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

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A TO Z CORPORATION
A TO Z DAYCARE & LEARNING CENTER
1315 KNOLL AVE
WATERLOO IA 50701

Appeal Number: 06A-UI-08006-H2T
OC: 07-09-06 R: 03
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/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the August 7, 2006, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on August 24, 2006. The claimant did participate. The employer did participate through Christine York, Executive Director, and (representative) Erika Lamp, On Site Director at the Donald Street Center.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a cook part time beginning August 30, 2005 through June 12, 2006, when she was discharged.

On June 8 Ms. Lamp walked into the kitchen and saw the claimant talking on her cell phone. Ms. Lamp left the kitchen and returned again a short time later and the claimant was still talking on her cell phone. Ms. Lamp instructed the claimant to put her cell phone in her car. The claimant went to put her cell phone in her car. The claimant was discussing Ms. Lamp's discipline of her with two other coworkers when Ms. Lamp approached her and told her not to discuss her conversations with coworkers. The claimant and Ms. Lampe began to argue and Ms. Lampe put her hand on the claimant's shoulder to guide her into guide her into the kitchen where they could talk when the claimant told her to "get your damn hands off me." The claimant has no previous disciplinary history for using profanity.

The claimant was sent home under a suspension and then later was called and told she was being discharged for talking on her cell phone. The claimant had no previous disciplinary history for talking on her cell phone. The claimant alleges that she had an agreement with the employer that she be allowed to keep her cell phone with her because her son was a special needs child and she needed to be available for calls from his care providers at all times. The employer's handbook provides that cell phones are not to be in the building at all when an employee is working.

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 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 employer discharged the claimant and has the burden of proof to show misconduct. 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).

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. While the employer may have had good cause to discharge, conduct which might warrant a discharge from employment will not necessarily sustain a disqualification from job insurance benefits. Budding v. Iowa Department of Job Service, 337 N.W.2d 219 (Iowa App. 1983).

The claimant was entitled to fair warning that the employer was no longer going to tolerate her performance and conduct, that is, her use of her cell phone on company property. 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 claimant should not have used the word "damn" when speaking to Ms. Lampe and, conversely, Ms. Lampe should not have put her hands on the claimant, no matter how well intentioned her motives. However, the claimant's use of "damn", although improper, does not rise to the level of disqualification by standards of either frequency or severity. Inasmuch as the employer has not established a current or final act of misconduct, benefits are allowed.

DECISION:

The August 7, 2006, reference 01, decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

tkh/kjw