

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

VAN T PHAM
Claimant

APPEAL NO. 10A-UI-00421-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**CHARLES DRAKE & ASSOCIATES
DRAKE STAFFING & SEARCH GROUPS**
Employer

**OC: 11/01/09
Claimant: Appellant (2)**

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

The claimant filed a timely appeal from a representative's decision dated December 30, 2009, reference 01, which held the claimant not eligible to receive unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on February 17, 2010. The claimant participated personally. Participating as a representative/witness was James Weatherfort. The employer participated by Charles Drake, Company Owner.

ISSUE:

The issue in this matter is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

Having considered the evidence in the record, the administrative law judge finds: Van Pham was employed by Drake Staffing & Search Groups from September 18, 2008 until November 3, 2008 when she was discharged from employment. Ms. Pham was assigned to work as a temporary worker at the C D S Warehouse Company where she performed package assembly work. The claimant was paid by the hour. Her contact person at Drake Staffing was Kendra Hughes.

The claimant was separated from her employment with this temporary employment company after the client no longer wished to use Ms. Pham's services due to language barriers. The client had experienced difficulties in giving work directions to Ms. Pham and therefore had removed her from the work assignment.

The claimant had not intentionally misrepresented her English language skills at the time of hire.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes that the claimant was discharged 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 proof in this matter. See Iowa Code section 96.6.2. Misconduct must be substantial in order to justify a denial of unemployment insurance benefits. 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).

Ms. Pham was discharged after she had difficulty comprehending work instructions given to her in English and following them. The evidence in the record does not establish that Ms. Pham intentionally misrepresented her English language skills at the time of hire. The claimant attempted to the best of her abilities to perform her duties but was unable to meet the client employer's expectations and was therefore discharged. The evidence in the record does not show that the claimant intentionally misrepresented her English skills or that she intentionally performed at a level below her capabilities. While the decision to terminate the claimant may have been a sound decision from a management viewpoint, misconduct sufficient to warrant the denial of unemployment insurance benefits has not been shown. Benefits are allowed providing the claimant is otherwise eligible.

DECISION:

The representative's decision dated December 30, 2009, reference 01, is reversed. The claimant was discharged for no disqualifying reason. Unemployment insurance benefits are allowed, providing the claimant meets all other eligibility requirements of Iowa law.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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