

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DAVID M OLSON
Claimant

APPEAL NO. 10A-UI-04832-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

FAREWAY STORES INC
Employer

**OC: 02-21-10
Claimant: Respondent (1)**

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the March 19, 2010, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on May 12, 2010. The claimant did participate. The employer did participate through Kim Garland, Human Resources Representative and Jack Rusnack, Truck Foreman. Employer's Exhibit One was entered and received into the record.

ISSUE:

Was the claimant discharged due to job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a truck driver part time beginning October 21, 2008 through February 25, 2010 when he was discharged.

The claimant was discharged due to attendance issues. He sustained a work-related injury when a pallet of groceries fell on him on January 5, 2010. He missed work after that time in February due to pain from the knee injury. He had other instances of missed work due to transportation problems. The claimant was never given any warning that his attendance was placing his job in jeopardy. Prior to January 5, 2010 the claimant had no attendance issues for which he had previously been warned. The claimant spoke disparagingly about his treating physician in the doctor's waiting room and was notified by the clinic manager on January 26, one month before his termination, that his conduct would not be tolerated at the clinic and that the doctor would refuse to see him if he continued to act inappropriately. The claimant missed the majority of his time from work due to pain from the work-related injury when the pallet of groceries fell on him.

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.

871 IAC 24.32(8) provides: 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 upon such past act or acts. The termination of employment must be based upon a current act. A lapse of 11 days from the final act until discharge when claimant was notified on the fourth day that his conduct was grounds for dismissal did not make the final act a "past act." *Greene v. EAB*, 426 N.W.2d 659 (Iowa 1988).

More than one month passed between the time the claimant spoke disparagingly about his treating physician and the time of the termination. Any discharge based upon the claimant's actions in the waiting room of the clinic, were made by the employer on a past act of misconduct and cannot justify a disqualification from benefits.

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).

In an at-will employment environment 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. Inasmuch as employer had not warned claimant that his absences were placing his job in jeopardy it has not met the burden of proof to establish that claimant acted deliberately or negligently after the most recent warning.

Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Benefits are allowed.

DECISION:

The March 19, 2010 (reference 01) decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/css