IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

VIRGELENE H SHOGREN
Claimant

HY-VEE INC
Employer

APPEAL NO. 11A-UI-11880-LT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 07/31/11
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed an appeal from the September 1, 2011 (reference 01) decision that allowed benefits. After due notice was issued, a hearing was held by telephone conference call on October 4, 2011. Claimant participated with friend, neighbor, and customer Pat Cahill. Ada Heincy was not available and did not participate. The other witnesses were not called. Employer participated through Human Resources Manager Mike Blunk and Manager of Store Operations Laura Rasmussen and was represented by Paula Mack of Corporate Cost Control, Inc. Employer's Exhibit 1 was admitted to the record.

ISSUE:

The issue is whether claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed part-time as a courtesy clerk and cashier for 40 years and was separated from employment on April 21, 2011. On the same date, a customer complained about how she sacked her order, placed some bags on the floor, and placed them in the cart. Blunk confronted her and she said she did not realize she was doing that. The employer had warned her on January 6, 2011 about how she sacked and she said she thought she was meeting expectations, but employer did not see any improvement. She was not given any further instruction about sacking and Blunk did not think she could perform sacking because, physically, "a person of that age" was not able to meet the expectations any longer. Given her height, she could not reach to put other bags on the counter, which was high for Blunk, and was above claimant's waist. Claimant is 4 feet, 11 inches in height and is 79 years of age. She was having trouble holding on to things and would drop items. She was having trouble with her eyesight, having headaches, and was confused frequently. She did not believe sacks were filled too heavy, because she had difficulty lifting them if the sacks were not packed properly. She stopped putting bags on the floor after Blunk told her not to do so. She did not do anything deliberately contrary to the employer's instructions. She has multiple sclerosis, migraine headaches, and had a stroke about two years ago. She has weakness on her right side. Her

doctor has said she is able to work. She had requested a transfer into non-foods, where lifting sacks and bagging would not be an issue, but was told there were no openings in that area.

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 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 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). Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. IDJS,* 391 N.W.2d 731 (Iowa App. 1986). 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). Failure in job performance due to inability or incapacity is not considered misconduct because the actions were not volitional. *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979). Where an individual is discharged due to a failure in job performance, proof of that individual's ability to do the job is required to justify disqualification, rather than accepting the employer's subjective view. To do so is to impermissibly shift the burden of proof to the claimant. *Kelly v. IDJS*, 386 N.W.2d 552 (Iowa App. 1986). In an at-will employment environment, 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. Since employer agreed that claimant had not been retrained how to improve her bagging skills and did not improve after the January 2011 warning, and claimant had some medical, strength, and height issues that contributed to the employer's concerns, and inasmuch as she did attempt to perform the job to the best of her ability but was unable to meet the employer's expectations, no intentional misconduct has been established, as is the employer's burden of proof. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). Accordingly, no disqualification pursuant to Iowa Code § 96.5(2)a is imposed.

DECISION:

The September 1, 2011 (reference 01) decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

_____
Dévon M. Lewis
Administrative Law Judge

_____
Decision Dated and Mailed

dml/kjw