket, it was hanging on a hook behind a door in the staff break room with Ms. Thomas' cell phone and cigarettes in the pocket.

The employer interviewed Ms. Thomas on October 18, 2013 about her possession of the resident's jacket. Ms. Thomas initially said she had just borrowed the jacket that morning and asserted she had borrowed the jacket because she had spilled something on her own. Later in the interview, Ms. Thomas admitted to having worn the jacket to work that day. Ms. Thomas had indeed possessed the jacket for several days and had wholly converted the jacket to her personal use to the detriment of the resident's rights to the jacket. Though Ms. Thomas asserted to the employer that she intended to have the jacket laundered and returned to the resident that very day, Ms. Thomas' ongoing possession and use of the jacket indicated otherwise. The employer concluded that Ms. Thomas had exploited the resident by converting the resident's personal property to her own use.

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 evidence in the record establishes that Ms. Thomas knowingly and willfully took possession of the disabled resident's jacket in violation of the employer's work rules. Ms. Thomas possessed and used the jacket without authorization in a manner that indicated an intent to deny the owner of the use of the jacket. That is theft under Iowa Code section 714.1(2). Ms. Thomas' conduct was in violation of the employer's work rules. The conduct was in wanton and willful violation of the employer's interest in safeguarding resident's property and in avoiding exploitation of a dependent adult in the employer's care.

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

DECISION:

The Agency representative's November 5, 2013, reference 01, 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css