

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**CHRISTINA M CORTEZ**  
Claimant

**VERMEER MANUFACTURING COMPANY  
INC**  
Employer

**APPEAL 18A-UI-10457-DB**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 09/23/18**  
**Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

The claimant/appellant filed an appeal from the October 11, 2018 (reference 02) unemployment insurance decision that found the claimant was not eligible for unemployment insurance benefits based upon her discharge from employment. The parties were properly notified of the hearing. An in-person hearing was held on November 7, 2018 in Des Moines, Iowa. The claimant, Christina M. Cortez, participated in person. The employer, Vermeer Manufacturing Company Inc., participated via telephone through witnesses Morgan Landon, Ann Flesher and Kevin Keegel. Claimant's Exhibits A through C were admitted. Employer's Exhibits 1 and 2 were admitted.

**ISSUE:**

Was the claimant discharged for disqualifying job-related misconduct?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds:

Claimant was employed full-time as a material handler from November 27, 2017 until September 21, 2018. Claimant's direct supervisors were Ann Flesher and Kevin Keegel. Ms. Landon is the human resources business partner.

On September 11, 2018, claimant was in the stump cutter area when another co-worker, who was driving a fork truck, came around a tight corner with a large load. Ms. Cortez moved out of the way of the fork truck in between two shelves. The driver hit a cart with the load, which then hit the shelving that claimant was leaning against. Claimant felt the impact from the shelving but was not injured. Claimant reported the work accident, pursuant to the employer's written policy requiring her to report work accidents.

Ms. Landon, Mr. Keegel and Ms. Flesher investigated the claimant's report of the accident by interviewing witnesses and reviewing the area where the accident occurred. Other witnesses reported that the fork truck driver did make contact with the cart; however, other witnesses did not report observing the cart make any impact into the shelving. Mr. Keegel did not see skid

marks on the floor by the shelving when he reviewed the area. Claimant did see the tape on the floor move from the impact to the shelving.

Based upon the conflicting witness statements, Ms. Landon and Mr. Keegel concluded that the claimant was untruthful in some of her statements given to the employer about the accident. On September 14, 2018, claimant received a final written warning for failing to meet the expectations for productivity and making some statements that did not align with the findings of the employer's investigation. See Exhibit A.

At the time claimant received the written warning, she requested to speak with Ms. Landon. Claimant told Ms. Landon that she felt she was being "treated like crap" by her group leader, Ms. Flesher. Claimant told Ms. Landon that Ms. Flesher had made unprofessional comments to her in group meetings, specifically that Ms. Flesher had stated to everyone "to do your 5 S's, especially you Christina" in a group setting. The 5 S's are an acronym the employer uses to remind employees to keep their workspace clean.

The claimant reported to Ms. Landon that she felt Ms. Flesher was negative to her and standoffish when she would ask her questions about her job assignments. Claimant also expressed concerns to Ms. Landon that other welders had been told not to speak with her about her job duties and were instructed to redirect claimant to only speak to Ms. Flesher. Welders had been instructed by the employer to redirect claimant to speak to Ms. Flesher.

Ms. Landon interviewed Ms. Flesher in addition to unnamed persons regarding whether Ms. Flesher had made inappropriate comments to claimant in a group setting. Ms. Flesher was not told at the time of the interview that Ms. Landon was investigating claims made by claimant against her. No witnesses reported hearing Ms. Flesher make unprofessional comments towards claimant in a group setting. Because no other witnesses reported hearing Ms. Flesher make unprofessional comments towards claimant and because Ms. Flesher denied making unprofessional comments towards claimant, Ms. Landon concluded that claimant was dishonest in her allegations about Ms. Flesher.

As part of her job duties, claimant was required to complete a project labeling shelving. Claimant had until the end of the day on September 21, 2018 to complete this work project. Prior to the end of the day on September 21, 2018, claimant was asked to report to the office with Ms. Landon, Ms. Flesher and Mr. Keegel. Claimant was discharged for failing to meet the deadline to complete the project labeling shelving. The deadline for the project had not expired when claimant was discharged. Employer also alleged that claimant was discharged for her dishonest allegations about Ms. Flesher.

#### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

As a preliminary matter, the administrative law judge finds that the Claimant did not quit. Claimant was discharged from employment.

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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

Iowa Admin. Code r. 871-24.32(8) provides:

(8) *Past acts of misconduct.* While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 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. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. 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. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. 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." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986).

In this case, the employer alleged that the claimant was discharged for lack of productivity in meeting a deadline and her untruthful statements regarding Ms. Flesher. Claimant was discharged prior to her failing to meet the deadline for the project labeling shelving. It is mere speculation to conclude that the claimant would not have met the deadline when she was discharged prior to the deadline expiring. This is not a substantial current act of job-related misconduct.

Lastly, the employer has failed to prove that the claimant's statements to Ms. Landon that she felt she was being "treated like crap" by Ms. Flesher were untruthful. While other unnamed witnesses did not report hearing Ms. Flesher make a comment to claimant in a group setting, that does not mean the comment did not occur.

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.* I have carefully weighed the credibility of the witnesses and the reliability of the evidence considering the applicable factors listed above. I find that the claimant's testimony that Ms. Flesher stated to everyone "to do your 5 S's, especially you Christina" was credible. I find that claimant's statement to Ms. Landon that she felt she was being "treated like crap" by Ms. Flesher was credible. I find that the claimant's testimony that other welders had been told not to speak with her about her job duties and were instructed to redirect claimant to only speak to Ms. Flesher was credible, as the employer did admit that welders had been instructed to redirect claimant to speak to only Ms. Flesher about her job duties. There is no credible evidence that claimant's reports to Ms. Landon that she felt Ms. Flesher was negative to her and standoffish when she would ask her questions about her job assignments were untruthful. As such, claimant did not provide untruthful statements to the employer about Ms. Flesher.

The employer has failed to meet its burden of proof in establishing a current act of disqualifying job-related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

**DECISION:**

The October 11, 2018 (reference 02) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

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Dawn Boucher  
Administrative Law Judge

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Decision Dated and Mailed

db/rvs