

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JANICE L HOTKA
Claimant

APPEAL NO: 09A-UI-05336-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

LABOR READY MIDWEST INC
Employer

OC: 02/22/09
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Labor Ready Midwest, Inc. (employer)) appealed a representative's March 19, 2009 decision (reference 01) that concluded Janice L. Hotka (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on May 1, 2009. The claimant participated in the hearing and was represented by Thomas Hobart, attorney at law. Jessica Spinello appeared on the employer's behalf. During the hearing, Employer's Exhibits One and Two were entered into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on August 11, 2008. She worked full time as a customer service representative in the employer's Iowa City, Iowa office of its temporary employment firm. Her last day of work was February 24, 2009. The employer discharged her on that date. The reason asserted for the discharge was general dissatisfaction with the claimant's job performance, with particular concern as to her professionalism.

The claimant had been running the office alone for several months before Ms. Spinello came on as branch manager as of January 26. After Ms. Spinello began working at the branch, on several occasions she and the claimant reviewed some of the practices the claimant had previously been following in the branch, such as leaving the office unattended to take care of other tasks while there were persons still in the office waiting to see if work would become available; she had allowed them to do this to keep warm during the winter months. Other practices they visited about was the claimant's tendency to speak informally with the clients and make frequent use of terms of endearment such as calling clients "honey." The claimant was not informed that these discussions were to be considered disciplinary.

On February 7 the claimant became upset with an employee she saw working on a work site but not going through the employer's process; she yelled at him from a second floor window as he was on the ground level to come and speak with her, that he was doing the company wrong. She realized shortly thereafter that she had reacted too strongly and apologized to the employee and those who had been around her. Ms. Spinello was aware of this situation by at least February 9. This was the most recent occurrence identified by Ms. Spinello as part of the reason for the claimant's discharge.

On February 20 Ms. Spinello prepared a corrective action notice addressing a number of the general issues she had been discussing with the claimant. She gave it to the claimant on February 23. The corrective action notice stated "as we want you on our team, it is expected that your behavior will be conducive to a professional working environment. It is requested that you respond in a statement form to each of these incidents/behavior and explain why they occurred and what you will do so they do not happen in the future." As a result, the claimant took the corrective action home on the evening of the 23rd and prepared a statement in response to the items. When she returned her response to Ms. Spinello on February 24, she was informed she was discharged for the issues contained in the corrective action notice.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, 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 is misconduct that warrants denial of unemployment insurance benefits are two separate matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. 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. 871 IAC 24.32(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

The reason cited by the employer for discharging the claimant was her job performance, particularly issues of professionalism. Misconduct connotes volition. A failure in job performance is not misconduct unless it is intentional. Huntoon, supra. The claimant had not previously been warned that her conduct was unacceptable, so that future occurrences could be

deemed to be intentional and result in termination. Higgins v. IDJS, 350 N.W.2d 187 (Iowa 1984). Further, there is no current act of misconduct as required to establish work-connected misconduct. 871 IAC 24.32(8); Greene v. Employment Appeal Board, 426 N.W.2d 659 (Iowa App. 1988). The employer was aware of the most recent incident in question two weeks prior to the employer's notice to the claimant it was imposing discipline. The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's March 19, 2009 decision (reference 01) is affirmed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs