

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**BRENDA N BROWN**  
Claimant

**APPEAL NO. 12A-UI-15154-NT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**“PSALM 51-7 ENTERPRISES INC  
“MOLLY MAID-CEDAR RAPIDS/IOWA CITY**  
Employer

**OC: 12/02/12  
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge

**STATEMENT OF THE CASE:**

Employer filed a timely appeal from a representative’s decision dated December 21, 2012, reference 01, which held claimant eligible to receive unemployment insurance benefits. After due notice was provided, a telephone hearing was held on January 29, 2013. Ms. Brown participated. The employer participated by Mr. Jeff Nullmeyer, Company Owner/Manager. Employer Exhibits One through Seven and Claimant’s Exhibits A through E were received into evidence.

**ISSUE:**

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

**FINDINGS OF FACT:**

Having considered all of the evidence in the record, the administrative law judge finds: Brenda Brown was most recently employed by Molly Maid-Cedar Rapids/Iowa City from June 13, 2012 until November 30, 2012 when she was discharged from employment. Ms. Brown was employed as a full-time associate maid and was paid by commission. Her immediate supervisor was the route manager, Dawn Thomas.

A decision was made to terminate Ms. Brown based upon the employer’s belief that Ms. Brown’s attendance was not satisfactory and that her work performance also was not meeting the employer’s expectations. The employer also had concerns about complaints from other employees that Ms. Brown and/or Ms. Brown’s supervisor were at times talking about other employees causing dissension among workers.

Ms. Brown had previously been employed by the company and was rehired. At the time of rehire the employer went through a list of expectations with Ms. Brown and Ms. Brown accepted employment with the company resuming on June 13, 2012. After becoming re-employed, Ms. Brown was absent on occasion due to the illness of herself or her child but properly notified the employer of impending absences and supplied a doctor’s note for an absence that took

place between June 25 and June 29, 2012. Ms. Brown missed work on November 23, 2012 because that day in the past had been a non scheduled work day and Ms. Brown had informed her supervisor that she had made plans and the claimant's absence was authorized by Ms. Thomas, the route manager.

The claimant's work performance at times was reviewed by the employer based upon complaints that it received from clients. At times Ms. Brown was told that the client or clients may have had unreasonable expectations and the claimant was informed in effect to discount the complaints, however, the employer did indicate a desire to retain the clients. On one occasion the employer spoke to Ms. Brown and her supervisor about making comments about other employees. Ms. Brown recognized the incident that the employer was referencing, however, she did not feel that the warning was directed particularly to her because her supervisor had made the comment. Claimant admits, however, that she did laugh at the comment made at the time.

Ms. Brown was unaware that her employment was in jeopardy. On November 30, 2012, she found an envelope on the desk and upon opening it later at home was informed by that letter that she had been terminated from employment. Prior to being discharged the claimant had received no formal warnings from the company. Both warnings submitted by the employer have a date of November 30, 2012, the date the claimant was discharged. Ms. Brown denies being warned that her job was in jeopardy by the employer prior to her discharge.

It is the employer's position that the claimant did not meet its expectations for performance and attendance and getting along with other employees after being rehired by the company. The company after considering the circumstances as a whole made a management decision during the week preceding November 30, 2012 that Ms. Brown should be discharged from employment.

#### **REASONING AND CONCLUSIONS OF LAW:**

The question before the administrative law judge is whether the evidence in the record establishes intentional, disqualifying misconduct at the time of job separation to warrant the denial of unemployment insurance benefits. It does not.

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.

871 IAC 24.32(7) provides:

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The employer has the burden of proof in establishing job disqualifying 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 the claimant but whether the claimant is entitled to unemployment insurance benefits. Infante v. Iowa Department of Job Service, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants the denial unemployment insurance benefits are two separate decisions. Pierce v. Iowa Department of Job Service, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not always serious enough to warrant a denial of unemployment insurance benefits. Such misconduct must be "substantial." When based upon 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 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 the employer incurs potential liability for unemployment insurance benefits related to that job separation.

In this matter the evidence in the record establishes that the claimant was not sufficiently warned prior to her discharge. Ms. Brown denies receiving ongoing verbal warnings from her employer and the record shows two warnings with dates that are the same date as the claimant's discharge. The evidence in the record does not establish that the claimant intentionally worked below her capabilities or that the claimant was properly warned before being discharged for unsatisfactory work performance. The claimant's absences were properly reported and due to illness and under those circumstances are deemed excused. The evidence in the record also does not sufficiently establish that Ms. Brown was adequately warned about interaction with other employees prior to being discharged. It was the claimant's perception that her supervisor also engaged in similar conduct and that the one verbal warning cited by the employer was directed to the supervisor as well as the claimant. The evidence in the record is devoid of any final act on the part of the claimant that establishes that Ms. Brown intentionally acted in a manner contrary to the employer's interests or standards of behavior.

The question before the administrative law judge is not whether the employer has a right to discharge an employee for the employer's stated reasons but whether the discharge is disqualifying under the provisions of the Employment Security Law. While the decision to terminate Ms. Brown may have been a sound decision from a management viewpoint, the evidence in the record does not establish intentional, disqualifying misconduct sufficient to warrant the denial of unemployment insurance benefits. Benefits are allowed, providing the claimant is otherwise eligible.

**DECISION:**

The representative's decision dated December 21, 2012, reference 01, is affirmed. The claimant was discharged under non disqualifying conditions. Unemployment insurance benefits are allowed, providing the claimant meets all other eligibility requirements of Iowa law.

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Terence P. Nice  
Administrative Law Judge

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Decision Dated and Mailed

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