

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KAREN S HIMES

Claimant

APPEAL NO. 12A-UI-02698-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

GOOD SAMARITAN SOCIETY INC

Employer

OC: 01/29/12

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 March 8, 2012, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on April 3, 2012. Claimant Karen Himes participated. The employer did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Karen Himes was employed by Good Samaritan Society, Inc., from 1990 and last performed work for the employer on December 27, 2011. Ms. Himes worked at the Van Buren Good Samaritan Society in Keosauqua. Ms. Himes was the full-time dietary supervisor during the final five years of her employment. Ms. Himes' work schedule was 8:00 a.m. to 3:00 or 4:00 p.m., Monday through Friday. Ms. Himes' immediate supervisor was Administrator Anne Johnston.

After Ms. Himes worked on Tuesday, December 27, 2011, she was next scheduled to work on Tuesday, January 3, 2012. On December 29, 2011, Ms. Himes' husband assaulted her and caused injury to Ms. Himes' ribs. On December 29, Ms. Himes sought medical evaluation. The doctor told Ms. Himes that she would need to be off work for two weeks. The doctor's staff faxed a medical excuse to the employer.

On December 30, 2011, Ms. Himes was arrested and charged with Conspiracy to Manufacture Methamphetamine, a class B felony. Ms. Himes was taken to the Wapello County Jail. Ms. Himes had her initial appearance before the judge on December 30, 2011. The judge set Ms. Himes' bond at \$100,000.00 and remanded her to the custody of the sheriff. Ms. Himes remained in jail until January 9, 2012, when the judge amended her conditions of release and released her to the supervisor by the Department of Correctional Services pending trial. While

Ms. Himes was incarcerated, Ms. Himes' daughter had been in contact with the employer to explain Ms. Himes' absence from the workplace.

On January 10, 2012, Ms. Himes telephoned Ms. Johnston to let the employer know that she had been released from jail and to see whether she was eligible to return to work. Ms. Himes and Ms. Johnston agreed to meet on January 12. By the time Ms. Himes met with Ms. Johnston on January 12, her ribs had sufficiently healed for her to return to work, though she had not met with a doctor to be formally released to return to work.

When Ms. Himes arrived at the workplace for the meeting on January 12, Ms. Johnston had Ms. Himes' personal effects already packed and placed by the door. Ms. Johnston had prepared termination paperwork for Ms. Himes to sign during the meeting. Ms. Johnston told Ms. Himes that she would be paid two weeks of paid time off (PTO) benefits based on her rib injury and the doctor excuse the employer had received. Ms. Johnston told Ms. Himes that she was being placed on an indefinite "leave of absence," based on the felony drug charge. The leave of absence documentation indicated December 27, 2011 as the start date of the leave. Instead of providing an end date for the leave, the documentation indicated that the employment was terminated. Ms. Johnston had Ms. Himes sign documentation indicating that she was separating from the employment. The employer had Ms. Himes turn in her keys and badge. Ms. Johnston wished Ms. Himes well. The tone and substance of the conversation were such that Ms. Himes concluded it was probably the last time she would speak with Ms. Johnston.

REASONING AND CONCLUSIONS OF LAW:

A quit is a termination of employment initiated by the employee for any reason except mandatory retirement or transfer to another establishment of the same firm, or for service in the armed forces. 871 IAC 24.1(113)(b). In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 698, 612 (Iowa 1980) and Peck v. EAB, 492 N.W.2d 438 (Iowa App. 1992). In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer. See 871 IAC 24.25. A worker is deemed to have left employment if the worker becomes incarcerated. See 871 IAC 24.25(16).

On the other hand, a discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period. 871 IAC 24.1(113)(c).

Iowa Administrative Code rule 871 IAC 24.32(9) provides:

Suspension or disciplinary layoff. Whenever a claim is filed and the reason for the claimant's unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as discharged, and the issue of misconduct must be resolved. Alleged misconduct or dishonesty without corroboration is not sufficient to result in disqualification.

The weight of the evidence indicates that during the period of incarceration, Ms. Himes missed shifts on January 3, 4, 5, 6, and 9. The weight of the evidence indicated that all of these absences fell within the two-week period covered by the medical excuse that had been forwarded to the employer at the end of December. The incarceration in no way added to the number of days Ms. Himes needed to be absent from the employment. Under the circumstances, the evidence does not support a conclusion that Ms. Himes voluntarily quit as a

result of being incarcerated for the period of December 30 until January 9. The question shifts instead to whether Ms. Himes was suspended or discharged for misconduct in connection with the employment. The evidence indicates that what the employer termed a "leave of absence" on January 12 was in fact a discharge from the employment.

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 employer did not respond to the hearing notice and did not present any evidence to establish a voluntary quit or a suspension/discharge for misconduct. The weight of the evidence indicates that the employer discharged Ms. Himes from the employment based on the mere fact that she had been arrested and charged with a felony criminal offense. Being charged with an offense is not the same as being convicted of an offense. The employer has presented no evidence to prove by a preponderance of the evidence that Ms. Himes committed the offense she is charged with. The employer has presented no evidence to establish a connection between the conduct in question and the employment. While the employer may have wanted to separate Ms. Himes from the employment to disassociate itself with Ms. Himes in the context of the pending criminal prosecution, the evidence does not indicate a discharge for misconduct in connection with the employment.

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

DECISION:

The Agency representative's March 8, 2012, 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs