

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KATHLEEN M MASTELLER
Claimant

APPEAL NO. 11A-UI-09563-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARE INITIATIVES
Employer

OC: 06/05/11
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Kathleen Masteller filed a timely appeal from the July 1, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on September 2, 2011. Ms. Masteller participated personally and was represented by attorney E.J. Gallagher. David Williams of TALX represented the employer and presented testimony through Diane Roberts, Shanay Lewis, Florence Miller and David Mollenhoff. Exhibits 1 through 11 and A through K 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: Kathleen Masteller was employed by Care Initiatives as the full-time housekeeping and laundry supervisor at Cravenwood Nursing and Rehab from 2004 until June 10, 2011, when Diane Roberts, Administrator, discharged her for theft of housekeeping supplies. Ms. Roberts had been the administrator, and Ms. Masteller's immediate supervisor, from May 2010 until the end of Ms. Masteller's employment.

The final incident that triggered the discharge occurred on April 22, 2011, when Ms. Masteller came to the workplace on her day off and took a five-gallon container of floor wax. At the time she took the container, it still contained approximately a gallon of floor wax. Ms. Masteller had a cleaning business on the side. Ms. Masteller used the employer's cleaning wax either for her business or for some other personal use and gave the empty container to a church that she cleaned as part of her cleaning business. This final incident came to the employer's attention on June 8, 2011, when a maintenance aide, Rick Milks, mentioned the incident to Ms. Roberts in conversation. Ms. Roberts investigated and learned that Ms. Masteller had told housekeeper Shanay Lewis shortly before the April 22 theft that she was going to take some wax from the employer's supply to do the church floor. Ms. Roberts learned that April 22 was not the first time Ms. Masteller had taken supplies belonging to the employer, but that her subordinates

were too intimidated by Ms. Masteller to bring it to the employer's attention. Ms. Masteller donated empty wax containers to the church that she cleaned and came to be viewed by the staff there as a source of empty five-gallon buckets. In the more than a year's time that Ms. Roberts had been Ms. Masteller's supervisor, Ms. Masteller had never once mentioned to Ms. Roberts that she was taking any supplies whatsoever and never mentioned that any such supplies were being donated to the church that she cleaned as part of her side business. In the course of investigating Ms. Masteller's theft of supplies, the employer learned that Ms. Masteller had knowledge of other staff possibly removing supplies from the facility, but that Ms. Masteller had failed to bring this conduct Ms. Roberts' attention.

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).

The April 22, 2011 final incident was a current act for unemployment insurance purposes because it only came to the employer’s attention on June 8, 2011 and the employer discharged the claimant two days later.

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 weight of the evidence in the record establishes that Ms. Masteller stole supplies from the workplace and converted those supplies to some other use that was inconsistent with the ownership interests of the employer. The evidence indicates that Ms. Masteller hid this conduct from her supervisor, but was quite brazen in discussing it with her subordinates, who were too intimidated by her to mention it to the employer. Ms. Masteller presented a creative, but unpersuasive, alternative version of events. Portions of Ms. Masteller’s testimony were not only implausible but also absurd. These included Ms. Masteller’s assertion that taking the buckets of wax was all about making a donation to a church, a church with which she had a business relationship but of which she was not a member, and the further assertion that it was routine to discard perfectly good wax at Cravenwood because it was inconvenient to pour it from the container. The latter assertion, if it had been believable, would indicate ongoing negligence on the part of Ms. Masteller.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Masteller was discharged for misconduct. Accordingly, Ms. Masteller 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. Masteller.

DECISION:

The Agency representative’s July 1, 2011, 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 shall not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css