

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BOBBI A DRYE
Claimant

APPEAL NO. 07A-UI-05343-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

GOOD SAMARITAN SOCIETY INC
Employer

OC: 04-22-07 R: 02
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the May 9, 2007, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on June 13, 2007. The claimant did participate. The employer did participate through Gwen Musick, Director of Nursing; Layne Gross, Administrator; and (representative) Lori Welch, Human Resources Manager. Employer's Exhibit One was received.

ISSUE:

Was the claimant discharged for work-related misconduct?

FINDINGS OF FACT:

Having reviewed the testimony and all of the evidence in the record, the administrative law judge finds: Claimant was employed as a LPN, full-time, beginning September 2, 2005, through April 5, 2007, when she was discharged.

The employer received a complaint that the claimant and another coworker were smoking marijuana while on duty on March 30, 2007. The claimant was contacted on her day off on April 2, 2007 by Ms. Welch at approximately 8:00 a.m. The claimant was told by Ms. Welch that she needed to appear for the test at 11:00 a.m. that same day. The claimant told Ms. Welch that she would see what she could do about getting there by 11:00 a.m. The claimant had car trouble that morning and took her car to a mechanic for repair. She did not have a cell phone to call the employer to report her delay and the phone at the mechanic's was in use the entire time she was there. The claimant appeared for the drug test at 1:20 p.m. and took the drug test. The drug test was negative.

The claimant was told that the test the employer used was only good at determining marijuana use if the employee was tested within 36 hours of the use. Even if the claimant had appeared for the test at 11:00 a.m., the test results would not have been valid, as more than 36 hours would have passed since the alleged use of marijuana.

The employer's policy, which is in writing and was given to the claimant, provides that employees must submit to drug testing if asked to when a reasonable suspicion has been raised. The employer discharged the claimant not because of the results of her drug test, but because she was two hours and twenty minutes late arriving to take the test.

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.

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.

While the claimant was required to submit in a timely manner, she was late only because she had car trouble. The administrative law judge cannot conclude that a claimant two hours and twenty minutes late to a drug test that would not be valid even if she had shown up on time, has committed misconduct serious enough to warrant denial of unemployment insurance benefits. The employer's evidence does not establish that the claimant deliberately and intentionally acted in a manner she knew to be contrary to the employer's interests or standards. There was no wanton or willful disregard of the employer's standards. In short, substantial misconduct has not been established by the evidence. While the employer may have had good cause to discharge, conduct which might warrant a discharge from employment will not necessarily sustain a disqualification from job insurance benefits. *Budding v. Iowa Department of Job Service*, 337 N.W.2d 219 (Iowa App. 1983). Inasmuch as the employer has not established a current or final act of misconduct, benefits are allowed.

DECISION:

The May 9, 2007, 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

tkh/kjw