

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

CHRISTINE G MOORE
Claimant

THE IOWA CLINIC PC
Employer

APPEAL 15A-UI-03597-JCT
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 02/22/15
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the March 11, 2015 (reference 01) unemployment insurance decision that denied benefits based upon separation. The parties were properly notified about the hearing. A telephone hearing was held on April 20, 2015. The claimant participated with Joseph Ferrentino, attorney. The employer participated through Michelle Minnehan. Beth McGinnis also testified for the employer.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full time as an appointment specialist and was separated from employment on February 18, 2015 when she was discharged.

The claimant was discharged for violating the employer's policies regarding harassment and unprofessional conduct. The claimant was made aware of the employer's policies upon hire in November 2014. The claimant had no prior warnings before separation.

The claimant worked in an office with approximately 14 or 15 other appointment specialists in close proximity. The final incident occurred when the employer was made aware of an employee complaint regarding inappropriate conversations amongst the appointment specialists. Specifically, the employer's investigation determined the claimant had written the word "moist" on a piece of paper and showed it to two co-workers. Prior to writing the word, the claimant's co-worker, Tiffany, had approached her and other employees and indicated she disliked the word. The employer determined the claimant had participated in other inappropriate discussions that were sexual in nature and did not report them to the employer. She was subsequently discharged based on the complaint, in part because the employee had made it known that the word was "unpleasant" to her and the claimant's conduct of writing the word "moist" on a piece of paper was deemed harassing and unprofessional.

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.

Iowa Admin. Code r. 871-24.32(1)a, (4) provide:

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).

(4) Report required. The claimant's statement and the employer's statement must give detailed facts as to the specific reason for the claimant's discharge. 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. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

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.

What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy. Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* In contrast, 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. *Huntoon, supra; Newman, supra.* Disqualification for a single misconduct incident must be a deliberate violation or disregard of standards of behavior which employer has a right to expect. *Diggs v. Emp't Appeal Bd.*, 478 N.W.2d 432 (Iowa Ct. App. 1991).

The claimant was discharged for a single incident of conduct regarding language used which the employer deemed to be unprofessional and harassing. Whether the use of improper language rises to the level of misconduct depends on "the context in which it is said" and the "general work environment." See *Myers*, 462 N.W.2d at 738. In this case, the claimant wrote the word "moist" on it and showed the piece of paper to two co-workers. The claimant worked in a clinical, healthcare setting and another employee had said she "disliked" the word. The claimant and other co-workers had joked and laughed about the word. The employer failed to provide credible evidence that the claimant's use of "moist" was in anyway harmful, or harassing, or even vulgar in its context. In comparison, the employer testified another co-worker (not the claimant) wrote the words "moist scrotum", which may imply something inappropriate or sexual, in certain contexts.

In the event that the claimant's conduct of writing the word "moist" on a piece of paper was vulgar or inappropriate in some way, the conduct for which claimant was discharged was merely an isolated incident of poor judgment and inasmuch as employer had not previously warned claimant about the issue leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. The claimant's conduct may have been unprofessional in some aspect but no evidence was presented that the comment alone was egregious enough to warrant immediate discharge without prior discipline. The employer has failed to meet its burden of proof and no disqualification is warranted. Benefits are allowed, provided the claimant is otherwise eligible.

Nothing in this decision should be interpreted as a condemnation of the employer's right to terminate the claimant for violating its policies and procedures. The employer had a right to follow its policies and procedures. The analysis of unemployment insurance eligibility, however, does not end there. This ruling simply holds that the employer did not meet its burden of proof to establish the claimant's conduct leading separation was misconduct under Iowa law. Since the employer has not met its burden of proof, benefits are allowed.

DECISION:

The March 11, 2015 (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. The benefits claimed and withheld shall be paid, provided she is otherwise eligible.

Jennifer L. Coe
Administrative Law Judge

Decision Dated and Mailed

jlc/can