

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DIANA R GASKELL
Claimant

APPEAL NO: 17A-UI-11483-TN-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

TENCO INDUSTRIES INC
Employer

**OC: 10/15/17
Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The employer filed a timely appeal from a representative's unemployment insurance decision dated October 31, 2017, reference 01, which held claimant eligible to receive unemployment insurance benefits quantifying that the claimant was dismissed from work under non-disqualifying conditions. After due notice was provided, a telephone conference hearing was held on November 30, 2017. Claimant participated. The employer participated by Ms. Marris Whitfield, Regional Director and Ms. Angie Lennie, Human Resource Director.

ISSUE:

Does the evidence in the record establishes intentional misconduct sufficient to warrant the denial of unemployment insurance benefits?

FINDINGS OF FACT:

The administrative law judge, having considered all of the evidence in the record, finds that: Diana Gaskell was employed by Tenco Industries, Inc. from June 6, 2013 until September 9, 2017 when she was discharged from employment. Ms. Gaskell was employed as a full-time direct support professional providing care in a group home setting for disabled individuals. Ms. Gaskell was paid by the hour. Her immediate supervisor was Maris Fitzmore.

Ms. Gaskell was discharged on September 9, 2017 after she had called off work on September 8, 2017, using what the employer considered to be inappropriate language. Ms. Gaskell had stated during the call that she could not report to work because she was "shitting herself". Ms. Gaskell, at the time, was upset because she had soiled her clothing in preparation of reporting for work and upset because she continued to have nausea and diarrhea. Ms. Gaskell was seen by her doctor that day and verified that she was ill. Employer believed the claimant's choice of words was inappropriate as it might be overheard by residents who often mimic the words of staff.

Ms. Gaskell had received a warning and one day suspension from work on August 2, 2017 because she had called in providing less than the required two hours advance notice of her impending absence, and because the employer could over hear the claimant's husband using

inappropriate language in the background. The claimant also had failed to attempt to secure her own replacement as required by policy.

During her employment with Tenco Industries, Inc., Ms. Gaskell had been given additional training and counseling on a number of occasions because the employer believed that the claimant's skills needed improvement.

In addition to the language the claimant had used to describe her medical condition during her final call in, the employer also considered a number of complaints that had been made by residents of the group home. Complaints alleged that the claimant had sold cigarettes to a resident, and the claimant had allowed her husband access to a medication area. Another resident had complained about a resident of a different sex entering another residents room without permission. Although the claimant denied these allegations were true, the employer concluded that it was in the best interest of the organization to separate Ms. Gaskell from her employment because she was not serving clients at the level of competence expected.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the claimant was discharged for work connected misconduct as defined by the Unemployment Insurance Law.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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 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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden to prove the claimant was discharged for work connected misconduct as defined by the Iowa Unemployment Insurance Law. See *Cosper v. Iowa Dep't of Job Serv.*, 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 or negligence that equals willful misconduct and culpability. See *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000). 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." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). 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).

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.

In the case at hand, the employer made a management decision to separate Ms. Gaskell from her employment because she had been intermittently absent and the employer had received unsubstantiated complaints from residents of group home. Prior to being discharged, the claimant was not given the opportunity to refute the allegations.

The employer's evidence in the hearing is primarily hearsay in nature. Although hearsay is admissible in administrative proceedings, it can't be recorded the same weight as sworn first hand testimony provided that the first-hand testimony is credible and not inherently improbable. The administrative law judge finds the claimant's first-hand testimony to be credible and it gives it more weight.

Ms. Gaskell has supplied a reasonable explanation for her final absence and the words she used to explain why she could not come to work that day. The claimant was upset that she continued to be ill and had soiled her garments due to diarrhea. The claimant's choice of words, although not exemplary was not sufficient to establish disqualifying work connected misconduct sufficient the denial of unemployment insurance benefits.

The question is not whether the employer has the right to discharge an employee for these reasons but whether the discharge is disqualifying under the provisions of the Iowa Security Act. While the decision to terminate Ms. Gaskell may have been a sound decision from a management viewpoint, for above stated reasons, the administrative law judge concludes that intentional misconduct has not been shown. Benefits are allowed, provided the claimant otherwise is eligible.

DECISION:

The representative's decision dated October 31, 2017, reference 01 is affirmed. Claimant was discharged under non disqualifying conditions. Unemployment insurance benefits are allowed, provided the claimant is otherwise eligible.

Terry P. Nice
Administrative Law Judge

Decision Dated and Mailed

tn/scn