

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TAMMY WORKMAN
Claimant

APPEAL NO: 11A-UI-14949-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

COVENANT CARE MIDWEST INC
Employer

OC: 10-09-11
Claimant: Appellant (2)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the November 10, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on January 9, 2012. The claimant participated in the hearing. Kate Delaney, DON, participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time LPN for Covenant Care Midwest from March 11, 2011 to October 6, 2011. In January 2011 the employer's facility became smoke free and employees were only allowed to smoke off the premises during their dinner break but not during their two 10-minute breaks. On June 10, 2011, the claimant received a final written warning for smoking off the premises while on the clock during a 10-minute break. She was not aware she could not smoke off premises during her 10-minute break and signed the final written warning. The administrator had informed employees that anyone caught violating the policy would be discharged immediately. DON Kate Delaney went to the administrator on the claimant's behalf and asked that she be given a final written warning rather than have her employment terminated because she believed there would not be any further violations so the claimant was given a second chance. On October 3, 2011, the claimant had dropped her timecard badge in a resident's room and did not have it when she went to clock out for her dinner break. She went to break, taking the keys to the medication cart with her, and did not have anyone cover her area, take physicians' calls for her or respond to her page. When leaving without clocking out the claimant planned to complete the form the employer provides to employees who forget to clock out. The employee is expected to complete the form during their shift and turn it into the payroll department. The claimant forgot to fill out the form and the payroll department called her the following morning and inquired about her hours on another day and the claimant told payroll she did not punch out for her dinner break October 3, 2011. Payroll told her it was okay because the system automatically deducted 30 minutes from each employees' time every shift.

Other employees told Ms. Delaney the claimant left without covering her area and another department head told Ms. Delaney the claimant was smoking off premises while on the clock. Ms. Delaney met with the claimant October 6, 2011, and terminated her employment for smoking off premises while on the clock.

REASONING AND CONCLUSIONS OF LAW:

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

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.

The employer has the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000). The claimant was effectively terminated for failing to clock out and complete the form required for payroll during her shift. The claimant did smoke while off the premises during her 30-minute dinner break when she was still on the clock because she did not have her badge to clock out after dropping it in a resident's room. She told Ms. Delaney she knew the policy but had a "really bad day" and

had to leave for a little bit. While the claimant had received a final written warning instead of a discharge for smoking while on her 10-minute break June 10, 2011, this is more a case of failing to clock out than violating the employer's smoke free policy. The claimant was smoking but was off the premises during her 30-minute dinner break, rather than smoking on the premises or off premises during a 10 minute break. The claimant also failed to arrange coverage for her area while she was gone. In order for misconduct to be disqualifying it must be substantial in nature. Failing to clock out, fill out the payroll form and provide coverage for her area on one occasion does not rise to the level of disqualifying job misconduct. Consequently, while not condoning the claimant's behavior during this isolated incident, the administrative law judge must conclude the claimant's actions do not rise to the level of disqualifying job misconduct as that term is defined by Iowa law. Therefore, benefits are allowed.

DECISION:

The November 10, 2011, reference 01, decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

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