

**IOWA WORKFORCE DEVELOPMENT  
Unemployment Insurance Appeals Section  
1000 East Grand—Des Moines, Iowa 50319  
DECISION OF THE ADMINISTRATIVE LAW JUDGE  
68-0157 (7-97) – 3091078 - EI**

**JILLIAN M EBETINO  
438 DENVER ST  
WATERLOO IA 50701**

**THE CBE GROUP INC  
PO BOX 900  
WATERLOO IA 50701**

**Appeal Number: 05A-UI-02571-JTT  
OC: 01/16/05 R: 03  
Claimant: Appellant (2)**

**This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

---

(Administrative Law Judge)

---

(Decision Dated & Mailed)

Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

Jillian Ebetino filed a timely appeal from the March 7, 2005, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on March 29, 2005. Ms. Ebetino participated in the hearing. The employer was represented by Tammy Pekrul, Prime Time Manager, who presented additional testimony through Greg Brandt, Division Director; Mary Phillips, Senior Vice President of Human Resources; and Prime Time Managers Amy Scrivener and Denise Bauler.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Jillian Ebetino was employed by the CBE Group as a full time collector from June 10, 2002 until December 29, 2004, when Greg Brandt, Division Director, discharged her for misconduct.

The employer is a collection agency. The collectors contact individuals by telephone. The employer utilizes a computerized dialing system that allows the employer to track the time an employee spends on the telephone pursuing collections on behalf of the employer, as well as time the employee spends away from the telephone on personal or other business.

The final incident that prompted Mr. Brandt and Ms. Pekarul to discharge Ms. Ebetino occurred on December 23, 2004. Ms. Ebetino was scheduled to work 3:30-10:30 p.m. Ms. Ebetino's immediate supervisor, Denise Bauler, was off work that evening and Tammy Pekarul was the Prime Time Supervisor responsible for supervising Ms. Ebetino's work. Shortly after 3:30 p.m., Ms. Pekarul observed that Ms. Ebetino was away from her desk. Ms. Pekarul located Ms. Ebetino in a stall in the women's restroom, speaking on her cell phone. Ms. Pekarul did not announce her presence to Ms. Ebetino. Ms. Ebetino was away from her desk for approximately 15 minutes.

At 6:58 p.m., Ms. Ebetino signed out for her scheduled 15-minute break. At 7:20 p.m., Ms. Pekarul observed that Ms. Ebetino had not returned to her desk. Ms. Pekarul again located Ms. Ebetino in a stall in the women's restroom speaking on her cell phone. Once again, Ms. Pekarul did not announce her presence to Ms. Ebetino. Ms. Pekarul then contacted Amy Scrivener, another supervisor, to go with her to the women's restroom to witness Ms. Ebetino speaking on her cell phone. Ms. Pekarul was able to discern that Ms. Ebetino was speaking with her mother on the cell phone and away from her desk. Neither Ms. Pekarul nor Ms. Scrivener listened closely enough to the conversation to discern what was being discussed. Ms. Pekarul and Ms. Scrivener stepped out of the restroom for a moment. When they re-entered, Ms. Ebetino was emitting noises a person would make when vomiting. Ms. Pekarul announced her presence to Ms. Ebetino and asked if she was okay. Ms. Ebetino indicated she was not okay, and continued making sounds as if she were in the process of vomiting or about to vomit. Ms. Pekarul advised Ms. Ebetino that she would need to meet with her before she returned to her workstation. Ms. Scrivener was surprised when Ms. Ebetino did not immediately exit the restroom. Ms. Ebetino did not exit the women's restroom until 7:45 p.m., several minutes after Ms. Pekarul had spoken to her.

Ms. Pekarul met with Ms. Ebetino and advised her that she had observed her away from her desk for an extended period of time on two occasions that evening. Ms. Pekarul instructed Ms. Ebetino to remain at her desk for the rest of the evening and contact Ms. Pekarul or Ms. Scrivener in the event that she needed to leave her desk due to illness or any other reason. Ms. Ebetino left her desk two more times that evening, but did not alert Ms. Pekarul.

The employer took no further action regarding the matter until December 28. The employer took no further steps to investigate the reason for Ms. Ebetino's behavior on December 23. The employer's business was closed for December 24-25 for the Christmas Holiday. Ms. Ebetino worked on Monday, December 28, without incident. On December 28 or 29, Ms. Pekarul alerted Greg Brandt, Division Director, of Ms. Ebetino's time away from the telephone system and cell phone use on December 23. On December 29, Mr. Brandt, Ms. Bauler and Ms. Pekarul met to discuss the matter. They considered a prior reprimand Ms. Bauler had issued to Ms. Ebetino on March 9, 2004, for using her cell phone at work. They also considered two unexcused absences from April and May 2004. Ms. Ebetino was summoned to the conference and advised she was being discharged.

At the time the employer discharged Ms. Ebetino, it was unaware that Ms. Ebetino had received news on December 23 that her grandmother had been diagnosed with cancer. Ms. Ebetino's

family wanted her to pack her things and immediately move in with her grandparents. She spoke with her mother twice during the course of the evening. While at work on December 23, Ms. Ebetino felt both emotionally overwhelmed and physically ill. After Ms. Pekrul advised her that she would need to speak with her before she returned to her desk, Ms. Ebetino did not immediately exit the restroom because, as she washed her face after having vomited, she thought she was going to vomit again and returned to the stall. Since Ms. Bauler, Ms. Ebetino's immediate supervisor, was not working that evening, Ms. Ebetino had advised her Team Leader, Megan Dean, when she needed to step away from her desk.

#### REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Ebetino was discharged for misconduct in connection with her employment.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

Since the claimant was discharged, the employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of

unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992). Before the administrative law judge can find that an employee was discharged for misconduct, the evidence in the record must establish the existence of a "current act" of misconduct. See 871 IAC 24.32(8). Allegations of misconduct or dishonesty without additional corroborating evidence shall not be sufficient to result in disqualification. See 871 IAC 24.32(4) and (9).

Based on the evidence in the record, the administrative law judge concludes that the employer has failed to meet its burden of proving that Ms. Ebetino was discharged for misconduct. See 871 IAC 24.32(1)(a). The employer failed to take any steps to investigate the reason for Ms. Ebetino's behavior on December 23. See 871 IAC 24.32(4) and (9). Ms. Ebetino was never asked why she was taking time away from her desk or why she was speaking to her mother on her cell phone during work hours. Instead, the employer appears to have started with the conclusion that the behavior constituted misconduct. The fact that more than one supervisor observed that Ms. Ebetino in the restroom on her cell phone speaking with her mother adds nothing to the employer's argument. Because the employer did not investigate the matter prior to discharging Ms. Ebetino, it could offer no response to Ms. Ebetino's compelling testimony. Much of the employer's testimony appears to support Ms. Ebetino's explanation of her behavior.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Ebetino was discharged for no disqualifying reason. Accordingly, benefits are allowed, provided Ms. Ebetino is otherwise eligible.

**DECISION:**

The Agency representative's decision dated March 7, 2005, reference 01, is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

jt/sc