

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KIMBERLY L PARRISH

Claimant

APPEAL NO. 14A-UI-01144-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WALGREEN PHARMACY SVCS MIDWEST

Employer

OC: 01/05/14

Claimant: Appellant (1)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.5(2)(b) & (c) – Discharge for Gross Misconduct

STATEMENT OF THE CASE:

Kimberly Parrish filed a timely appeal from the January 22, 2014, reference 01, decision that disqualified her for benefits and that deleted wage credits from all employers prior to the date of discharge based on an agency conclusion that she had been discharged for gross misconduct. After due notice was issued, a hearing was held on May 22, 2014. Ms. Parrish participated personally and was represented by attorney Christopher Clausen. Robert Winn of Equifax Workforce Solutions represented the employer and presented testimony through Mike Lyons and Shirley Phinney. Exhibits One, Two, Three and A 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: Kimberley Parrish was employed by Walgreen Pharmacy Services Midwest as a part-time pharmacy tech at the employer's Newton store. Her immediate supervisor was Mike Lyons, Pharmacy Manager. Ms. Parrish began the employment in August 2012. The employer discharged Ms. Parrish on December 13, 2013 for theft of prescription medication. Ms. Parrish had most recently committed theft from the employer on December 8, 2013. On that day, Ms. Parrish removed a bulk bottle containing hydrocodone, a narcotic controlled substance, from the shelf where it was stored in the pharmacy. Ms. Parrish removed approximately 120 pills from the bulk container, placed them in a prescription pill vial, and placed the vial in her work smock. Ms. Parrish removed the pills from the store without authorization. The theft was documented on surveillance. The theft was reflected in the daily medication account performed before and after Ms. Parrish's shift that day. The theft of the substantial quantity of pills on December 8, 2013 followed a pattern of similar behavior dating back to October 2013.

On December 13, 2013, Shirley Phinney, District Loss Prevention Manager, interviewed Ms. Parrish about the theft on December 8 and the prior similar thefts. Ms. Parrish initially denied stealing prescription medication from the employer, but later in the same interview, admitted to the December 8 theft and several prior similar thefts. Ms. Parrish provided a written statement in which she admitted to the thefts. Ms. Parrish provided the employer with an estimated number of two types of prescription pills she had stolen in October 2013. The employer provided Ms. Parrish of estimates of the number of additional pills stolen by Ms. Parrish. The employer correctly estimated that Ms. Parrish had stolen approximately 400 controlled substance pills in all. Ms. Parrish included the employer's estimates in her written statement. Ms. Parrish signed the written statement admitting to the theft of pills. The employer estimated the dollar amount of the theft at \$745.71. On December 13, 2013, Ms. Parrish signed an agreement to repay that loss amount to the employer.

Ms. Phinney had alerted a Drug Task Force that she would be interviewing Ms. Parrish on December 13, 2013. At the end of the interview, Ms. Phinney summoned the Drug Task Force. The law enforcement officers took Ms. Parrish into custody. Ms. Parrish was charged with Theft in the Third Degree, an aggravated misdemeanor, in violation of Iowa Code section 714.2(3). On February 5, 2014, Ms. Parrish entered a guilty plea to Theft in the Third Degree, an aggravated misdemeanor, in Jasper County case number AGCR018011. Ms. Parrish appeared for sentencing the same day and was granted a deferred judgment. The sentencing court placed Ms. Parrish on probation, ordered her to pay restitution pursuant to the filing of a pecuniary damages statement, and imposed as a condition of probation the requirement that Ms. Parrish complete an intensive substance abuse treatment program. Ms. Parrish continued on probation, and had not yet fulfilled the terms of the probation, at the time of the appeal hearing.

REASONING AND CONCLUSIONS OF LAW:

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).

Iowa Code § 96.5-2-b-c 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:

b. Provided further, If gross misconduct is established, the department shall cancel the individual's wage credits earned, prior to the date of discharge, from all employers.

c. Gross misconduct is deemed to have occurred after a claimant loses employment as a result of an act constituting an indictable offense in connection with the claimant's employment, provided the claimant is duly convicted thereof or has signed a statement admitting the commission of such an act. Determinations regarding a benefit claim may be redetermined within five years from the effective date of the claim. Any benefits paid to a claimant prior to a determination that the claimant has lost employment as a result of such act shall not be considered to have been accepted by the claimant in good faith.

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).

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 approach to the unemployment insurance matter was in some respects unwise. The employer's missteps included not supplying Ms. Phinney's raw interview notes, the record of missing pills attributed to the theft, or the surveillance record of the December 8 theft, for the hearing. While such omissions could under certain circumstances have proven fatal to the employer's case, there is sufficient evidence in the record to establish misconduct and gross misconduct in connection with the employment.

Iowa Code section 801.4(8) defines an indictable offense as an offense other than a simple misdemeanor.

Iowa Code section 714.2(3) and (4) provide as follows:

714.2 Degrees of theft.

3. The theft of property exceeding five hundred dollars but not exceeding one thousand dollars in value, or the theft of any property not exceeding five hundred dollars in value by one who has before been twice convicted of theft, is theft in the third degree. Theft in the third degree is an aggravated misdemeanor.

4. The theft of property exceeding two hundred dollars in value but not exceeding five hundred dollars in value is theft in the fourth degree. Theft in the fourth degree is a serious misdemeanor.

The weight of the evidence indicates that Ms. Parrish did indeed commit theft of prescription medication from the employer on December 8, 2013 and on several prior occasions. The weight of the evidence indicates that Ms. Parrish knew at the time she committed the thefts that her conduct was contrary to the interests of the employer and illegal. Any one of Ms. Parrish's thefts from the employer was sufficient by itself to constitute misconduct in connection with the employment. Ms. Parrish's conduct was misconduct in connection with the employment despite her addiction. The employer's decision to discharge Ms. Parrish from the employment was based on evidence of misconduct and was not based on Ms. Parrish's addiction. Because Ms. Parrish was discharged for misconduct, she is disqualified for benefits until she has earned 10 times her weekly benefit amount and would then have to meet all other eligibility requirements. The employer's account will not be charged for benefits paid to Ms. Parrish.

The weight of the evidence also indicates that Ms. Parrish's discharge was based on gross misconduct as defined in Iowa Code section 96.5(2)(c). On December 13, 2013, Ms. Parrish signed a written statement admitting to the thefts and also signed a written statement agreeing to the \$747.51 loss amount. The theft amount exceeded \$200.00 and thereby was at the level of an indictable offense.

Ms. Parrish was charged with and entered a guilty plea to an indictable offense based on her theft of prescription medication from the employer. The fact that Ms. Parrish was granted a deferred judgment does not prevent her guilty plea to the indictable offense from constituting a *conviction* for unemployment insurance purposes. The administrative law judge borrows from his learned colleague, Administrative Law Judge Steven A. Wise, for a discussion of whether a deferred judgment constitutes a conviction in the context of determining whether a claimant was discharged for gross misconduct.

The Iowa case law in this area is not straightforward, and deferred judgments have been treated as convictions for some purposes and not for others. It is necessary to review the case law in order to make a proper judgment in this case.

The leading case on this issue is State v. Kluesner, 389 N.W.2d 370 (Iowa 1986). The Iowa Supreme Court acknowledged the difficulty with the legislature's use of the word "conviction" because the word may have different meanings in different contexts. *Id.* at 372. The court reasoned that in the "restricted or technical legal sense the word" conviction "means the final consummation of the prosecution against the accused

including the judgment or sentence rendered pursuant to an ascertainment of his guilt,” but in “its general and popular sense and frequently in its ordinary legal sense, the word ‘conviction’ is used in the sense of establishment of guilt prior to and independently of judgment and sentence by a verdict of guilty or a plea of guilty.” Id.

This distinction is important in determining whether a deferred judgment is a conviction, because technically, a deferred judgment is “a sentencing option whereby both the adjudication of guilt and the imposition of a sentence are deferred by the court.” Iowa Code § 907.1-1. The elements of a judgment in a criminal case include both an adjudication of guilt and imposition of sentence, but when judgment is deferred, there is neither an adjudication of guilt nor an imposition of sentence. State v. Farmer, 234 N.W.2d 89, 91-92 (Iowa 1975).

The court in Kluesner concluded the purpose of the statute controls the determination of which meaning—technical or popular—the legislature had in mind. The court stated: “While we have construed the word ‘conviction’ to have a relatively narrow and technical meaning where it appears in statutes used to enhance punishment, we have accepted a broader definition when protection of the public has been at stake.” Kluesner, 389 N.W.2d at 372. The court ruled the restitution statute’s purpose was to protect the public by compensating victims of criminal activities and, therefore, the word conviction should be given a broad meaning to include an order for deferred judgment. Id. See also State v. Ridout, 346 N.W.2d 839-40 (Iowa 1984) (deferred judgment not included within definition of offense under statute prescribing enhanced punishment for second, third or subsequent OWI offense); Schilling v. Iowa Department of Transportation, 646 N.W.2d 69 (Iowa 2002) (deferred judgment for eluding a police officer may be used for revocation of driving privileges because revocation is not intended as a punishment to the driver but for the protection of the public in the use of the highways).

The case law establishes the purpose of the statute as the deciding factor for whether a deferred judgment will be treated as a conviction, but the cases unfortunately suggest every statute falls into one of two purpose categories—statutes used to enhance punishment or to protect the public. On the surface level, the gross misconduct statute at issue in this case appears to be a punishment-enhancement statute because an ordinary misconduct disqualification lasts until a claimant earns wages of at least ten times her weekly benefit amount while the gross misconduct completely cancels a claimant’s wage credits, which requires establishing a whole new base period of wages meeting the requirements of Iowa Code § 96.4-4. In addition, the statute does not appear to have a purpose of protecting the public. On the other hand, the principles of statutory construction advise that all parts of a statute are to be considered together without giving undue importance to a single or isolated part. The language used in the statute and the purpose for which it was enacted must be examined. Iowa Beef Processors, Inc. v. Miller, 312 N.W.2d 530, 532 (Iowa 1981).

Using these principles, Iowa Code § 96.5-2 provides two methods to establish a gross misconduct disqualification—conviction or signing a statement admitting to an indictable offense. The revealed statutory purpose then is to impose a gross misconduct disqualification when a claimant is discharged for act determined to be a serious crime if there is objective proof of commission of the crime. The fact that the statute imposes a gross misconduct disqualification when a claimant merely signs a statement admitting to an indictable crime shows that “duly convicted” is to have broader than its technical

meaning. It would include the claimant's deferred judgment after her plea of guilty to the indictable offense of accessory after the fact. Viewed in this fashion, the gross misconduct statute is not a punishment-enhancement statute but instead is separate disqualification with different elements.

See Dahl v. Golden Eagle Distributing Company, Inc., Appeal Number 06A-UI-06523-SWT.

Because the discharge was based on gross misconduct, all wage credits Ms. Parrish earned from all employers prior to the date of the December 13, 2013 discharge are cancelled and cannot be used by Ms. Parrish to establish eligibility for unemployment insurance benefits.

DECISION:

The claims deputy's January 22, 2014, 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.

The claimant was discharged for gross misconduct. All wage credits the claimant earned from all employers prior to the date of the December 13, 2013 discharge are cancelled and cannot be used by the claimant to establish eligibility for unemployment insurance benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs