

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**SARAH E RAY**  
Claimant

**EGS CUSTOMER CARE INC**  
Employer

**APPEAL 15A-UI-12498-JP-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 10/11/15  
Claimant: Respondent (1)**

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

**STATEMENT OF THE CASE:**

The employer filed an appeal from the November 4, 2015 (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on December 1, 2015. Claimant participated. Employer participated through Turkessa Newsome and team leader Jason Morales. Employer's Exhibit One was admitted into evidence with no objection.

**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 full time as a customer service representative (CSR) from May 7, 2012 and was separated from employment on October 13, 2015; when she was discharged.

The employer has business and conduct work rules policy. This is a written policy. Employees are supposed to observe designated start times and break times. Claimant was aware of the policy. The employer bills its clients based on the hours an employee is in service. It is important for employees to place themselves out of service if they are not at their desk working so the client is not billed for this hire. Claimant was aware of the billing process.

The final incident occurred on October 13, 2015, when Mr. Morales observed that claimant was off the floor when she was supposed to be working; it was not a designated break time. During this time, claimant was clocked in as though she was working. Employees have to switch their phone to a setting that shows they are not at their desk when they leave. On October 13, 2015, claimant's phone still showed her at her desk. Claimant denied that her status still showed her at her desk. Claimant testified she had placed herself out of service prior leaving her desk. When questioned, claimant told Mr. Morales that she had to run off the floor so she could use the restroom. Claimant told Mr. Morales that it was an emergency. Mr. Morales had observed claimant coming back from the restroom. Mr. Morales told claimant that even though it was an emergency she still had to place herself out of service. Mr. Morales then told claimant she was discharged.

Claimant had a prior warning for not placing herself out of service on April 9, 2015 and April 14, 2015 (Employer's Exhibit One). Claimant was observed outside smoking when her status was not out of service (Employer's Exhibit One). Claimant was given a final written warning for the incidents, but she refused to sign the warning (Employer's Exhibit One). Claimant was warned that her job was in jeopardy.

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

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

It is the duty of an administrative law judge and the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge, as the finder of fact, may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other evidence you believe; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. This administrative law judge reviewed the exhibit submitted. This administrative law judge finds claimant's version of events to be more credible than the employer's recollection of those events.

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 and (4) provide:

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).

(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 employer has the burden of proof in establishing disqualifying job misconduct. *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). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *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 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, it incurs potential liability for unemployment insurance benefits related to that separation. 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 employer has the burden to prove claimant was discharged for job related misconduct. Claimant had a prior final written warning for not properly placing her status as out of service; however, on October 13, 2015, claimant presented substantial and credible evidence that the reason she left her desk, which was the reason the employer discharged her, was due to an emergency. Claimant had to leave her desk to use the restroom or risk having an accident at her desk. When questioned on October 13, 2015 by Mr. Morales why she had left her desk, claimant told him it was because she had a restroom emergency. Claimant's emergency was supported by Mr. Morales observation of claimant returning from the restroom. It is also noted that the reason claimant had left her desk was because of a restroom emergency, not to go outside on a break like her prior warning. Furthermore, claimant denied that on October 13, 2015, that she left her status as in service when she went to the restroom. Claimant testified

she changed her status to out of service. Regardless of whether claimant changed her status to out of service, claimant's emergency situation on October 13, 2015 clearly shows she had no "wrongful intent[.]" *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). Therefore, the employer failed to meet its burden and establish claimant was discharged for job related misconduct. Benefits are allowed.

**DECISION:**

The November 4, 2015 (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

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Jeremy Peterson  
Administrative Law Judge

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Decision Dated and Mailed

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