

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

VICKIE A ABSTON
Claimant

APPEAL NO. 08A-UI-04006-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

ALDI INC
Employer

**OC: 03-09-08 R: 04
Claimant: Appellant (1)**

Iowa Code § 96.4(3) – Able and Available
Iowa Code § 96.5(2)a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the April 17, 2008, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on May 8, 2008. The claimant did participate. The employer did participate through Scott Fogarty, District Manager. Claimant's Exhibit A was received.

ISSUES:

Was the claimant discharged for work-related misconduct?

Is the claimant able to and available for work?

FINDINGS OF FACT:

Having reviewed the testimony and all of the evidence in the record, the administrative law judge finds: Claimant was employed as a cashier full time beginning May 9, 2006 through March 3, 2008 when she was discharged.

The claimant suffered a non-work-related stroke on July 6, 2007 and has not worked since that time. The claimant's stroke has left her unable to work according to the current opinion of her treating physician, Valerie Flacco-Nesselroad, M.D. The claimant is currently waiting to be seen by physicians at the University of Iowa Hospitals. As a result of the stroke, the claimant has on ten or twelve occasions forgotten where she is or where she is going. She carries a note in her pocket so that if she is at the grocery store and becomes disoriented and does not know where she is or who she is, the note will provide guidance for someone on how to reach her mother to come and get her. On at least one occasion at her own home, the claimant has failed to recognize her mother who lives with her. She became frightened thinking that a stranger had broken into her home. The employer does not accommodate non-work-related restrictions.

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. The claimant's inability to return to work without work restrictions after a non-work-related stroke is not misconduct. The administrative law judge is persuaded that the claimant did keep in touch with the employer. The employer never wrote to the claimant and gave her any instructions about keeping in touch. The employer did not even notify the claimant that she was discharged when they could not reach her on the telephone.

For the reasons that follow, the administrative law judge concludes that the claimant is not able to work and available for work effective July 6, 2007.

Iowa Code § 96.4-3 provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

871 IAC 24.22(1)a provides:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(1) Able to work. An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.

a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

871 IAC 24.23(35) provides:

Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.

(35) Where the claimant is not able to work and is under the care of a physician and has not been released as being able to work.

Inasmuch as the medical condition was not work related and the treating physician has not released the claimant to return to work with or without restriction, the claimant has not established her ability to work. Employer is not obligated to accommodate a non-work-related

medical condition, thus until claimant is released to perform her full work duties, she is not considered able to or available for work. Benefits are withheld until such time as the claimant obtains a medical release to return to some type of work of which she is capable of performing given any medical restrictions. The claimant is simply unable to work at this point given her medical condition.

DECISION:

The representative's decision dated April 17, 2008, reference 01, is affirmed. The claimant was discharged from employment for no disqualifying reason. However, the claimant is not able to work and available for work effective July 6, 2007. Benefits are withheld until such time as the claimant obtains a full medical release to return to work.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/css