

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**MELANIE L REINER**  
Claimant

**SAC & FOX TRIBE**  
Employer

**APPEAL 17A-UI-10246-CL-T**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 09/03/17**  
**Claimant: Appellant (1)**

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

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the September 27, 2017, (reference 01) unemployment insurance decision that denied benefits based upon a separation from employment. The parties were properly notified about the hearing. A telephone hearing was held on October 24, 2017. Claimant participated personally. Employer participated through spa manager Sandy Dirks, director of hotel and pleasure development Jason Kriegal, and human resources director Lucie Roberts. Employer's Exhibits 1 through 7 were received.

**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 began working for employer on January 3, 2017. Claimant last worked as a full-time licensed massage therapist. Claimant was separated from employment on September 7, 2017, when she was terminated.

Employer has standards of conduct for its employees. They are included in the employee handbook. The handbook warns that employees may be terminated for failing to maintain the standards. The standards instruct employees to refrain from behavior or conduct deemed offensive or undesirable or which is contrary to employer's interests. Claimant was aware of the standards of conduct. [Exhibit 3]

Beginning in March 2017, spa manager Sandy Dirks began informing claimant of customer complaints that she spent too much time talking during massages.

By April 20, 2017, employer had received four complaints in the last month that claimant talked too much during massages. One person complained claimant was giving unsolicited medical advice. [Exhibit 7]

On April 20, 2017, Dirks held a meeting for all massage therapists warning them not to engage in excessive conversation during massages and not to address issues outside of the scope of practice of a licensed massage therapist. [Exhibit 5]

In June 2017, there were several more complaints about claimant talking too much and bringing up inappropriate topics during massages. [Exhibit 7]

On June 29, 2017, Dirks gave claimant a written warning for talking to a guest about her personal issues during a relaxation massage. [Exhibit 6]

On July 13, 2017, director of hotel and pleasure development Jason Kriegal met with the spa staff and stated excessive chatter with guests needed to stop.

On August 11, 2017, Dirks received a phone call from a customer who had a massage with claimant that day. The customer reported that claimant talked constantly during the massage about many inappropriate topics. The guest followed up the phone call with an email the next day. [Exhibit 1]

On August 16, 2017, Dirks forwarded the email to human resources director Lucie Roberts. Dirks then met with Kriegal to discuss claimant's future employment.

On August 25, 2017, Dirks and Kriegal met with claimant and informed her that they were ending her employment at the spa. Dirks and Kriegal informed claimant she had good attendance, but talked too much to massage customers. They informed claimant she could transfer to another position at the casino and handed claimant a list of open positions. Claimant did not apply for any of the positions because the pay was not satisfactory. Employer assigned claimant to give massages only to customers who specifically requested claimant during the next two weeks. Claimant was not assigned to perform any massages for walk-in or new clients.

September 7, 2017, was claimant's last day of work for employer.

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

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

Iowa Code § 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *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). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000).

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).

In this case, claimant was discharged for talking constantly to massage clients about odd and inappropriate topics after being warned. This is job related misconduct.

**DECISION:**

The September 27, 2017, (reference 01) unemployment insurance decision is affirmed. The 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.

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Decision Dated and Mailed

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