IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

CHRISTY A FARNSWORTH
Claimant

B R STORES INC
SUPER SAVER/ALPS
Employer

APPEAL NO. 09A-UI-17450-S2T

ADMINISTRATIVE LAW JUDGE DECISION

Original Claim: 11/30/08
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

B R Stores (employer) appealed a representative's November 10, 2009 decision (reference 03) that concluded Christy Farnsworth (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for December 29, 2009. The claimant participated personally. The employer participated by Donna Bristol, Director of Human Resources; David Herrick, Front End Manager; and Jody Torbensen, Deli Manager.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds that: The claimant was hired on April 6, 2009, as a full-time assistant deli manager. The claimant signed for receipt of the employer's handbook on April 6, 2009. The employer issued the claimant a written warning on August 6, 2009, for not removing out-of-date cheese items. The claimant had not been trained to do so. On August 20, 2009, the employer issued the claimant a written warning for failure to work during her lunch break. On August 23, 2009, the employer issued the claimant a written warning for an absence without finding a replacement. The claimant was unaware she had to find a replacement. On September 18, 2009, the employer issued the claimant a written warning for tardiness and leaving early. On October 9, 2009, the employer issued the claimant a written warning reiterating the prior issues and for tardiness on October 4, 2009.

The claimant discovered a mass on her cervix and was absent from work after October 9, 2009. On October 19, 2009, the claimant asked the employer for Family Medical Leave (FMLA) paperwork. The employer told the claimant to come in for a meeting. At the meeting on October 19, 2009, the employer terminated the claimant for failure to take out-of-date cheese out of the case while she was absent due to medical issues.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was not discharged for misconduct.

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(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 disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Misconduct connotes volition. A failure in job performance which results from inability or incapacity is not volitional and therefore not misconduct. Huntoon v. Iowa Department of Job Services, 275 N.W.2d 445 (Iowa 1979). Poor work performance is not misconduct in the absence of evidence of intent. Miller v. Employment Appeal Board, 423 N.W.2d 211 (Iowa App. 1988). The employer discharged the claimant for poor work performance and has the burden of proof to show evidence of intent.

The employer did not provide any evidence of intent at the hearing. The claimant's final poor work performance was a result of her absence from work due to medical issues. The employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The employer has failed to provide any evidence of willful and deliberate misconduct that would be a final incident leading to the discharge. The claimant was discharged, but there was no misconduct. Benefits are allowed.

DECISION:

The representative's November 10, 2009 decision (reference 03) is affirmed. The employer has not met its burden of proof to establish job-related misconduct. Benefits are allowed.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/kjw