

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

DARRELL J SCHMITZ Claimant SCOTTISH RITE PARK INC Employer	<p>68-0157 (9-06) - 3091078 - EI</p> <p>APPEAL NO: 06A-UI-11621-LT</p> <p>ADMINISTRATIVE LAW JUDGE DECISION</p> <p>OC: 11-12-06 R: 02 Claimant: Respondent (1)</p>
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Iowa Code § 96.5(2)a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the December 1, 2006, reference 01, decision that allowed benefits. After due notice was issued, a telephone conference hearing was held on December 19, 2006. Claimant participated. Employer participated through Denny Frederiksen, Nicole Hammer and Rex Retzlaf. The administrative law judge took judicial notice of the administrative record.

ISSUE:

The issue is whether claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant was employed as a full-time maintenance worker from March 16, 1998 until November 13, 2006 when he was discharged. His supervisor, Frederiksen, was on vacation and Retzlaf complained that the week before on one day claimant went to him and wanted to know if he had ordered a part yet, raised his hands, was loud, approached the desk and did not wait for an answer before leaving the room. Later the same day he allegedly approached Retzlaf and was forceful, loud, upset, aggressive, flailing his arms, and raising them in the air. Retzlaf followed claimant out the door on the last occasion and said, "You don't scare me, stop bullying me around, go fuck yourself." In the morning, Greg Painter was there but was not called as a witness. No one else was present in the afternoon. Residents reportedly approached Retzlaf asking him to do their repair work instead of claimant.

There had been two prior warnings: The first on October 20, 2005 was verbal after claimant declined to throw away a resident's chair at the behest of a supervisor; and, the second, a written warning on January 10, 2006 after he was abrupt with a receptionist who called to complain about the heat. He said, "Yeah, I'm working on it" and hung up.

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.

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 proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 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. IDJS*, 364 N.W.2d 262 (Iowa 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. IDJS*, 425 N.W.2d 679 (Iowa 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." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Employment Appeal Board*, 423 N.W.2d 211 (Iowa App. 1988).

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, employer incurs potential liability for

unemployment insurance benefits related to that separation. While claimant might be abrupt and brusque, Retzlaf was equally so in swearing at claimant and acting with aggression towards him. Since Retzlaf was not disciplined for his conduct, claimant's discharge was disparate discipline. Since employer punished some behavior but not other similar behavior, employer has not established that claimant's behavior rose beyond that of Retzlaf to the level of disqualification. Benefits are allowed.

DECISION:

The December 1, 2006, reference 01, decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

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