

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

LINDA S ROSS
Claimant

FAREWAY STORES INC
Employer

APPEAL 16A-UI-13435-LJ-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 11/20/16
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the December 7, 2016, (reference 01) unemployment insurance decision that denied benefits based upon a determination that claimant was discharged for employment for conduct not in the best interest of her employer. The parties were properly notified of the hearing. A telephone hearing was held on January 12, 2017. The claimant, Linda S. Ross, participated. The employer, Fareway Stores, Inc., participated through Theresa McLaughlin, director of human resources; Bret Wiltse, area supervisor. Employer's Exhibits 1 through 3 was received and admitted into the record over objection.

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 part time, most recently as a grocery clerk, from October 14, 2014, until November 21, 2016, when she was discharged for violation of the workplace violence policy. On November 15, claimant met with Wiltse regarding an accusation that she hit her coworker, Tim. During this conversation, claimant commented that her husband should come in and beat up Tim, as that would resolve their issue. Claimant then laughed. Wiltse informed her that she just made a threat and the employer takes threats of violence seriously. Claimant did not express remorse or retract her statement. Rather, she replied that her comment was not a threat. Claimant testified that her comment was both a joke and a comment made out of frustration in the heat of the moment.

Claimant was suspended on November 15, pending the outcome of the employer's investigation into the accusation Tim made against her. She was discharged six days later. Wiltse testified that initially, claimant accused Tim of kicking her. When Wiltse learned about that accusation, he immediately placed Tim on suspension. During a meeting with Tim several days later regarding this accusation, Tim reported that claimant had struck him. The employer concluded its investigation and determined that claimant's accusation against Tim was not founded, so Tim was reinstated.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for disqualifying misconduct. Benefits are withheld.

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).

Misconduct must be "substantial" to warrant a denial of job insurance benefits. *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). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

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.*

After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the employer's version of events credible. The administrative law judge found claimant was not credible, as she gave contradictory explanations for the threat she made against Tim during her meeting with Wiltse. The employer has a duty to protect the safety of all employees. It was acting in furtherance of this duty on November 15, when Wiltse met with claimant about Tim's accusation against her. During this meeting, claimant made a threat against Tim. Claimant's threat of harm to her coworker was contrary to the best interests of the employer and the safety of her coworker. Claimant's conduct is disqualifying misconduct even without prior warning. Benefits are withheld.

DECISION:

The December 7, 2016, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

Elizabeth A. Johnson
Administrative Law Judge

Decision Dated and Mailed

lj/