

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI	
<b>CLAIMANT</b>	<b>APPEAL NO. 09A-UI-11625-JTT</b>
<b>EMPLOYER</b>	<b>ADMINISTRATIVE LAW JUDGE DECISION</b>
	<b>OC: 07/05/09</b> <b>Claimant: Respondent (2-R)</b>

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

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the August 5, 2009, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on August 31, 2009. Claimant and employer each participated. Exhibit One was received into evidence.

**The case contains material that is required by law to remain confidential as to the general public. The confidential material will only be made available to the parties to this proceeding and any others who are legally authorized to have access to the information pursuant to Iowa Code chapters 135C and 232. The unredacted decision and the unredacted hearing record, including the audio recording, shall be sealed and not publicly disclosed.**

**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: Claimant was employed by employer as a full-time certified nursing assistant in the employer's skilled nursing facility from September 2008 until June 2, 2009, when the employer discharged the claimant from the employment. The claimant's immediate supervisor was the director of nursing. Claimant provided care to elderly residents.

On April 10, 2009, law enforcement officers responded to a domestic dispute at the residence the claimant shared with her husband and young daughter. The law enforcement officers summoned a representative of the Department of Human Services to the home. The D.H.S. representative took the claimant, her husband, and the child to a hospital for hair sample drug testing. The claimant promptly notified the employer of these events on the same day.

At some point between April 20 and 23, the claimant received word that her daughter's hair sample had tested positive for marijuana and that D.H.S. would be filing a founded child abuse

report with the claimant and her husband each listed as the perpetrator of the abuse. The day after the claimant received this information, she notified the director of nursing and administrator. The employer, in order to comply with Iowa Code section 135C.33 governing healthcare facilities licensed by the State of Iowa had the claimant complete a consent form to allow the employer to contact the Department of Human Services for evaluation of whether the claimant could continue to work at the employer's facility.

On May 13, the employer received word that something of note had been detected on the abuse registry and on the criminal history check. The employer had known at the time it hired the claimant about one or more theft convictions related to passing bad checks. The employer and the claimant had to complete additional documentation before the Department of Human Services would provide further information concerning the abuse registry entry. The claimant and the employer completed the appropriate documentation and submitted it to the Department of Human Services on May 13.

On May 25, the claimant received a copy of the founded child abuse report from the Department of Human Services. The claimant promptly reported this to the employer.

On May 27, the claimant and the employer completed additional documentation to be used by the Department of Human Services to evaluate whether the claimant could continue in her employment.

On June 2, the Department of Human Services notified the employer and the claimant in writing that the Department had completed an Iowa Code section 135C.33 Record Check Evaluation on the criminal history and abuse history. The Department notified the parties that as the result of the evaluation, the claimant could not work in the employer's licensed healthcare facility. The letter from the Department indicated that the decision was based on the circumstances of the crimes and the abuse. The claimant had continued to work up to this point. Upon receipt of the letter, the employer summoned the claimant and discharged her from the employment.

The employer had notified the claimant at the time of hire that under Iowa law she could not work for the employer if she had a founded abuse entry on the state abuse registry. The policy was also contained in the employee handbook the claimant received at the time of hire. The policy did not distinguish between dependent adult abuse and child abuse. Likewise, Iowa Code section 135C.33 does not distinguish between the child abuse and dependent adult abuse, but looks instead for a nexus between the conduct and the employment when determining whether an employee may continue to work for a state licensed healthcare facility.

#### **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 indicates that the discharge from the employment was not based on anything that happened in the course of the claimant's employment. The evidence indicates instead that the employer discharged the claimant in response to the Iowa Department of Human Services' decision that the claimant could not continue to work for the employer because of the founded child abuse matter and because of prior criminal convictions. The claimant was made aware at the start of her employment that she could not work for the employer if she was found by the Department of Human Services to have engaged in abuse. On May 25, the Department of Human Services entered a formal finding that the claimant was responsible for an act of child abuse. This finding made the claimant ineligible to continue in the

employment. The claimant was aware at all relevant times that she would not be allowed to continue in the employment if the Department of Human Services disqualified her from the employment because of an abuse finding.

In Cook v. Iowa Department of Job Service, 299 N.W.2d 698 (Iowa 1980), the Iowa Supreme Court held that when a claimant lost his insurability, and thereby lost his ability to perform his duties, because of traffic tickets he accumulated, the loss was self-inflicted and disqualifying misconduct. The question for the administrative law judge is whether the Cook ruling applies also in the present case, where the claimant lost her employability due to criminal convictions and the entry of a founded child abuse. In Cook, the claimant's employment required that he be able to operate motor vehicles. Through commission of traffic offenses and resulting convictions, the claimant rendered himself incapable of continuing in the employment. In the present case, the claimant rendered herself incapable, under Iowa Code chapter 135C, of continuing in the employment by means of criminal conduct she perpetrated, and that resulted in one or more criminal convictions, and by means of abusive behavior she personally perpetrated or allowed another to perpetrate when she had a duty to intervene to protect her dependent child. The administrative law judge concludes that the reasoning in the Cook decision applies here as well.

The administrative law judge concludes that the claimant was discharged for misconduct in connection with the employment that disqualifies her for unemployment insurance benefits. The claimant 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 disbursed to the claimant.

Iowa Code section 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code section 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received would constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

#### **DECISION:**

The Agency representative's August 5, 2009, reference 01, decision is reversed. The claimant was discharged for misconduct in connection with the employment that disqualifies her for unemployment insurance benefits. The claimant 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 disbursed to the claimant.

This matter is remanded to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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