

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CATHY J LAMB
Claimant

APPEAL NO. 11A-UI-12642-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FAMILIES INC
Employer

**OC: 08/28/11
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

Cathy Lamb filed a timely appeal from the September 21, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on October 18, 2011. Ms. Lamb participated. Mary Kay Townsend, Executive Director, represented the employer. The parties waived formal notice on the issues of whether the claimant was discharged or suspended for misconduct in connection with the employment and whether the claimant voluntarily quit the employment for good cause attributable to the employer. The administrative law judge took official notice of the clerk of court records available to the general public on the Iowa Judicial Branch's website, www.iowacourts.gov, with regard to Johnson County Case Number SMSM086050.

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: Cathy Lamb commenced her employment with Families, Inc., in 2000 and last performed work for the employer on August 12, 2011. Ms. Lamb is a full-time family counselor. Her immediate supervisor is Mary Kay Townsend, Executive Director. Effective August 15, 2011, Ms. Lamb was on approved sick leave that was to run through August 26, 2011. On August 18, 2011, Ms. Lamb was charged with the criminal offense of Theft in the Fifth Degree in violation of Iowa Code section 714.2(5). The incident that gave rise to the charge occurred at the Iowa City Kmart while Ms. Lamb was off-duty.

On August 22, 2011, a member of the community alerted Ms. Townsend to the charge. Ms. Townsend reviewed the clerk of court records available to the general public on the Iowa Judicial Branch's website, www.iowacourts.gov, with regard to Johnson County Case Number SMSM086050 and saw that Ms. Lamb had indeed been charged with a criminal offense. On that same day, Ms. Townsend telephoned Ms. Lamb. Ms. Lamb told the employer that a bra had fallen into her purse, that she intended to plead guilty to the charge, and that it was cheaper

to pay a fine than pay an attorney to fight the charge. Ms. Townsend told Ms. Lamb that because of the charge, the employer was suspending Ms. Lamb without pay effective August 29, 2011. The effective suspension date was to be the date the approved sick leave expired. Ms. Townsend told Ms. Lamb that she would need to perform a background check and discuss the matter with the agency's board of directors to determine whether Ms. Lamb would be allowed to return to the employment. The employer also intended to report the matter to the Iowa Department of Human Resources once the case had been resolved so that DHS could determine whether Ms. Lamb could continue to perform her duties. Ms. Lamb regularly interacted with children and escorted children out into the community in connection with her duties as a family counselor.

The employer did not have a work rule that subjected Ms. Lamb to workplace discipline based on conduct that occurred off-duty and away from the workplace.

At the time of the suspension, Ms. Lamb had been charged, but not convicted of the simple misdemeanor theft offense. Ms. Lamb did retain legal counsel. On September 30, 2011, Ms. Lamb entered a guilty plea to the theft charge. On October 6, 2011, a judge granted Ms. Lamb a deferred judgment, placed her on probation for one year, imposed 20 hours of community service, and assessed a civil penalty. The employer did not learn about the plea and sentencing until the October 18, 2011 unemployment insurance appeal hearing.

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.

Iowa Administrative Code section 871 IAC 24.32(9) provides as follows:

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 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).

Violation of a specific work rule, even off-duty, can constitute misconduct sufficient to disqualify a claimant from unemployment insurance benefits. See Kleidosty v. Employment Appeal Board, 482 N.W.2d 416, 418 (Iowa 1992). But the employer must have a work rule that covers the off-duty conduct.

The evidence in the record establishes that Ms. Lamb was suspended, effective August 29, 2011. The suspension was based on off-duty conduct that occurred away from the workplace. The employer did not have a work rule that subjected Ms. Lamb to suspension or discharge based on off-duty conduct. At the time of the suspension, Ms. Lamb had been charged, but not convicted of off-duty criminal conduct.

The employer believed it was necessary to suspend Ms. Lamb based on Iowa Code sections 249A.29, 135C.33(5)(a)(1) and (3). Those statutory provisions only apply where an employee or prospective employee has been convicted of a crime or has a record of founded child or dependent adult abuse." This also pertains only to the employer's obligation to notify the Department of Human Services so that that agency can determine whether the employee should be allowed to continue in the employment. Ms. Lamb had not been convicted of a crime at the time Ms. Townsend suspended her. In light of the deferred judgment, Ms. Lamb has still

not been *convicted* of a crime. Nothing about Iowa Code statutes cited by the employer made it necessary for the employer to suspend Ms. Lamb while her criminal case was pending.

The weight of the evidence establishes that Ms. Lamb was suspended, and effectively discharged from the employment, based on off-duty conduct that had only resulted in a criminal charge, not conviction, at the time the employer ended the employment on August 22, 2011. The employer lacked a work rule that would subject Ms. Lamb to discipline for off-duty conduct. The state statutes upon which the employer relied did not require that the employer suspended or discharge Ms. Lamb from the employment based on a criminal charge or anything short of a criminal conviction. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Lamb was suspended and discharged for no disqualifying reason. Accordingly, Ms. Lamb is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Lamb.

DECISION:

The Agency representative's September 21, 2011, reference 01, decision is reversed. 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