

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TRACEY J DYKES
Claimant

APPEAL NO. 10A-UI-12723-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MRS CLARK'S FOODS LLC
Employer

OC: 07/11/10
Claimant: Appellant (2)

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The claimant, Tracey Dykes, filed an appeal from a decision dated September 2, 2010, reference 01. The decision disqualified her from receiving unemployment benefits. After due notice was issued, a hearing was held by telephone conference call on October 26, 2010. The claimant participated on her own behalf. The employer, Mrs. Clark's Foods, did not provide a telephone number where a witness could be contacted and did not participate.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Tracey Dykes was employed by Mrs. Clark's Foods from June 2008 until July 13, 2010 as a full-time production worker. On the evening of July 12, 2010, the claimant was asked to take a drug screening test because the employer had "reasonable cause" to believe she might be under the influence. A breathalyzer test was done and the results were negative for alcohol. The claimant attempted on three occasions to give an acceptable amount of urine for the other test but was unable to do so. The employer's policy considers this to be a refusal to take the test and the claimant was discharged the next day.

REASONING AND CONCLUSIONS OF LAW:

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 to establish the claimant was discharged for substantial, job-related misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). In the present case the employer did not participate to establish the basis for the "reasonable suspicion" Ms. Dykes was under the influence. Nor has any evidence been provided the claimant deliberately refused to give the urine sample, only that she was unable to provide a quantity sufficient to satisfy the technician.

The issue is not whether the employer made a correct decision in separating the 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 benefits are two separate decisions. *Pierce v. IDJS*, 426 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. IDJS*, 351 N.W.2d 806 (Iowa App. 1984). The employer has failed to meet its burden of proof to establish willful misconduct sufficient to warrant a denial of unemployment benefits.

DECISION:

The representative's decision of September 2, 2010, reference 01, is reversed. Tracey Dykes is qualified for benefits, provided she is otherwise eligible.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/kjw