

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JILL M LAMPE

Claimant

APPEAL NO. 09A-UI-09976-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

THE MCGREGOR COMPANY

Employer

OC: 05-31-09

Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the June 30, 2009, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on August 24, 2009. The claimant did participate along with her witnesses Tom Lampe, Jan Corso and Jill Christensen. The employer did participate through Carrie Strub, Scott Marks and Erin McGregor and was represented by John F. Veldey, attorney at Law. Employer's Exhibits One through Eight were entered and received into the record. Claimant's Exhibits One through Ten were entered and received into the record.

ISSUE:

Was the claimant discharged for work related misconduct?

FINDINGS OF FACT:

Having reviewed the testimony and all of the evidence in the record, the administrative law judge finds: Claimant was employed as a sales associate full time beginning January 24, 2008 through May 27, 2009 when she was discharged.

The claimant was discharged by Mr. Scott and Ms. Strub because she was not waiting on customers appropriately. The claimant was waiting on customers on May 27 and on two occasions Ms. Strub had to get the claimant from another area of the sales floor where she was talking to another sales associate to get her to wait on customers. The employer had no policy that was entered into the record that detailed how closely the sales associates were to monitor or follow customers in the store. The sales associates were not expected to follow the customers around nor were they required to always keep the customers in their line of site. The claimant had not been disciplined for not treating customer's properly. Neither Ms. Strub nor Mr. Marks heard either of the conversation that the claimant was having with her coworker on May 27. Mr. Marks made it clear that he believed that the claimant was having an inappropriate conversation with her coworker on May 27. The claimant had never been warned previously for failing to wait on or help customers.

The claimant had been previously warned about having explicit discussions of a sexual nature with her coworkers while at work. The claimant had been suspended for those discussions for three days on March 26, 27 and March 28. After her suspension for the conversations there is no evidence that the claimant had any discussion with any coworker that was inappropriate.

The claimant worked from March 31, after she returned from her medical leave due to her knee injury and from her suspension until May 27 without any other incidents until her discharge. The employer alleges that the claimant was not helping customers appropriately but she had never been warned about not helping customers appropriately and there was no written policy to put the claimant on notice as to how closely she was to follow customers in the store.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

Iowa Code § 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 establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants

denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Employment Appeal Board*, 423 N.W.2d 211 (Iowa App. 1988).

An employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, employer incurs potential liability for unemployment insurance benefits related to that separation.

The claimant had been suspended for an inappropriate conversation that took place in March. There was no allegation that the conversation she was having with coworkers on May 27 was inappropriate in content. She had no prior warnings for not being available to help customers. The claimant was entitled to fair warning that the employer was no longer going to tolerate her performance and conduct that is her failure to be available to help customers. Without fair warning, the claimant had no way of knowing that there were changes she needed to make in order to preserve her employment. The employer's evidence does not establish that the claimant deliberately and intentionally acted in a manner she knew to be contrary to the employer's interests or standards. There was no wanton or willful disregard of the employer's standards. In short, substantial misconduct has not been established by the evidence. Inasmuch as the employer has not established a current or final act of misconduct, benefits are allowed.

DECISION:

The June 30, 2009, reference 01, decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/pjs