

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KIMBERLY K NISSEN
Claimant

APPEAL NO. 07A-UI-01876-L

**ADMINISTRATIVE LAW JUDGE
DECISION**

THE UNIVERSITY OF IOWA
Employer

OC: 01-14-07 R: 03
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the February 14, 2007, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on April 16, 2007, in Cedar Rapids, Iowa. Claimant participated and was represented by Philip Mears, Attorney at Law. Employer participated through Dave Bergeon and Kate Trump. Employer's Exhibit 1 was received.

ISSUE:

The issue is whether claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed for 15 years, most recently as a full-time secretary in the pediatrics unit for one year through January 19, 2007, when she was discharged. The final and sole incident for which she was discharged occurred on December 29, 2006, when she faxed a request to a pharmaceutical company for samples of a prescription drug without authorization. (Employer's Exhibit 1) A company representative called claimant on that date and said she wanted to provide information for pediatric patients about Metformin, an oral solution that is claimed to reduce insulin resistance in adult or pediatric patients. Claimant offered to take the information over the phone. The drug representative said she could not do that but would fax a form and would send the information back to claimant. She completed the handwritten fax date on the upper right hand corner of the document and the physician's name stamp and license number but everything else had already been completed by the drug representative. Claimant noticed the box asking for the samples was pre-stamped but did not pay attention since she was the only receptionist present that day. Normally she would just take information from drug representatives and pass it along to doctors. She had never filled out sample request forms but had used physician license numbers with the authorization of her supervisor, who was not present on December 29. She had never used the signature stamp before and found the stamp for Dr. Salikien first but did not get specific permission to use it or the license number. Claimant is a high school graduate, is not diabetic, and has no family members who are diabetic. Her

only intention in sending the form was to obtain written information about this new drug to pass along to doctors and nurses. She was the only staff member working that morning and the entire incident occurred over the course of a half hour. She was not aware of the gravity of using a physician's signature stamp and license number or the formal protocol for obtaining samples. When interviewed during the investigation claimant admitted sending the form and using the signature stamp and license number.

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.

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).

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. This conduct was merely an isolated incident of poor judgment; and inasmuch as employer had not previously warned claimant about any of the issues 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. The claimant was entitled to fair warning that the employer was no longer going to tolerate her performance and conduct. Without fair warning, the claimant had no way of knowing that there were changes she needed to make 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. Benefits are allowed.

DECISION:

The February 14, 2007, reference 01, decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/kjw