

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**LISA M FERNHOLZ**  
Claimant

**APPEAL NO. 11A-UI-15741-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**ECHO PLUS INC**  
Employer

**OC: 11/06/11  
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 November 29, 2011, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on January 11, 2012. Claimant Lisa Fernholz participated personally and was represented by attorney Don Hemphill. Amanda Brewer represented the employer and presented additional testimony through Laralei Mulder. Exhibits 1 through 23 were received into evidence.

**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: The employer provides services to persons with disabilities. Lisa Fernholz was employed by Echo Plus, Inc., on a full-time basis from 2008 until November 7, 2011, when Amanda Brewer, Executive Director, discharged from the employment. Ms. Brewer had joined Echo Plus in May 2011 and became Ms. Fernholz's immediate supervisor at that time. Ms. Fernholz was the agency's business manager from November 2010 until July 1, 2011, when Ms. Brewer promoted her to finance director. The promotion to finance director came about in connection with Ms. Brewer's downsizing and reorganization of duties the agency's finance area. Ms. Brewer had laid off two full-time finance clerks who handled billing matters and had reassigned their duties to Ms. Fernholz. Ms. Fernholz continued to perform the duties she had performed as business manager. Ms. Fernholz had a degree in finance and relevant work experience when she joined the agency.

Ms. Brewer discharged Ms. Fernholz on November 7, 2011 for what Ms. Brewer termed gross misconduct. Ms. Fernholz had failed to appropriately follow through on a number of finance matters. Ms. Fernholz's failed to pay the employer's federal taxes by the established deadline, which prompted the federal government to impose a \$713.55 penalty. Ms. Fernholz then failed to pay the tax penalty by the deadline, which prompted the federal government to issue a notice of intent to levy on October 31, 2011. All the while, an outside accounting firm representative

was reminding Ms. Fernholz of the deadlines and offering assistance so that Echo Plus could avoid further consequences. Ms. Fernholz's also failed to get appropriate audit information to an auditor in a timely manner despite multiple prompts from Ms. Brewer. Ms. Fernholz submitted erroneous cash flow information for October 2011 that indicated the employer had sufficient operational funds on hand when the employer did not. While Ms. Fernholz was out of the office in mid-October, Ms. Brewer discovered dozens of unopened envelopes in Ms. Fernholz's work area. These included bank statements, bills and overdue notices, bad check notices, Iowa Medicaid documents, DHS Notice of Decisions, worker's compensation claim materials, and unemployment insurance claims.

Ms. Brewer's poor decision-making made the bad situation in the finance department worse. It started with the decision to lay off the two-full time finance clerks effective June 30, 2011, and assigning their duties to Ms. Fernholz, who already had full-time finance duties. It quickly became the case that Ms. Fernholz could not keep up with all of her assigned duties despite working extended hours. Ms. Brewer hired a new finance clerk, Laralei Mulder, during the latter half of July. In September, despite the over-abundance of work, Ms. Brewer had Ms. Fernholz change offices and had other employees paint Ms. Fernholz's office.

The situation began to implode in mid-October, when Ms. Fernholz, a type one diabetic, became sick. Ms. Fernholz was sick from work on October 19, but returned on October 20 and continued to report to work for a number of days despite the fact that she was subject to frequent vomiting. Ms. Fernholz was hospitalized on October 24. Ms. Fernholz was released at 5:30 p.m. the next day with medical discharge instructions to not work on October 26 and to work only half days on October 27 and 28. On October 28, despite the financial disaster that was unfolding in the workplace, Ms. Brewer notified Ms. Fernholz that she was suspended for three days.

#### **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).

The evidence establishes a pattern of negligence on the part of Ms. Fernholz. The evidence also establishes a pattern of negligence on the part of Ms. Brewer. It is difficult to conclude that despite Ms. Fernholz's pattern of negligence, it is difficult to conclude that Ms. Fernholz acted out of willful or wanton disregard of the employer. This is because of the role Ms. Brewer's negligent decision-making played in creating a dysfunctional finance department and fostering dysfunction in the finance department. One question raised by the evidence is why Ms. Brewer, as the brand new executive director, would take the bold move of eliminating two full-time positions in the finance department without foreseeing the problems that would create. The evidence raises the question of why Ms. Brewer, in the context of an over-abundance of work in the finance department, would choose to disrupt business to have Ms. Fernholz move offices and to paint Ms. Fernholz's office. The evidence raises the question of why, in the context of an over-abundance of finance work, Ms. Brewer would suspend Ms. Fernholz for three days after Ms. Fernholz had just missed time from work due to illness.

In Richers v. Employment Appeal Board, 479 N.W.2d 308 (Iowa 1991), the Supreme Court of Iowa concluded that an employee's negligent performance of certain aspects of her work duties did not constitute misconduct when the problem was a failure to properly prioritize competing responsibilities. This case presents facts that are more compelling as those at issue in Richers. In this case, Ms. Brewer created a dysfunctional financial department by laying off workers and assigning Ms. Fernholz more duties than she could handle. Ms. Brewer engaged in additional decision-making that kept the finance department dysfunctional. Ms. Fernholz lacked sufficient organizational skills to begin with and, unsurprisingly, was not up to the challenge of having her workload doubled. In addition to that—or perhaps because of the work situation—Ms. Fernholz was battling illness.

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

**DECISION:**

The Agency representative's November 29, 2011, 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.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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