

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

STORMIE L CLARK
Claimant

DOLGENCORP LLC
Employer

APPEAL 19A-UI-02066-NM-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 02/03/19
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the March 1, 2019, (reference 01) unemployment insurance decision that denied benefits based on her discharge for failure to follow instructions in the performance of her job. The parties were properly notified about the hearing. A telephone hearing was held on March 25, 2019. Claimant participated and was represented by attorney Gregory Barntsen. Employer participated through Hearing Representative Caroline Semer and witness Howie Erickson. Employer's Exhibits 1 through 3 and claimant's Exhibits A through W were received into evidence.

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 began working for employer on May 12, 2011. Claimant last worked as a full-time store manager. Claimant was separated from employment on January 31, 2019, when she was discharged.

In March 2018 claimant began experiencing lower back pain. She went to the doctor, who attributed the pain to her work and put her on medication. By September 2018 the pain had gotten much worse so claimant returned to the doctor. Claimant was given a ten pound lifting restriction and referred to a physical therapist. The ten-pound restriction made it impossible for claimant to perform many of her regular job duties. (Exhibit A). As a result, claimant was given an extra \$245.00 in her weekly budget to allow those job duties to be delegated to other employees.

In October 2018 Erikson took over as the district manager for claimant's store. At that time claimant's then-store manager indicated she had been noticing issues with claimant's performance. During the first few months in the district manager position Erikson also noticed issues with claimant's performance. On December 19, 2018, claimant was placed on a six-

week performance improvement plan. (Exhibit 2). During the period of the plan Erikson met with claimant on a weekly basis to discuss her progress. Prior to claimant's injury, there had not been any issues with her performance and she had recently received recognition for excelling as an employee. (Exhibits E and F).

Claimant explained to Erikson that the issues he had identified were because she was now having to rely on other employees to perform tasks she had previously been able to perform and those employees were not meeting expectations. Erikson explained to claimant that if employees were not meeting expectations she needed to hold them accountable. Erikson testified this showed a lack of leadership on claimant's behalf. Claimant testified she was giving these employees regular coaching and constructive feedback, but she was concerned about taking more severe disciplinary action because she feared she would then not have sufficient labor to run the store. Claimant expressed this concern to Erikson, who suggested she hire additional employees. Claimant attempted to follow this suggestion, but had difficulty finding qualified applicants who were willing to accept employment offers. Claimant was ultimately discharged from employment when she failed to meet the goals of her performance improvement plan.

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). 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 employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. (Refusal to pick up mail at a place where racial harassment occurred.) *Woods v. Iowa Dep't of Job Serv.*, 327 N.W.2d 768, 771 (Iowa 1982).

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 assess points or impose discipline up to or including discharge for the incident under its policy. 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, employer incurs potential liability for unemployment insurance benefits related to that separation.

Iowa Admin. Code r. 871-24.32(5) provides:

(5) Trial period. A dismissal, because of being physically unable to do the work, being not capable of doing the work assigned, not meeting the employer's standards, or having been hired on a trial period of employment and not being able to do the work shall not be issues of misconduct.

Failure in job performance due to inability or incapacity is not considered misconduct because the actions were not volitional. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979). Where an individual is discharged due to a failure in job performance, proof of that individual's ability to do the job is required to justify disqualification, rather than accepting the employer's subjective view. To do so is to impermissibly shift the burden of proof to the claimant. *Kelly v. Iowa Dep't of Job Serv.*, 386 N.W.2d 552 (Iowa Ct. App. 1986). Here, claimant had been able to consistently meet the expectations of the store manager position until she was given a ten-pound lifting restriction in September 2018. Erikson testified claimant appeared to lack the leadership skills to be successful in her position, as employees were not performing the tasks delegated to them. Claimant explained she could only hold employees accountable to a certain point, as she was having difficulty finding potential replacement employees and feared she would not have sufficient staff to operate the store.

The employer agreed, since her injury, that claimant had never had a sustained period of time during which she performed her job duties to employer's satisfaction. Claimant made every attempt to hold her employees accountable and search for additional help, but was unsuccessful due to no fault of her own. Inasmuch as she did attempt to perform the job to the best of her ability but was unable to meet its expectations, no intentional misconduct has been established, as is the employer's burden of proof. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). Accordingly, no disqualification pursuant to Iowa Code § 96.5(2)a is imposed. Benefits are allowed, provided claimant is otherwise eligible.

DECISION:

The March 1, 2019, (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