

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

AMY L RICHTER
Claimant

ALGONA MARINE & SPORT INC
Employer

APPEAL 17R-UI-03600-NM-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 01/01/17
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the January 24, 2017, (reference 01) unemployment insurance decision that denied benefits based upon her discharge for conduct not in the best interest of the employer. A hearing on claimant's appeal was originally held on February 21, 2017, but the employer did not participate. Following that hearing a decision was issued in appeal number 17A-UI-01131-JT-T by Administrative Law Judge James Timberland reversing the January 24, 2017 (reference 01) fact-finding decision. The employer appealed ALJ Timberland's decision to the Employment Appeal Board, who remanded the case for rehearing to allow the employer to participate. The parties were properly notified of the new hearing. A telephone hearing was held on April 27, 2017. The claimant participated and testified. The employer participated through Owner Chad Hall and witnesses Doug Cook and Wendy Hall.

ISSUE:

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: Claimant was employed full time as an office manager from August 10, 2016, until this employment ended on December 22, 2016, when she was discharged.

On either December 20 or 21, 2016, claimant gave calendars containing images of topless women to two employees. One employee was a co-owner of the business and another was one of claimant's co-workers. Hall testified neither employee appeared to be offended by the calendars, but both reported the incident, as they felt conduct of this nature might expose the company to legal issues and violated the sexual harassment policy. Hall believed claimant was likely told about the policy, located in the employee handbook, but could not say for certain. Claimant testified she was unaware handing out these calendars violated the employer's policies and believed it was acceptable, as she had seen pictures of women in swimsuits located in work areas. Hall and Cook both denied there are such pictures in the workplace.

On December 21, 2016, a meeting was held with the owners to discuss claimant's employment. Initially, the meeting was meant to discuss an issue where claimant had, on two occasions,

used the employer's account to make unauthorized purchases of personal items and failed to reimburse the employer for these items until several weeks later. However, the issue of the calendars was also discussed at the meeting. It was determined by management that claimant should be terminated for the incident involving the calendars. Hall could not say for certain whether the employer would have ended claimant's employment if not for this incident. The following day Hall had a meeting with claimant to discuss the situation and issue her a written warning. Claimant noted to Hall that the two had been meeting more frequently and asked if her job was in jeopardy. Hall, not wanting to mislead claimant, told her that the decision had been made to look for a replacement and end her employment.

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 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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Department of Job Service*, 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). Misconduct must be “substantial” to warrant a denial of job insurance benefits. *Newman v. Iowa Dep’t of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

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. A determination as to whether an employee’s act is misconduct does not rest solely on the interpretation or application of the employer’s policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

Claimant was discharged for handing out inappropriate calendars to two employees. The conduct for which claimant was discharged was an isolated incident of extremely poor judgment. The employer testified claimant’s conduct violated its sexual harassment policy, though it could not say for certain she received a copy of this policy and she had never done anything of this nature before. Claimant testified she was unaware her conduct would be considered inappropriate. The employer also discussed two incidents where claimant made unauthorized purchases on its accounts. While the employer may have had serious and legitimate concerns about the unauthorized charges claimant made, it could not say for certain she would have been discharged based on this conduct alone. Rather, Hall testified claimant was discharged based on the poor judgement she showed in handing out the calendars.

An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Training or general notice to staff about a policy is not considered a disciplinary warning. Inasmuch as employer had not previously warned claimant about the issue leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning.

DECISION:

The January 24, 2017, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

nm/rvs