

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

Claimant

APPEAL NO. 11A-UI-13561-WT

Employer

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 09/18/11
Claimant: Respondent (2-R)**

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Employer filed an appeal from a fact-finding decision dated October 7, 2011, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on November 7, 2011. Claimant participated personally and had two witnesses. Employer participated by Consultant and had two witnesses, Witness A and Witness B. Employer Exhibit A was admitted into evidence. Following the hearing, the administrative law judge became aware of a provision of Iowa law which prohibits the agency from receiving “child abuse information” which would include DHS reports. See Iowa Code section 235A.17 (2011). For this reason, pages 3 and 4 of Exhibit A were excluded from the record of evidence and returned to the employer under separate cover. Pages 3 and 4 are not considered in the final disposition of this case. Furthermore, any reference to these documents in the record, shall be stricken if there is any appeal. This record is sealed to prevent the illegal dissemination of any protected information.

ISSUE:

The issue in this matter is whether claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: Claimant began working for the employer on August 14, 2008 as a Lead Teacher in the Toddler Room. Claimant last worked for employer on September 9, 2011. Following investigation, claimant was discharged on September 9, 2011 by employer for striking a child on the bottom.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 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:

(8) 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 on such past act or acts. The termination of employment must be based on a current act.

871 IAC 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.

The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation.

In this matter, the evidence established by a preponderance of evidence that claimant was discharged for an act of misconduct. The Infant Lead Teacher, Witness B, saw Claimant strike a child on the bottom on September 9, 2011. Witness B testified live and is found to be credible. While the evidence is close in this case, the employer has carried its burden by a preponderance of evidence.

DECISION:

The fact-finding decision dated October 7, 2011, reference 01, is reversed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible. This matter is remanded to the Unemployment Division on the issue of overpayment.

Joseph L. Walsh
Administrative Law Judge

Decision Dated and Mailed

jlw/pjs