

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

FRANCINE A RYERSON
Claimant

APPEAL NO. 07O-UI-03965-LT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BILL'S FOREST CITY SUPERMARKET INC
Employer

**OC: 01/14/07 R: 02
Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the February 14, 2007, reference 01, decision that allowed benefits. After due notice was issued, a telephone conference hearing was held on May 2, 2007. Claimant participated with Toni Beck. Employer participated through Ken Korth. Claimant's Exhibits A and B were received.

ISSUE:

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

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant was employed as a full time assistant baker from 2001 until January 17, 2007, when she was discharged. She was unable to attend the Christmas party on January 14, due to snow, and on January 15 took two pieces of leftover pizza home with her. On January 16 she took home four egg rolls and four chicken fingers. Claimant did not attempt to conceal the food or the fact she was taking it home to eat, as two employees were present when she took the food and she specifically told another employee she was taking it home. This food was leftover from the Christmas party, which employer provided free to employees. She did not take any more food home than she would have eaten at the party.

Employer's store policy addresses food purchased from the store but does not address the consumption of or taking of food provided to employees at no charge. (Claimant's Exhibit A) The store historically allowed employees to take home bread and buns, leftover food from parties, and other food that is determined to be unsaleable. Another employee was fired because she took and did not pay for first quality doughnuts from the bakery packaged as they would be for a customer. Toni Beck, who last worked there three years ago and is currently certified by the State of Iowa in safe serving temperatures for food, believes by the time claimant took the food it may have been inedible if it was not maintained or stored at proper temperatures. She has also known claimant for more than 15 years as an honest and loyal person.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

Iowa Code § 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 issue is not whether the employer made a correct decision in separating 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 insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 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. 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).

An employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job-related misconduct as the reason for the separation, employer incurs potential liability for

unemployment insurance benefits related to that separation. Since claimant did not take or consume any saleable food or food that was not provided to other employees without charge and there is nothing in the policy about unsaleable food products such as leftover party food, employer has failed to establish any act of misconduct by claimant. Benefits are allowed.

DECISION:

The February 14, 2007, reference 01, decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/kjw