

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JENNIFER A BAYLIE

Claimant

APPEAL NO. 09A-UI-14800-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

STREAM INTERNATIONAL INC

Employer

OC: 09-06-09

Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the September 24, 2009, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on November 2, 2009. The claimant did participate. The employer did participate through Elva Connelly, Service Delivery Manager, Michael Manke, Site Director and (representative) Christopher Clausen, Human Resources Generalist. 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 team manager full time beginning November 6, 2007 through September 4, 2009 when she was discharged.

On August 27 the claimant was returning from the printer to her desk area with a stack of 13 or so 8.5 by 11 sheets of paper in her hand when she stopped by the desk of coworker Tonya Brown to talk with her. The claimant told Ms. Brown that she had seen her picture on her face book account when she thought Ms. Brown was reaching toward her computer to look at her face book account. The papers in the claimant's hand, some of which were stapled together fell or slipped from her hand and hit Ms. Brown on the arm, wrist and hand. Ms. Brown rubbed her arm but told the claimant she was ok. The claimant apologized to Ms. Brown. Ms. Brown did not file a complaint against the claimant at that time. Approximately one week later another employee, Pam Johnson, went to the employer to report another incident and at that time Ms. Johnson reported to the employer that the claimant had hit Ms. Brown on the arm with a stack of rolled up paper.

The employer spoke to Tonya Brown who allegedly told them that the claimant had "struck her forcefully" with the papers. Ms. Brown is still an employee but the employer chose not to have her testify at the hearing. As a result of the incident Ms. Brown had no visible bruises and did not require any medical treatment after the incident.

The claimant was discharged on September 3 due to the employer's conclusion that she violated the anti-workplace violence policy. The claimant had no prior discipline for violation of the anti-workplace violence policy.

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).

If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. Crosser v. Iowa Department of Public Safety, 240 N.W.2d 682 (Iowa 1976). The employer chose not to present the testimony of Ms. Brown or of Ms. Johnson.

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.

The claimant denies striking Ms. Brown intentionally with the papers. The only person to testify at the hearing who was present when the incident took place was the claimant. The administrative law judge is persuaded that the claimant did not intentionally and willfully strike Ms. Brown. Ms. Brown never filed a complaint about the incident nor did she testify at the hearing. While the administrative law judge is not persuaded that other employees conspired to get her discharged, the employer's evidence does not establish deliberate, intentional misconduct on the part of the claimant.

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 September 24, 2009, 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/pjs