

**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**

**TRACY R TONEY  
516 N DAKOTA APT #49  
AMES IA 50014**

**KELLY CLEANING SERVICES INC  
PO BOX 154  
NEVADA IA 50201 0154**

**Appeal Number: 04A-UI-03702-H2T  
OC 02-29-04 R 02  
Claimant: Respondent (1)**

**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.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the March 23, 2004, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on April 26, 2004. The claimant did participate, with Jeremy Bennett. The employer did participate through Jamie Kelly, President and Owner, and Kim Miller, Janitor. Employer's Exhibit One was received. Claimant's Exhibit A was received.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a custodian part time beginning September 27, 2002 through February 18, 2004, when she was discharged. The claimant was discharged for allegedly

falsifying her time card on February 18, 2004. The claimant indicated that she worked for six hours on that day. She worked at the Medical Art Building from midnight until 3:00 a.m. and at Nickel and Associates from 3:00 a.m. until 6:00 a.m. Mr. Kelly, the owner and the claimant's direct supervisor, testified that he went to the Medical Arts Building at approximately 4:00 a.m. and drove by the Nickel and Associates Building shortly thereafter on his way to the claimant's house. Mr. Kelly estimated that he arrived at the claimant's house at around 4:30 a.m. He said that the claimant answered the door and he told her she was fired and asked for the keys back. When the claimant answered the door she estimated the time to be just after 6:00 a.m. and she told Mr. Kelly that she had just gotten home from work. When the claimant refused to give Mr. Kelly the keys, Mr. Kelly called the Ames Police Department. The call logs from the police department show that Mr. Kelly called them at 6:34 a.m. on the morning of February 19, 2004. The claimant's boyfriend, who was asleep at the time Mr. Kelly arrived, estimated that Mr. Kelly arrived at their home at approximately 6:00 a.m.

#### 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, (8) 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 Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

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 has failed to establish that the claimant falsified her time card on February 18, 2004. The records from the Ames Police Department indicate that Mr. Kelly did not call them for assistance until 6:34 a.m., not the 4:30 a.m. he estimated in his testimony. It is possible that the claimant worked as she indicated that evening. The other allegations levied by Mr. Kelly are unsubstantiated and are not current acts of misconduct. No evidence established that the claimant had a child with her at work after she was warned months earlier not to bring her children to work with her. The employer has additionally failed to establish misconduct due to the claimant's work performance.

Failure in job performance due to inability or incapacity is not considered misconduct because the actions were not volitional. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979). Where an individual is discharged due to a failure in job performance, proof of that individual's ability to do the job is required to justify disqualification, rather than accepting the employer's subjective view. To do so is to impermissibly shift the burden of proof to the claimant. Kelly v. IDJS, 386 N.W.2d 552 (Iowa App. 1986). Inasmuch as she did attempt to perform the job to the best of her ability but was unable to meet the employer's expectations, no intentional misconduct has been established, as is the employer's burden of proof. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Accordingly, no disqualification pursuant to Iowa Code Section 96.5-2-a is imposed. Inasmuch as the employer has not established a current or final act of misconduct, benefits are allowed.

#### DECISION:

The March 23, 2004, reference 01, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

tkh/b