

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

THERESE M COHRS
Claimant

APPEAL NO. 12A-UI-06345-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

GOOD SAMARITAN SOCIETY INC
Employer

OC: 04/22/12
Claimant: Respondent (2-R)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the May 21, 2012, reference 05, decision that allowed benefits. After due notice was issued, a hearing was held on June 22, 2012. Claimant Therese Cohrs participated. Mary Brevik represented the employer and presented additional testimony through Doug Williamson. Exhibits One and Three through Six 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: Therese Cohrs was employed by Good Samaritan Society, Inc., during three distinct periods. Ms. Cohrs had initially worked as a nurses' aide at the employer's nursing care facility in Estherville. Ms. Cohrs returned to the nursing care facility in 2009 and the second period of employment ended in 2010. The most recent period of employment started November 29, 2011 and ended just three days later on December 2, 2011. In the new employment, Ms. Cohrs was to work as a home health aide, which would involve going to clients' homes and providing a variety of services that might include running errands or transporting the clients. Ms. Cohrs understood that the work would involve working with dependent adults. The home care agency is located in Spirit Lake, but utilizes the human resources office and staff located at the Estherville nursing care facility for payroll, orientation, and other human resources matters.

On October 14, 2011, Ms. Cohrs completed an on-line application for employment for a home health aide position at Good Samaritan Society. The application asked, "Have you ever been convicted of a misdemeanor?" Ms. Cohrs marked the circle that indicated no prior convictions. The application further stated, "A record of a conviction of a misdemeanor or felony may not disqualify you from consideration for employment in the Society or this center." The application also contained a question that asked whether Ms. Cohrs had been convicted of a crime involving abuse or neglect of another person.

On the electronic job application, Ms. Cohrs listed her most recent previous employment with Good Samaritan in Estherville. In addition, Ms. Cohrs referenced that she had 11 years experience working at the Estherville facility.

On November 9, Ms. Cohrs executed a written authorization to allow the employer to perform a background check to include a criminal history check.

Ms. Brevik had interviewed and hired Ms. Cohrs. During the interview process, Ms. Cohrs did not bring up any prior criminal convictions and Ms. Brevik did not ask.

On December 1, the employer received the results of Ms. Cohrs' background check. The check revealed a 2006 conviction in Minnesota for OWI and a 2007 conviction in Minnesota for Driving While Revoked. Both were misdemeanors and both predated Ms. Cohrs' 2009-2010 employment at the Good Samaritan Society nursing care facility in Estherville. Ms. Cohrs had been without driving privileges for an extended period in connection with the offenses.

On December 2, 2011, Mary Brevik, Director of Home Care discharged Ms. Cohrs for failing to disclose the 2006 OWI conviction and a 2007 Driving While Revoked conviction on her job application for the 2011 employment.

The employer had a written policy regarding falsification of records. Ms. Cohrs acknowledged the policy in writing at the time she completed her online application. The policy stated as follows:

This application was completed by me and I certify that the information in this application is correct to the best of my knowledge. I understand that falsification of this application or any other hiring record or omission of requested information in any detail is grounds for disqualification from further consideration and for dismissal from employment, regardless of when discovered.

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.

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).

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).

Iowa Administrative Code section 871 IAC 24.32(6) provides as follows:

False work application. When a willfully and deliberately false statement is made on an Application for Work form, and this willful and deliberate falsification does or could result in endangering the health, safety or morals of the applicant or others, or result in exposing the employer to legal liabilities or penalties, or result in placing the employer in jeopardy, such falsification shall be an act of misconduct in connection with the employer.

Ms. Cohrs asserts that her failure to disclose the OWI conviction and the Driving While Revoked conviction on the job application was oversight, that she was just so happy to be working that she did not think to disclose the convictions. The administrative law judge finds these assertions not credible. Ms. Cohrs completed the application in October and did not start working until the end of November. The question on the application was clearly worded and easily understood. To answer the question, Ms. Cohrs had to decide which circle to mark--the one that acknowledged the prior convictions or the one that omitted them. The weight of the evidence indicates that Ms. Cohrs intentionally failed to disclose the two convictions. The prior employment with Good Samaritan Society, Inc., did not provide a reason or justification for Ms. Cohrs failure to disclose the prior convictions.

The remaining question is whether Ms. Cohrs' failure to disclose the prior convictions could have resulted in "endangering the health, safety or morals of the applicant or others, or result in exposing the employer to legal liabilities or penalties, or result in placing the employer in jeopardy." The answer to that question is yes. Ms. Cohrs' proposed employment involved caring for and otherwise assisting dependent adults. The duties would involve Ms. Cohrs working independently in the clients' homes. The duties would involve Ms. Cohrs running errands for the clients or even transporting the clients. Ms. Cohrs had worked in the nursing field long enough to be fully aware that criminal convictions had the potential of disqualifying her from working in the field under Iowa law. Had the employer allowed Ms. Cohrs to work for the employer without notifying the licensing agency of the prior convictions, the employer could have faced penalties under state law. Ms. Cohrs' failure to disclose the prior convictions was a dishonest act and undermined the employer's ability to trust her in other matters that required trustworthiness.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Cohrs was discharged for misconduct. Accordingly, Ms. Cohrs is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer's account shall not be charged for benefits paid to Ms. Cohrs.

Iowa Code section 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code section 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received would constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The Agency representative's May 21, 2012, reference 05, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements.

This matter is remanded to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css