

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

KRISTY R HEIDT
Claimant

TYSON PET PRODUCTS INC
Employer

APPEAL 14A-UI-03849-L
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 03/16/14
Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the April 3, 2014, (reference 01) decision that denied benefits because of a discharge from employment. After due notice was issued, a hearing was held on June 9, 2014, in Waterloo, Iowa. Claimant participated with former coworker Mica Popham. Employer did not respond to the hearing notice instruction and did not appear to participate.

On June 9, 2014, the day of the hearing, the employer representative from Talx faxed a request for postponement to the Appeals Bureau because the proposed witness was not available because of interviews the employer scheduled. The administrative law judge (ALJ) did not receive the request until June 10, 2014, the day after the hearing.

ISSUE:

Shall the employer's request for postponement/reopening of the record be granted?
Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The request was not sent at least three days in advance of the scheduled hearing as required by the hearing notice instructions on the back of the page. The employer requested a postponement because the employer witness had scheduled interviews that conflicted with the hearing time and date.

Claimant was employed as a full-time packager from February 7, 2013, through March 14, 2014. Three days prior she accidentally kicked her supervisor Carl Kelley in the leg. They were at a sink, she was trying to work with the paper towel dispenser and he called her "stupid." He started to walk away and she kicked towards him such that the tip of her foot hit the back of his leg. He told her to leave. Packager Paula Harris was present and later told Popham about the incident saying Kelley was joking around with claimant before he walked away. She came back later to check on her employment status and was told she was discharged. She understood the employment policy prohibiting horseplay.

She had been warned about horseplay with a pallet once before when she walked really fast around the pallet jack that Popham was operating in order to give her a hug. Kelley said the pallet jack was still moving when she did that but did not warn Popham. Claimant had been warned about wearing fingernail polish at work (a food safety violation), and alleged racial harassment when she thought a coworker was slowing down the line. Claimant merely told the coworker to push the sachets down into the package further. Popham was present and did not observe any rudeness or racially related communication or behavior.

Kelley is reputed to constantly joke around and lightly punching people in the arm but taking any response more seriously. He has a history of warning claimant but no other coworkers involved in the same or similar incidents. On one occasion, Popham was in charge of the line for an absent coworker. Kelley wanted claimant to train new worker Jasmine. Popham gave her walkie talkie to claimant, while she was doing something else. The next day Kelley was written up for an incorrect product run when it should have been Popham or another line crew leader.

REASONING AND CONCLUSIONS OF LAW:

The first issue is whether the employer's request for postponement or to reopen the record should be granted.

Iowa Admin. Code r. 871-26.8(4) provides:

(4) A request to reopen a record or vacate a decision may be heard *ex parte* by the presiding officer. The granting or denial of such a request may be used as grounds for appeal to the employment appeal board of the department of inspections and appeals upon the issuance of the presiding officer's final decision in the case.

Iowa Admin. Code r. 871-26.8 provides:

871-26.8(2) A hearing *may* be postponed by the presiding officer for *good cause*, either upon the presiding officer's own motion or upon the request of any party in interest. A party's request for postponement may be in writing or oral, provided the oral request is tape-recorded by the presiding officer, and is *made not less than three days prior to the scheduled hearing*. A party shall not be granted more than one postponement except in the case of extreme emergency. (Emphasis added.)

26.8(3) If, due to emergency or other good cause, a party, having received due notice, is unable to attend a hearing or request postponement within the prescribed time, the presiding officer may, if no decision has been issued, reopen the record and, with notice to all parties, schedule another hearing. If a decision has been issued, the decision may be vacated upon the presiding officer's own motion or at the request of a party within 15 days after the mailing date of the decision and in the absence of an appeal to the employment appeal board of the department of inspections and appeals. If a decision is vacated, notice shall be given to all parties of a new hearing to be held and decided by another presiding officer. Once a decision has become final as provided by statute, the presiding officer has no jurisdiction to reopen the record or vacate the decision.

...

26.8(5) If good cause for postponement or reopening has not been shown, the presiding officer shall make a decision based upon whatever evidence is properly in the record.

The postponement, now reschedule, request is denied for two reasons; first, the request was not timely submitted, and the reason does not constitute an emergency or other good cause reason at that late date for changing the scheduled date of the in-person hearing.

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.

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 of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 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. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. 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. 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." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986).

In an at-will employment environment 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. The conduct for which claimant was discharged was merely an isolated incident of poor judgment but was not a deliberate attempt to make physical contact with Kelley. Inasmuch as Kelley had engaged in joking around with claimant and called her "stupid" just before that happened, his conduct as a supervisor indicated tolerance of such behavior. Given his history of a disparate application of expected standards of conduct from claimant as opposed to him or other employees, the evidence does not support a disqualification from benefits.

DECISION:

The April 3, 2014, (reference 01) unemployment insurance decision is reversed. The employer's request for postponement/reopening is denied. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed. The benefits withheld shall be paid, provided she is otherwise eligible.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/pjs