

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

PAMELA J POLLARD
Claimant

IMAGE INC
Employer

APPEAL 15A-UI-14053-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 11/08/15
Claimant: Respondent (1)**

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

STATEMENT OF THE CASE:

The employer filed an appeal from the December 14, 2015, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on January 13, 2016. Claimant participated. Employer participated through Tammy Huinker, Owner.

ISSUE:

Was the claimant discharged due to job-connected 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 associate/partner beginning on April 13, 2012 through November 19, 2015 when she was discharged. The claimant was not working quickly enough to meet the employer's expectations. The claimant had been off work from October 2014 through April 2015 for breast cancer treatment. When she returned in April 2015 she was still undergoing 'light' chemotherapy treatment. She was off work again for a preventative hysterectomy during the month of July 2015.

The claimant was working too slowly to meet the employer's expectations. The claimant was taking pain medication for a prior back injury and for treatment of her cancer and surgeries. The employer believed the claimant was "too heavily sedated" to be working. The claimant had valid prescriptions from her pain medication physician. She was taking her prescription medication according to instructions and was not abusing it. By November the employer required the claimant provide a doctor's note that indicated she could work with all of the medication she was taking. The claimant did provide a note from her treating physician that indicated she could work with all the medication she was taking and that she had no work restrictions. The claimant's last chemo treatment was on October 29.

On November 17 and 18 the employer had the trainer Karen shadow the claimant while she worked in order to evaluate her work performance. Karen reported that the claimant would clean the same surfaces four or five times and just seemed "out of it" and worked too slowly.

Based upon that evaluation, the employer made the determination to discharge the claimant for failure in her job performance. The claimant was not intentionally trying to do a poor or incomplete job; she simply was taking medication for her illness that affected her ability to work.

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 § 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 Department of Job Service*, 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. IDJS*, 364 N.W.2d 262 (Iowa 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. IDJS*, 425 N.W.2d 679 (Iowa 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 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 App. 1988).

Failure in job performance due to inability or incapacity is not considered misconduct because the actions were not volitional. *Huntoon v. Iowa Department of Job Service*, 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. IDJS*, 386 N.W.2d 552 (Iowa App. 1986). The claimant’s job performance slipped after she was diagnosed with cancer and began undergoing treatment. She was taking medication which affected the speed at which she worked. Her failure to work quickly enough to meet the employer’s expectations was not intentional. The claimant was working to the best of her ability given her physical condition, but was unable to meet the employer’s expectations. Under these circumstances, no intentional misconduct has been established, as is the employer’s burden of proof. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). Accordingly, no disqualification pursuant to Iowa Code § 96.5(2)a is imposed. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The December 14, 2015, (reference 01) decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

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