

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DAWN R WHEELER
Claimant

APPEAL NO. 08A-UI-02608-LT

**ADMINISTRATIVE LAW JUDGE
DECISION**

IA DEPT/AGRIC & LAND STEWARDSHIP
Employer

**OC: 02/10/08 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 March 6, 2008, reference 01, decision that denied benefits. After due notice was issued, a telephone conference hearing was held on April 1, 2008. Claimant participated. Employer participated through Gary Johnson and was represented by Beverly Lamb of TALX UC eXpress. 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 heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant was employed as a full time meat inspector from December 2, 1999 until February 13, 2008 when she was discharged. On January 9, 2008 she wrote in her report that she was at Farmington Locker on January 9 but she was not there according to plant management and after being questioned about it, claimant investigated and corrected the statement in an e-mail dated January 30, 2008 indicating she had forgotten to write her notes for the day and did not take her laptop computer with her into plants. She did find a procedure record at the plant indicating she had not been there on January 9 and brought that to the attention of employer. The employer commenced an investigation on January 14 after claimant's report was submitted for the week ending January 11, 2008. The investigation concluded with an interview and investigation hearing on January 29, 2008 and suspended pending termination. January 29 was the first date employer notified claimant of its concern about the January 9 issue. Employer was aware of claimant's history of brain surgery and related memory and stress problems. Employer made no other allegations of errors or omissions other than unspecified late reports on occasion ranging from one to three days. There had been no prior warning to claimant that her job was in jeopardy.

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.

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). 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. It appears from the evidence that this report was not more than an isolated mistake related to claimant’s failure to take adequate notes and not because of any mal intent. Since 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. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made 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. Furthermore, since employer knew of the issue on January 14 but did not raise the issue with her for two weeks, even had this been an act of misconduct, it cannot be considered a current act for the purpose of determining qualification. Benefits are allowed.

DECISION:

The March 6, 2008, reference 01, decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. The benefits withheld effective the week ending February 16, 2008 shall be paid to claimant forthwith.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/css