

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

EILEEN A STROUD

Claimant

APPEAL NO. 09A-UI-03577-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

COLUMBUS COMMUNITY

SCHOOL DISTRICT

Employer

Original Claim: 02/01/09

Claimant: Appellant (4)

Iowa Code section 96.5(2)(a) – Discharge for Misconduct
Iowa Code section 96.4(3) – Able & Available

STATEMENT OF THE CASE:

Eileen Stroud filed a timely appeal from the February 23, 2009, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on March 30, 2009. Ms. Stroud participated. Rich Bridenstein, School District Superintendent, represented the employer. Exhibits A and 1 were received into evidence.

ISSUES:

Whether Ms. Stroud separated from the employment for a reason that disqualifies her for unemployment insurance benefits.

Whether Ms. Stroud has been able and available for work since she established her claim for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Eileen Stroud was employed by the Columbus Community School District as a full-time bus driver from 2005 until January 30, 2009, when she resigned in lieu of being discharged from the employment. Rich Bridenstein, School District Superintendent, had learned that Ms. Stroud was charged with a felony criminal offense concerning an allegation of embezzlement. The charge did not arise from Ms. Stroud's employment with the Columbus Community School District. On Friday, January 30, 2009, Mr. Bridenstein summoned Ms. Stroud to a meeting. Mr. Bridenstein asked Ms. Stroud whether she intended to fight the charge and she indicated she did not intend to do so. Mr. Bridenstein told Ms. Stroud that the School District had decided to proceed with termination of Ms. Stroud's employment because of the pending felony charge. Mr. Bridenstein provided Ms. Stroud the opportunity to resign in lieu of being discharged. Ms. Stroud elected to resign in lieu of being discharged from the employment. There was no other basis for the employer's decision to terminate the employment and Ms. Stroud had performed her assigned duties well.

Ms. Stroud established a claim for unemployment insurance benefits that was effective February 1, 2009. From the effective date of the claim until February 23, 2009, when Ms. Stroud commenced

new full-time employment, Ms. Stroud sought new full-time employment and made two employer contacts per week.

REASONING AND CONCLUSIONS OF LAW:

871 IAC 24.26(21) provides:

Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:

(21) The claimant was compelled to resign when given the choice of resigning or being discharged. This shall not be considered a voluntary leaving.

In analyzing quits in lieu of discharge, the administrative law judge considers whether the evidence establishes misconduct that would disqualify the claimant for unemployment insurance benefits.

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 a discharge 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 weight of the evidence indicates that Ms. Stroud's involuntary separation from the employment was not based on misconduct in connection with the employment, but was instead based on an allegation of misconduct based on Ms. Stroud's actions outside the employment. At the time of the involuntary separation, Ms. Stroud had been charged with a felony offense, but had not yet been convicted.

Because the involuntary separation was not based on misconduct in connection with the employment, the administrative law judge concludes that Ms. Stroud was involuntarily separated from the employment for no disqualifying reason. Accordingly, Ms. Stroud is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Stroud.

Iowa Code section 96.4-3 provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

871 IAC 24.22(2) provides:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(2) Available for work. The availability requirement is satisfied when an individual is willing, able, and ready to accept suitable work which the individual does not have good cause to refuse, that is, the individual is genuinely attached to the labor market. Since, under unemployment insurance laws, it is the availability of an individual that is required to be tested, the labor market must be described in terms of the individual. A labor market for an individual means a market for the type of service which the individual offers in the

geographical area in which the individual offers the service. Market in that sense does not mean that job vacancies must exist; the purpose of unemployment insurance is to compensate for lack of job vacancies. It means only that the type of services which an individual is offering is generally performed in the geographical area in which the individual is offering the services.

The weight of the evidence indicates that Ms. Stroud was available for full-time employment and engaged in an active and earnest search for full-time employment from the date of her January 30, 2009 resignation from the Columbus Community School District until she commenced new full-time employment on Monday, February 23, 2009.

When a person's availability for other work is unduly limited because the person is working to such a degree that removes it the person from the labor market, the person no longer meets the work availability requirements of Iowa Code section 96.4(3) and is not eligible for unemployment insurance benefits. See 871 IAC 24.23(23).

The weight of the evidence indicates that Ms. Stroud was able and available for work during the three-week period of February 1, 2009 through February 21, 2009. Ms. Stroud was eligible for benefits for that period, provided she was otherwise eligible. Effective the benefit week that began February 22, 2009, Ms. Stroud was employed on a full-time basis, no longer met the availability requirements of Iowa Code section 96.4(3), and was no longer eligible for unemployment insurance benefits.

DECISION:

The Agency representative's February 23, 2009, reference 01, decision is modified as follows. The claimant was involuntarily separated from the employment for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

The claimant was able and available for work during the three-week period of February 1, 2009 through February 21, 2009 and was eligible for benefits for that period, provided she was otherwise eligible. Effective February 22, 2009, the claimant no longer met the availability requirements of Iowa Code section 96.4(3) and was no longer eligible for unemployment insurance benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw