

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

AMBER R BURKHOLDER
Claimant

APPEAL NO. 11A-UI-13688-LT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**GOVERNMENT EMPLOYEES
INSURANCE COMPANY**
Employer

**OC: 09/04/11
Claimant: Respondent (1)**

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

STATEMENT OF THE CASE:

The employer filed an appeal from the October 4, 2011 (reference 01) decision that allowed benefits. After due notice was issued, a hearing was held by telephone conference call on December 5, 2011. Claimant participated. Employer participated through Human Resources Supervisor Andrew Vaughn, Licensing Technician Bethany Horning, and Customer Service Supervisor Liz Nelson and was represented by Todd Richardson of Employer's Unity. Employer's Exhibit 1 (pages 1 - 16) was admitted to the record.

ISSUE:

The issue is whether claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a service associate and was separated from employment on September 6, 2011. About 60 percent of the calls into the employer's Coralville facility come from Texas, so that license was required for employment and claimant was notified of such at the time of hire. She disclosed a criminal background of fifth degree theft (in 2007 and 2008) on her job application form but not the underage alcohol possession (2004) or possession of marijuana (2003) convictions. The employer found the issues during the background check, discussed them with her, and hired her in spite of those. The insurance license application on December 1, 2009 with the Texas Department of Insurance (TDI) was submitted with background documentation that she had been convicted of fifth degree theft. (Employer's Exhibit 1, pages 14 - 16) TDI denied the application because of the criminal background and the employer appealed the denial beyond the deadline. (Employer's Exhibit 1, pages 8 - 11) In May 2011, Horning found out claimant had an additional fifth degree theft charge against her on May 18 for which she entered an Alford plea. (Employer's Exhibit 1, page 3 - 7) On June 27, 2011, the Texas Department of Insurance denied claimant's appeal. The TDI representative indicated she would not be able to reapply for licensure until 2016, at which time her license application would be denied again because of the May 2011 theft conviction. (Employer's Exhibit 1, page 2) The employer then offered claimant the option to resign or apply for other

positions within the company that would not require a Texas insurance license by a September 6, 2011 deadline. (Employer's Exhibit 1, page 1) There were no other positions for which she would qualify in that office and she was unable to move to other offices elsewhere in the country. Claimant opted not to resign or apply for other positions and was fired.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

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.

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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

A lapse of 11 days from the final act until discharge when claimant was notified on the fourth day that his conduct was grounds for dismissal did not make the final act a "past act." *Greene v. EAB*, 426 N.W.2d 659 (Iowa 1988).

Since the employer made its final decision on June 27, 2011 to discharge if the claimant did not quit or accept another job and the claimant was permitted to work after that date until September 6, 2011, the employer has not established a current act of misconduct. Accordingly, because the act for which the claimant was discharged was not current and the claimant may not be disqualified for past acts of misconduct, benefits are allowed.

DECISION:

The October 4, 2011 (reference 01) decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/kjw