

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**SUSAN K GILCHRIST**

Claimant

**APPEAL NO. 16A-UI-10737-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**AMERICAN BAPTIST HOMES OF MIDWEST**

Employer

**OC: 09/11/16**

**Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

Susan Gilchrist filed a timely appeal from the September 30, 2016, reference 01, decision that disqualified her for benefits effective September 11, 2016, based on an agency conclusion that she had requested and was granted a leave of absence, was voluntarily unemployed and, therefore could not be deemed available for work. After due notice was issued, a hearing was started on October 17, 2016 and concluded on November 1, 2016. Ms. Gilchrist participated. Amy Spangler represented the employer and presented additional testimony through Peggy Stevens. Exhibits One through Five, A and B were received into evidence.

**ISSUES:**

Whether Ms. Gilchrist requested and was granted a leave of absence.

Whether Ms. Gilchrist separated from the employment for a reason that disqualifies her for unemployment insurance benefits or that relieves the employer of liability for unemployment insurance benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Susan Gilchrist began her employment with American Baptist Homes of the Midwest (ABHM) in 2010. Ms. Gilchrist worked as a Director Support Professional. Her work duties involved assisting disabled persons with independent living skills. The employment began full-time in August 2016. Peggy Stevens, Independent Living Program Director, was Ms. Gilchrist's immediate supervisor. Amy Spangler, Community Administrator, was Ms. Stevens' immediate supervisor.

On September 3, 2016, Ms. Gilchrist was arrested by Des Moines police officers and charged with Domestic Abuse Assault, a simple misdemeanor, and Criminal Mischief 4th Degree, a serious misdemeanor. The charges stemmed from a dispute between Ms. Gilchrist and her boyfriend about use of Iowa Supplemental Nutrition Assistance Program (SNAP) funds. Ms. Gilchrist wanted to be present when the SNAP funds were used. Her boyfriend wanted her to relinquish the SNAP benefit card so he could use it without Ms. Gilchrist being present. The dispute occurred away from Ms. Gilchrist's workplace and while she was off duty. At one point

during the dispute, Ms. Gilchrist believed her boyfriend was going to hit her and grabbed her boyfriend's arm. That act was the basis for the Domestic Abuse Assault. At one point in the dispute, Ms. Gilchrist kicked her boyfriend's car and caused a dent. That act was the basis for the Criminal Mischief charge.

The employer's written work rules required that Ms. Gilchrist notify the employer within five days of being arrested for and/or convicted of a criminal offense. The requirement was contained in the employee handbook that the employer provided to Ms. Gilchrist at the start of her employment. The policy also stated as follows:

ABHM will conduct an evaluation regarding job relatedness and appropriate next steps relative to continued job assignment and/or employment which, depending on the circumstances, may result in no action up to job reassignment or immediate termination of employment.

Ms. Gilchrist initially notified Ms. Stevens by telephone of the charges. On September 5, Ms. Gilchrist spoke with Ms. Stevens in person to explain the charges and the basis for the charges. Ms. Stevens consulted with Ms. Spangler. Ms. Spangler consulted with the employer's home office in Minnesota. Ms. Spangler and/or Ms. Stevens then notified Ms. Gilchrist that she would be placed on an indefinite leave of absence while the criminal charges were pending. Ms. Gilchrist had not requested a leave of absence. Ms. Gilchrist had done nothing in the course of the employment to indicate a risk to the employer's clients or staff. Ms. Spangler prepared a leave of absence request form and had Ms. Gilchrist sign the form on September 9, 2016. Ms. Gilchrist has continued to be involuntarily separated from the employment since that time.

The charges against Ms. Gilchrist are still pending. A pre-trial conference date is set for November 10, 2016. A trial date has been tentatively set for December 7, 2016.

#### **REASONING AND CONCLUSIONS OF LAW:**

Iowa Admin. Code r. 871-24.23(10) provides:

(10) The claimant requested and was granted a leave of absence, such period is deemed to be a period of voluntary unemployment and shall be considered ineligible for benefits for such period.

Iowa Administrative Code section 871 IAC 24.32(9) provides as follows:

Suspension or disciplinary layoff. Whenever a claim is filed and the reason for the claimant's unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as discharged, and the issue of misconduct must be resolved. Alleged misconduct or dishonesty without corroboration is not sufficient to result in disqualification.

Ms. Gilchrist did not request a leave of absence. Ms. Gilchrist has not been on a voluntary leave of absence or voluntarily unemployed at any point since she went off work. Rather, the employer indefinitely suspended Ms. Gilchrist on September 9, 2016 in response to learning that Ms. Gilchrist had been charged with non-work related criminal offenses.

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

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 employer's decision to indefinitely suspend Ms. Gilchrist from the employment amounted to a discharge from the employment. The employer's sole basis for separating Ms. Gilchrist from the employment was the allegation that she had engaged in off-duty misconduct. A criminal charge is an allegation of misconduct, not proof of misconduct. From the employer's perspective, the assault charge would be the most concerning. However, the available evidence indicates that no assault occurred and that Ms. Gilchrist had merely grabbed her boyfriend's arm in a self-defensive act to prevent him from hitting her. There is no evidence to indicate that the off-duty incident placed the employer's clients or staff at risk. The employer's testimony confirmed that the employer had no basis to conclude that the employer's clients or staff were at risk.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Gilchrist was discharged for no disqualifying reason. Accordingly, Ms. Gilchrist is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Gilchrist.

**DECISION:**

The September 30, 2016, reference 01, decision is reversed. The claimant was discharged on September 9, 2016 for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs