

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JENNIFER J SCHWICKERATH
Claimant

APPEAL NO. 08A-UI-01634-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FAMILY VIDEO MOVIE CLUB INC
Employer

**OC: 01/13/08 R: 03
Claimant: Appellant (2)**

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Jennifer J. Schwickerath (claimant) appealed a representative's February 6, 2008 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on March 4, 2008. The claimant failed to respond to the hearing notice and provide a telephone number at which she could be reached for the hearing and did not participate in the hearing. Joe Zuiker appeared on the employer's behalf. During the hearing, Employer's Exhibits One through Six were entered into evidence. Based on the evidence, the arguments of the employer, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on February 13, 2007. She began as a manager trainee, and as of August 2007 began working as store manager. Her last day of work was January 14, 2008. The employer discharged her on that date. The reason asserted for the discharge was employee complaints regarding the claimant's effectiveness as a manager after prior warnings on other issues.

On November 16, the claimant was given a warning for being late for a crew interview session. On November 28, she was given a warning for failing to get the marquis signboard changed in a timely manner. On December 21, she was given a further warning for failing to complete an item from a checklist as far as getting stock updated in a timely manner.

On December 29, two employees at the store each sent an email to Mr. Zuiker, the district manager, complaining about the claimant's poor management, including lack of attention to duties including staff scheduling issues and being frequently too sick to work. Mr. Zuiker received the complaints on December 30 and made a business decision that the claimant would need to be replaced. However, while the claimant continued to work on her regular schedule, the employer did not advise the claimant of any pending problems or her imminent discharge

until the regional manager was available to be present, which did not occur until January 14, 2008.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, 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 is misconduct that warrants denial of unemployment insurance benefits are two separate matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

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 focus of the definition of misconduct is on acts or omissions by a claimant that "rise to the level of being deliberate, intentional or culpable." Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer's interest, such as found in:
 - a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
 - b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:
 - a. Manifest equal culpability, wrongful intent or evil design; or
 - b. Show an intentional and substantial disregard of:
 1. The employer's interest, or
 2. The employee's duties and obligations to the employer.

Henry, supra.

The reason cited by the employer for discharging the claimant is in essence her failure to be an effective manager. Misconduct connotes volition. A failure in job performance is not misconduct unless it is intentional. Huntoon, supra. There is some question as to whether the claimant intentionally failed to perform her duties to the best of her abilities, or whether she simply lacked the ability to work to the employer's expectations. Regardless, here there is no current act of misconduct as required to establish work-connected misconduct. 871 IAC 24.32(8); Greene v. Employment Appeal Board, 426 N.W.2d 659 (Iowa App. 1988). The most recent problems which led to the employer's decision to discharge the claimant occurred prior to December 29; even going from December 30 when the employer learned of the most recent problems, this was just over two weeks prior to the employer's discharge of the claimant which can therefore not be considered for a "current act" of misconduct. Greene, supra. While the employer had a good business reason for discharging the claimant, it has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's February 6, 2008 decision (reference 01) is reversed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/css