

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

TONYA E WILLIAMS
Claimant

FAREWAY STORES INC
Employer

APPEAL 14A-UI-12997-L
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 11/16/14
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the December 8, 2014, (reference 01) decision that denied benefits because of a discharge from employment. After due notice was issued, a hearing was held on January 14, 2015, in Des Moines, Iowa. Claimant participated. Employer participated through human resource manager Theresa McLaughlin. Employer's Exhibits 1 through 4 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 was employed as a full-time buyer's assistant paid hourly from May 30, 2013, through November 17, 2014. The employer's time records and surveillance video show her taking long breaks and/or not clocking out for lunch on November 4, 6, 11, and 14, 2014. (Employer's Exhibits 1 and 2) She took a long lunch break without clocking out on November 12, 2014. The company controller found the incident on video after an employee reported it to him two weeks prior to the separation. The employer placed video surveillance cameras in the break room where time clock and receptionist area are and where employees go in and out for smoke breaks. The employer reviewed the video in comparison to time punches after two weeks. It found that on November 4 video showed claimant took a five-minute smoke break in the morning and at 12:18 p.m. she went to the vending machine and refrigerator in the break area, sat with someone in reception area, and ate without clocking out for lunch until 12:33 p.m. when she clocked out for lunch and back in for work at 12:45 p.m. No afternoon breaks were recorded. On November 6 she took a five-minute smoke break at 9:47 a.m. and a six-minute smoke break at 12:11 p.m. She clocked out for lunch at 12:20 p.m. and clocked back in at 12:33 p.m. Again, no afternoon breaks were noted. (Employer's Exhibit 1) On November 11 there is no morning break noted. At 11:24 a.m. claimant is recorded as having gone to the break area, prepared lunch items, eating lunch and clocking out for lunch at 11:45 a.m. At 12:06 p.m. she clocked back in for work, at 12:10 p.m. she went to smoke and at 12:16 p.m. she returned to work. No other breaks are noted. On November 12, 2014, the employer records

her clocking out for lunch at 12:25 p.m. and clocking back in at 12:46 p.m. with a smoke break from 12:48 p.m. to 12:50 p.m. No other breaks are noted. Overtime of four hours per week beyond 40 is allowed without authorization. The employer did not have information if any of this time was offset by additional time worked or if overtime was paid. Morning and afternoon 15-minute breaks are paid but half-hour lunch breaks are not. The employer did not submit the break policy even though it offered the handbook acknowledgement and disciplinary policy. (Employer's Exhibits 3 and 4) Claimant sometimes applied unused 15-minute break times towards her lunch break. This recollection is consistent with the events recorded in Employer's Exhibits 1 and 2. The employer had not previously warned claimant her job was in jeopardy for any similar reasons.

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.

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 the 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.

A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy. The conduct for which claimant was discharged was related to an unclear understanding of the break policy and a lack of communication about such from the employer. Inasmuch as employer had not previously warned claimant about the issue leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. 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. Training or general notice to staff about a policy is not considered a disciplinary warning.

DECISION:

The December 8, 2014, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. The benefits claimed and withheld shall be paid, provided she is otherwise eligible.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/pjs