

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

DEBRA L MARTIN
308 E 8TH ST N
NEWTON IA 50208

FBG SERVICE CORPORATION
C/O JOHNSON & ASSOC UC EXPRESS
PO BOX 6007
OMAHA NE 68007

Appeal Number: 05A-UI-03322-JTT
OC: 02/20/05 R: 02
Claimant: Appellant (2)

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.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

Debra Martin filed a timely appeal from the March 25, 2005, reference 02, decision that denied benefits. After due notice was issued, a hearing was held on April 19, 2005. Ms. Martin participated in the hearing. Alyce Smolsky of Johnson & Associates/TALX UC Express represented FBG Service Corporation and presented testimony through Larry Karlovsky, Program Manager. Exhibits One through Five were received into evidence.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Debra Martin was employed by FBG Service Corporation (FBG) as a full-time cleaning technician from March 3, 1998 until February 10, 2005, when Program Manager Larry Karlovsky discharged her

for misconduct based on an incident of insubordination on February 8, 2005 and a no-call/no-show on February 9, 2005.

FBG provides cleaning services to the Maytag Corporation and employs a staff of 28 specifically for the Maytag account. FBG primarily performs cleaning services at night, but also provides "day porters," who perform light-duty cleaning during the day. Day porters have assigned duties, but are also expected to respond to reasonable requests for cleaning services made by Maytag representatives. Ms. Martin primarily worked the overnight shift, but also substituted as a day porter in the building to which she was assigned. Ms. Martin had performed the day porter duties many times. Those duties included sweeping in certain areas of the plant.

The final incident that prompted Mr. Karlovsky to discharge Ms. Martin occurred on February 8, 2005. Ms. Martin was substituting for a day porter. A Maytag representative asked Ms. Martin to sweep sand off some stairs to prevent a safety hazard. Ms. Martin responded that sweeping sand off that particular set of stairs was not her job, but that she would contact her supervisor regarding the request. Ms. Martin further indicated that if she learned she was supposed to sweep that particular set of stairs, she would sweep the stairs the next time the request was made. Ms. Martin contacted Mr. Karlovsky's office phone and left a message regarding the request. Mr. Karlovsky did not fully understand Ms. Martin's message when he reviewed it. Ms. Martin did not contact Mr. Karlovsky at his cellular phone, though she had been provided that number. The employer expected Ms. Martin to contact Mr. Karlovsky or her immediate supervisor, Team Leader Gary Selby, if she was faced with an unreasonable request from a Maytag representative.

On February 9, 2005, Mr. Karlovsky learned of the incident from a Maytag's representative, who indicated that Maytag was not happy about the refusal to provide services. Thereafter, Mr. Karlovsky contacted Team Leader Gary Selby, who advised that he had learned about the incident shortly after it occurred and swept the stairs himself in an attempt to prevent the matter from escalating.

Prior to speaking with Ms. Martin about the matter, Mr. Karlovsky reviewed Ms. Martin's personnel file and learned that she had received a written reprimand on October 13, 2004 for failing to follow through with direct instruction from Mr. Selby. In that situation, Mr. Selby had reviewed Ms. Martin's work and discerned that she was not dusting appropriately. Mr. Selby directed Ms. Selby to perform the remedial dusting immediately. Ms. Martin indicated she would do it after she completed her other work. Mr. Selby directed Ms. Martin to complete the dusting immediately and Ms. Martin again refused. Despite Mr. Selby's direct instruction, Ms. Martin had concluded on her own that it would be sufficient for her to complete the dusting assignment sometime before the end of her shift.

Mr. Karlovsky also considered the alleged no-call/no-show on February 9, 2005, in deciding whether to discharge Ms. Martin. Ms. Martin was scheduled to report for work at 5:00 a.m. Ms. Martin left a message on Mr. Karlovsky's office answering machine, apparently advising that she would absent. Mr. Karlovsky did not review the message until 5:00 p.m. when he started his workday. On January 18, 2005, Ms. Martin had signed an acknowledgment of receipt of a revised attendance policy. Under the revised policy, employees who needed to be absent were directed not to leave messages on office answering machines, because of the delay in management's receipt of the message. The policy instructed employees to leave messages on the supervisor's cellular phone instead.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Martin was discharged for misconduct in connection with her employment.

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.

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).

Since the claimant was discharged, the employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992). Before the administrative law judge can find that an employee was discharged for misconduct, the evidence in the record must establish the existence of a "current act" of misconduct. See 871 IAC 24.32(8).

Since a single unexcused absence does not constitute misconduct, Ms. Martin's absence from work on February 9, 2005, cannot constitute misconduct that would disqualify her for benefits. See Sallis v. EAB, 437 N.W.2d 895 (Iowa App. 1992).

In general, continued failure to follow reasonable instructions constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). Failure to perform a specific task does not constitute misconduct if the failure is in good faith or for good cause. See Woods v. IDJS, 327 N.W. 768 (Iowa App. 1982). The administrative law judge analyzes discharges based on insubordination by evaluating both the reasonableness of the employer's request in light of all circumstances, and the worker's reason for non-compliance. See Endicott v. IDJS, 367 N.W.2d 300 (Iowa App. 1985).

The direct request at issue in this case did not come from the employer, but from the employer's corporate client. The employer had issued a general instruction to employees that they were to accommodate the reasonable requests of Maytag and to contact the employer if there was a question as to the reasonableness of the request. At first glance, the request that Ms. Martin sweep some stairs to prevent a safety hazard would appear to be a reasonable request. Ms. Martin testified that her duties included sweeping another set of stairs in the plant. Mr. Selby apparently had no difficulty in discerning the reasonableness of the Maytag representative's request. Ms. Martin had worked in her position for approximately five years. Ms. Martin testified she had previously been instructed not to honor the request of a Maytag representative that she search for him in the plant when she needed the door to his office unlocked. Ms. Martin testified that FBG had reprimanded her for accommodating a request from a Maytag representative that she immediately clean under an office machine at a time when she was supposed to be off-duty.

Ms. Martin appears to have been limited in her ability to discern what constituted a reasonable request that she could perform without fearing reprimand by the FBG. Ms. Martin followed the employer's instruction to contact a supervisor when in doubt as to the reasonableness of the Maytag request. The record does not indicate that Ms. Martin acted with willful or wanton disregard for the employer's interests by refusing to sweep the stairs without first checking with her supervisor. Indeed, Ms. Martin testified the person who made the request was a very nice person with whom Ms. Martin was well familiar.

The alleged insubordination on February 8, 2005, stands in stark contrast with the insubordination that clearly took place on October 13, 2004, when Ms. Martin refused to follow her supervisor's direct instructions. Based on the evidence in the record, the administrative law judge concludes that the incident on February 8, 2005, involved a good faith exercise of poor judgment, rather than insubordination, and did not rise to the level of misconduct that would disqualify Ms. Martin for benefits. See 871 IAC 24.32(1)(a). Accordingly, Ms. Martin is eligible for benefits, provided she is otherwise eligible.

DECISION:

The Agency representative's decision dated March 25, 2005, reference 02, is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

jt/sc