

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DIANE FOXEN
Claimant

APPEAL NO. 11A-UI-07565-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MERCY HEALTH SERVICES – IOWA CORP
Employer

**OC: 05/08/11
Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

Diane Foxen filed a timely appeal from the June 1, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on August 3, 2011. Ms. Foxen participated personally and was represented by Attorney Joseph Ferrentino. Joseph Sullivan, Corporate Counsel, represented the employer and presented testimony through Angela Faber and Kathy Fennel.

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: Diane Foxen was employed by Mercy Health Services as a full-time housekeeper from 1975 until May 9, 2011, when Kathy Fennel, Director of Environmental Services discharged her from the employment. Ms. Fennel was Ms. Foxen's immediate supervisor.

The final incident that prompted the discharge occurred on May 4, 2011. On that day, Ms. Foxen went into a kitchen area and took into her possession for personal use three new mesh laundry bags. Ms. Foxen placed the three laundry bags in semi-transparent black trash bag, carried them out of the kitchen, and placed them on her assigned work cart. Ms. Foxen placed the black trash bag in an area on the cart designated for soiled cleaning rags, not an area designated for trash. Ms. Foxen was the only person who used that cart during that shift. Ms. Foxen had no legitimate purpose for venturing into the kitchen when she did or for having the bags in her possession at that time. Ms. Foxen was not assigned to collect garbage from the kitchen area that day. The coworker assigned to collect garbage from the kitchen that day had already collected the garbage from the kitchen. Ms. Foxen knew the garbage bag she carried from the kitchen contained neither garbage nor dirty laundry at the time she carried it from the kitchen.

On May 4, Rose Steffensmeier, Charge Housekeeper, was supervising Ms. Foxen's work. Ms. Steffensmeier was across the hall from the kitchen at the time Ms. Foxen placed on her cart the garbage bag containing the contraband laundry bags. Ms. Steffensmeier observed Ms. Fox place the trash bag on her cart. Ms. Steffensmeier immediately confronted Ms. Foxen about the presence of the bag on her cart. Ms. Foxen denied any knowledge of the bag or how it got on her cart.

Ms. Steffensmeier then contacted Ms. Fennel to report what she had just observed. Ms. Fennel directed Ms. Steffensmeier to retrieve the mesh bags as part of the employer's investigation into the matter and further directed Ms. Steffensmeier to contact a security officer. Ms. Fennel directed Ms. Steffensmeier to prepare a written statement while the matter was still fresh in her memory. Ms. Steffensmeier prepared a written statement the same day and e-mailed it to Ms. Fennel that same day. Ms. Fennel did also contact the security officer directly to ask him to take the mesh bags into his possession.

On May 6, Ms. Fennel, Security Representative Dan McCullough, and Human Resources Generalist Angela Faber met with Ms. Foxen for the purpose of interviewing her about the May 4 incident. Ms. Foxen initially denied putting the mesh bags on her cleaning cart. In discussing the matter, Ms. Foxen mentioned that there had been three mesh laundry bags in the black garbage bag. She did this *before* the employer mentioned the number of mesh bags that had been located on Ms. Foxen's work cart. Later during the interview, Ms. Foxen asserted that she had picked the black garbage bag up from the floor and had placed it on her cart. Ms. Foxen's account of the May 4 incident evolved during the May 6 interview. Toward the end of the interview, Ms. Foxen told the employer, "I did it--there." By that statement, Ms. Foxen meant that she had indeed taken unauthorized possession of the mesh laundry bags for the purpose of converting them to some personal use. The employer suspended Ms. Foxen while the employer further investigated.

As part of the investigation, Ms. Fennel and others reviewed video surveillance that showed Ms. Foxen placing the black garbage bag on her work cart in an area designated for soiled cleaning rags.

On May 7, 2011, Ms. Foxen made an unsolicited telephone call to Ms. Fennel and left a message on Ms. Fennel's voicemail system. Ms. Foxen told Ms. Fennel the following:

Kathy, This is Diane. I know I put it on the cart, but I really didn't take it out of the building, so I really didn't steal them. I know I was wrong. I should have known better. I'm very sorry. I can't afford to lose the job. I have a house and a car payment. I should have thought of that before. I know I didn't explain what I did. I'm very sorry. I don't what I was thinking when I did it. I'm very sorry. Good-bye.

On May 9, Ms. Fennel and a human resources representative telephoned Ms. Foxen and discharged her from the employment.

In making the decision to discharge Ms. Foxen, the employer considered prior incidents in which the employer suspected Ms. Foxen had committed theft. In the fall of 2009, the employer suspected Ms. Foxen was responsible for multiple thefts of coinage or change from an area where Ms. Foxen was assigned to work. Once the employer removed Ms. Foxen from the area, the thefts discontinued. In June 2010, Ms. Foxen removed a stainless steel bowl where a nurse had left it and placed in a store room area, where it stayed until the nurse found it. In December 2010, the employer suspected Mr. Foxen of take some beef sticks from a break room area. Ms. Fennel went to the Dyersville facility to investigate, but did not find any contraband in

Ms. Foxen's possession. Ms. Foxen had advance warning that the employer was coming to investigate. In January 2011, a supervisor located new washcloths and hardboiled eggs on Ms. Foxen's assigned cart. Though the employer lacked sufficient information to confirm that Ms. Foxen had intended to commit theft in connection with the prior incidents, Ms. Fennel and others strongly suspected Ms. Foxen was responsible for the prior incidents.

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).

Though the employer did not have Ms. Steffensmeier testify at the hearing, there is enough evidence in the record to establish that Ms. Foxen took steps to commit theft from the employer on May 4, 2011 and did so with the intention of committing theft from the employer.

Iowa Code section 714.1 sets forth the several ways that a person can commit the criminal offense of theft. Iowa Code section 714.1(1) and (2) provide, relevant part as follows:

A person commits theft when the person does any of the following:

1. Takes possession or control of the property of another, or property in the possession of another, with the intent to deprive the other thereof.
2. Misappropriates property which the person has in trust, or property of another which the person has in the person's possession or control, whether such possession or control is lawful or unlawful, by using or disposing of it in a manner which is inconsistent with or a denial of the trust or of the owner's rights in such property, or conceals found property, or appropriates such property to the person's own use, when the owner of such property is known to the person.

While not precisely on point, Iowa Code section 714.5 provides guidance to the administrative law judge with regard to determining Ms. Foxen's intent at the time she placed the new laundry bags on her work cart. The statute states, in relevant part, as follows:

The fact that a person has concealed ... unpurchased property of a store or other mercantile establishment, either on the premises or outside the premises, is material evidence of intent to deprive the owner, and the finding of ... unpurchased property concealed upon the person or among the belongings of the person, is material evidence of intent to deprive and, if the person conceals or causes to be concealed ... unpurchased property, upon the person or among the belongings of another, the finding of the concealed ... property is also material evidence of intent to deprive on the part of the person concealing the ... goods.

Ms. Foxen's entry into a work area she was not assigned to be on May 4, her placement of the new laundry bags in the black trash bag, her removal of the items from the kitchen, and her placement of these items in a garbage bag on her cart in an area where they did not belong, all point to an intent to deprive the employer of its property and an intent to convert the bags to personal use. Ms. Foxen's immediate denial of knowledge of how the items got on her cart points to this same intent. Ms. Foxen's evolving story when the employer questioned her also points to this same intent. Ms. Foxen's admission at the end of the May 6 interview clearly points to such an intent. Finally, Ms. Foxen removed doubt about her intention when she made the unsolicited telephone call to Ms. Fennel on May 7. Ms. Foxen also removed the question of whether her May 6 admission had been a result of intimidation, the result of poor mental health,

or a side effect of psychotropic medication. During that call she made the argument that it was theft because she had not been successful in the theft, lamented her lack of judgment, and pleaded for her job.

The weight of the evidence in the record establishes that Ms. Foxen acted with willful and wanton disregard of the employer's interests when she attempted to steal three mesh laundry bags from the employer. Ms. Foxen's lack of success in her venture is not a mitigating factor. The weight of the evidence establishes that the employer reasonably suspected Ms. Foxen of prior theft, or attempted theft, and that Ms. Foxen confirmed the employer's suspicions in connection with the final incident and investigation that prompted her discharge.

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

DECISION:

The Agency representative's June 1, 2011, 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. The employer's account will not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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