

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

EMILY S PEARCE
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MASON CITY IA 50401-5505

CARE INITIATIVES
C/O TALX UC EXPRESS
PO BOX 6007
OMAHA NE 68106-6007

Appeal Number: 06A-UI-01869-CT
OC: 01/08/06 R: 02
Claimant: Appellant (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

Emily Pearce filed an appeal from a representative's decision dated February 2, 2006, reference 02, which denied benefits based on her separation from Care Initiatives. After due notice was issued, a hearing was held by telephone on March 6, 2006. The employer participated by Jack Musker, Administrator, and was represented by Lynn Corbeil of TALX UC eXpress. Ms. Pearce responded to the notice of hearing but was not available at the number provided at the scheduled time of the hearing. The hearing record was left open to receive a section of the employer's handbook. The document was received, admitted as Exhibit One, and the hearing record closed.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having reviewed all of the evidence in the record, the administrative law judge finds: Ms. Pearce was employed by Care Initiatives, doing business as Manly Nursing and Rehab Center, from December 7 until December 29, 2005. She was a certified nursing assistant and worked approximately 20 hours each week. On December 29, she was suspended from work pending resolution of a legal matter.

On December 28, Ms. Pearce gave notice that she would not be at work on December 29 because she was in jail. On or about that same date, the administrator, Jack Musker, received a call from a local tire store. He was told that Ms. Pearce had stolen a billfold from the service counter on December 17. He was given an opportunity to view the video surveillance tape of the incident and observed Ms. Pearce remove the billfold. Ms. Pearce was released from jail on her own recognizance on December 29. She was suspended from work until such time as the criminal matter was resolved. If she is found not guilty, she will be allowed to return to work.

The employer's handbook prohibits off-duty abuse of alcohol or controlled substances when such activities adversely affect job performance, safety at the workplace, or the employer's reputation in the community. The handbook also prohibits acts or threats of violence against other employees anywhere and at any time. The handbook describes theft as a "Type A" offense, one that may result in immediate discharge. The handbook does not discuss whether the theft has to occur on the job. "Type A" offenses also include conduct that is detrimental to operations that result in serious negative public relations or poor customer service. The list of "Type A" offenses also includes engaging in any indecent or illegal act on company property.

REASONING AND CONCLUSIONS OF LAW:

At issue in this matter is whether Ms. Pearce was separated from employment for any disqualifying reason. Where an individual is unemployed as a result of a suspension imposed by the employer, she is considered discharged and the issue of misconduct must be resolved. See 871 IAC 24.25(9). An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Code Section 96.5(2)a. The employer had the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). A crucial issue in the case at hand is whether Ms. Pearce's suspension was predicated on conduct that was in connection with her employment. Her suspension was due to an act of theft that occurred away from the workplace and in no way involved the employer. The employer's work rules only address certain off-duty conduct. Employees are prohibited from using alcohol or controlled substances away from work if it impairs functioning on the job. Employees are prohibited from engaging in acts of violence against other employees away from the workplace. The work rule prohibiting theft does not address the issue of whether the violation must occur at the workplace. The section of the rules that addresses illegal conduct specifies that the conduct must occur on company property in order to be considered a violation. In short, the employer's work rules do not clearly put an individual on notice that criminal conduct, such as theft, away from work is considered a violation that will subject the individual to disciplinary action.

The employer has a general rule that prohibits conduct that results in serious negative public relations or poor customer service. Ms. Pearce's conduct has the potential of subjecting the employer to negative public relations. However, she has not yet been convicted of any crime. If the suspension is based solely on the fact that charges have been filed, Ms. Pearce is entitled to the presumption of innocence. If the suspension is based on Mr. Musker's review of the

video surveillance tape from the tire store, it does not square with the intent to return Ms. Pearce to the employment if she is found not guilty of the charge of theft. That is, if the conduct observed on the surveillance tape is not sufficient to warrant a discharge, a not guilty finding by the court notwithstanding, then it is not sufficient to support a misconduct disqualification.

The administrative law judge appreciates that the employer's rules allow for the suspension of an employee pending resolution of legal issues. However, this does not, standing alone, establish misconduct. The employer must still establish that the suspension was due to work-related misconduct. Because the employer has failed to establish that Ms. Pearce's conduct was in connection with her employment, no disqualification is imposed.

DECISION:

The representative's decision dated February 2, 2006, reference 02, is hereby reversed. Ms. Pearce was discharged but misconduct in connection with the employment has not been established. Benefits are allowed, provided she satisfies all other conditions of eligibility.

cfc/kkf