

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JESSICA SMITH
Claimant

APPEAL NO: 16A-UI-13448-JE-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

ABCM CORPORATION
Employer

OC: 11/27/16
Claimant: Respondent (1R)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the December 13, 2016, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on January 11, 2017. The claimant participated in the hearing. Rachel Kist, Administrator and Sierra Rasmussen, Human Resources, participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time dietary supervisor for ABCM Corporation from April 10, 2010 to November 28, 2016. She was discharged for inability to perform the job.

On August 8, 2016, the claimant received a performance improvement plan due to several issues including food quality, sanitation and upkeep of the kitchen, outdated product, and management of staff.

On October 15, 2016, the claimant received another performance improvement plan for continuation of the previous issues including continuing sanitation problems, failure of the claimant to complete orientation or 30 day competency check lists, and failure to audit portions and meal services.

On October 18, 2016, the claimant received a written warning for insubordination after she asked the employer if she could alter the supper hour and the employer denied permission but the claimant did it anyway.

On October 24, 2016, the claimant received a written warning for unprofessional behavior after she discussed personal employee information with other staff in her department and spoke adversely about her staff to other departments.

On November 16, 2016, the claimant received a three day suspension because the employer conducted an audit and found among other issues many servings were inappropriate, temperatures were not correct, holding temperatures were not correct, and sanitation was not in compliance. The employer did not see any improvement in the claimant's skills despite the performance improvement plans.

On November 28, 2016, corporate personnel returned and did an audit and did not find any improvement in the areas of concern. The employer met with the claimant to tell her she did not meet the employer's expectations as a manager and she was given the choice of resigning and being eligible for another position with the employer in the future or being discharged in which case she would not have been eligible for rehire by the employer. The claimant chose to resign rather than face termination of her employment.

The issue of whether the claimant refused a suitable offer of work has not yet been heard or adjudicated by the Claims Section of Iowa Workforce Development.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the 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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proving disqualifying misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 665 (Iowa 2000).

The employer stated the claimant did not have the ability or professionalism to work as a manager for its facilities. Misconduct connotes volition. A failure in job performance which results from inability or incapacity is not volitional and therefore not misconduct. *Huntoon v. Iowa Department of Job Services*, 275 N.W.2d 445 (Iowa 1979). In this case, while the claimant did not meet the employer's expectations, her lack of ability caused that situation and her performance cannot be considered misconduct as that term is defined by Iowa law. Therefore, benefits must be allowed.

The issue of whether the claimant refused a suitable offer of work is remanded to the Claims Section of Iowa Workforce Development for an initial investigation and adjudication.

DECISION:

The December 13, 2016, reference 01, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible. The issue of whether the claimant refused a suitable offer of work is remanded to the Claims Section of Iowa Workforce Development for an initial determination.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/rvs