

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**ELAINE CHISM**  
Claimant

**APPEAL NO. 06A-UI-10729-AT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**KATHLEEN D TWYNER**  
Employer

**OC: 10/15/06 R: 04  
Claimant: Appellant (2)**

Section 96.5-2-a –Discharge  
871 IAC 24.32(8) – Current Act of Misconduct

**STATEMENT OF THE CASE:**

Elaine Chism filed a timely appeal from an unemployment insurance dated November 3, 2006, reference 01, which disqualified her for benefits. After due notice was issued, a telephone hearing was held December 1, 2006. Ms. Chism participated on her own behalf and was represented by her husband, Eugene Chism. Tina Garcia, Clotier Dixon, Carrie Jones and Trish Maland testified for her. M. Leanne Tyler, Attorney at Law, appeared on behalf of the employer, Kathleen Twyner, DDS. Dr. Twyner testified as did Herbert Klauer and Sherrie Copeland. Claimant Exhibit A and Employer Exhibits One and Two were admitted into evidence.

**ISSUE:**

Was the claimant discharged for a current act of misconduct?

**FINDINGS OF FACT:**

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: Elaine Chism was employed by Kathleen Twyner, DDS for approximately 12 years prior to her discharge October 16, 2006. The final incident leading to the discharge occurred on the afternoon of October 10, 2006. During a staff meeting, Ms. Chism accused Dr. Twyner of paying caucasian employees more than she paid employees of color. Thus began an argument which ended in Dr. Twyner ordering Ms. Chism to leave the office. Ms. Chism inquired if Dr. Twyner were discharging her. When Dr. Twyner indicated that she was not discharging Ms. Chism, Ms. Chism refused to leave unless she was discharged or unless Dr. Twyner called the police. Dr. Twyner did neither. She allowed Ms. Chism to work the rest of the day and for the full days of October 11 and October 12, 2006. Ms. Chism also attended an in-house training session on October 13, 2006, all without incident. However, Dr. Twyner discharged Ms. Chism as the latter arrived for work on the following Monday, October 16, 2006.

## REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence establishes that the claimant was discharged for disqualifying misconduct. For the reasons which follow, the administrative law judge concludes that it does not.

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. See Iowa Code section 96.6-2. Among the elements the employer must prove is that the final incident leading directly to the decision to discharge was a current act of misconduct. See 871 IAC 24.32(8).

The evidence in the record establishes that the final incident leading to the discharge occurred in the early afternoon of Tuesday, October 10, 2006. It also establishes that the discharge occurred on the following Monday, October 16, 2006. There is no evidence in the record indicating that the employer put the claimant on notice that she was considering discharge or that she was conducting any further investigation of the incident.

In the case Greene v. EAB, 426 N.W.2nd 659 (Iowa App. 1988), the Court of Appeals of Iowa concluded that a discharge need not be immediate for a final incident to constitute a current act. However, the court indicated that the employer must at the minimum put the employee on notice of the potential of discharge if the employer intended further investigation or contemplation before action. There is no indication in this record that Dr. Twyner conducted further

investigation or that she advised Ms. Chism that she was considering a discharge. Therefore, even if the final incident constitutes an act of misconduct, no disqualification can be imposed because of the delay.

Since the final incident leading to discharge was not a current act, the administrative law judge need not and does not rule on whether the final incident constituted misconduct as defined above.

**DECISION:**

The unemployment decision dated November 3, 2006, reference 01, is reversed. The claimant is entitled to receive unemployment insurance benefits, provided she is otherwise eligible.

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Dan Anderson  
Administrative Law Judge

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Decision Dated and Mailed

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