

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CARRIE L WENGER
Claimant

KUM & GO LC
Employer

APPEAL NO. 12A-UI-06390-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 04/29/12
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The employer filed an appeal from a decision of a representative dated May 21, 2012, reference 01, which held that the claimant was eligible to receive unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on June 25, 2012. Claimant participated. The employer participated by Erika Tietz, human resources generalist. The record consists of the testimony of Erika Tietz; the testimony of Carrie Wenger; and Employer's Exhibits 1-5.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a retail chain of convenience stores. The claimant worked at the store located in Marion, Iowa. The claimant was hired on April 21, 2003. She was terminated on April 2, 2012. At the time of her termination, the claimant was a full-time sales manager/assistant manager.

On March 19, 2012, the claimant told her employer that she had had some "trouble" in Oelwein, Iowa. The claimant had been arrested for driving on a revoked license and possession of marijuana. She also mentioned a prior conviction of possession of a controlled substance. The employer did a background check and found out that the claimant had been convicted of possession of a controlled substance on October 10, 2011. Based on the results of the background check, the claimant was considered to have "fallen outside of eligibility" for employment. (Exhibit 1) The claimant was then terminated.

Charges relating to the March 19, 2012, arrest are still pending. The claimant said that she is "fighting" the charge of possession of marijuana.

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.

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.

Misconduct that leads to termination is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. In order to justify disqualification, the evidence must establish that the final incident leading to the decision to discharge was a current act of misconduct. See 871 IAC 24.32(8). See also Greene v. EAB, 426 N.W.2d 659 (Iowa App. 1988). The employer has the burden of proof to show misconduct.

There is insufficient evidence in this record that the claimant was discharged for a current act of misconduct. The claimant was terminated after a background check was completed on

March 31, 2012, which showed that the claimant had been convicted of possession of a controlled substance on October 10, 2011. The employer determined that the claimant was no longer eligible for employment under its guidelines. What triggered the background check was the claimant's arrest for driving with a revoked license and possession of marijuana. There has been no conviction on those charges and therefore these charges cannot constitute misconduct. The other conviction, which occurred on October 10, 2011, is too remote in time to constitute a current act of misconduct. There is no allegation that the claimant falsified her employment application.

The employer has the right to determine whether an employee remain eligible for employment when there are criminal charges pending or on record. But the employer must still show that the claimant was discharged for a current act of misconduct before a disqualification will be imposed. The employer did not show that the claimant was discharged for a current act of misconduct. Benefits are therefore allowed if the claimant is otherwise eligible.

DECISION:

The decision of the representative dated May 21, 2012, reference 01, is affirmed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs