

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SHANE A ROUW
Claimant

APPEAL NO. 10A-UI-04831-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

FAREWAY STORES INC
Employer

OC: 02-28-10
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Disciplinary Suspension/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the March 22, 2010, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on May 12, 2010. The claimant did participate. The employer did participate through Rick Shaw, Grocery Manager and (representative) Kim Garland, Human Resources Representative. Employer's exhibit one was entered and received into the record.

ISSUE:

Was the claimant suspended due to job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a grocery clerk part time beginning June 27, 2006 through February 25, 2010 when he was suspended indefinitely. The male claimant, age twenty, was suspended indefinitely after the employer learned on February 20, 2010 that he had been arrested and charged with sexual abuse in the third degree for allegedly participating in a sexual act with a fifteen-year-old female. The claimant has pled not guilty and is awaiting trial. The employer's policy, a copy of which had been given to the claimant, provides that employees may be terminated if they engage in any conduct outside of their employment that could "impact Fareway's reputation in the community in a negative manner." (See Employer's Exhibit One)

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was suspended 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(9) provides:

(9) Suspension or disciplinary layoff. Whenever a claim is filed and the reason for the claimant's unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as discharged, and the issue of misconduct must be resolved. Alleged misconduct or dishonesty without corroboration is not sufficient to result in disqualification.

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 [suspending] 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 suspension 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 suspension 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 administrative law judge is persuaded that an employee's conviction of a criminal act, even if committed on the employee's own time, can harm the reputation of the employer or cause the general public to perceive the employer in a negative manner because the employer merely employed the convicted employee. The claimant has pled not guilty to the charge. The employer offered no credible evidence that the claimant committed the act for which he has been charged or that the claimant acted intentionally in a manner to disparage the employer's reputation in the community. Unproven charges alone do not establish that the claimant committed any illegal act and as such cannot, under these circumstances, constitute good cause for disqualifying the claimant from unemployment insurance benefits. Should the charges turn out to be true, either through a plea agreement or verdict, and the employer makes a decision to discharge based upon a criminal conviction, the separation due to discharge can be revisited at that time.

DECISION:

The March 22, 2010, reference 01, decision is affirmed. Claimant was suspended from employment without establishment of misconduct. Benefits are allowed, provided claimant is otherwise eligible.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/pjs