

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

GERALD T FOLEY
Claimant

APPEAL NO. 07A-UI-01641-S2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

FLYING J INC
Employer

OC: 01/14/07 R: 02
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Flying J (employer) appealed a representative's February 7, 2007 decision (reference 01) that concluded Gerald Foley (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on March 5, 2007. The claimant participated personally. The employer was represented by Lesley Buhler, Hearings Representative, and participated by Timothy Lloyd, Western Division Manager for Diesel Fuel Marketing. The employer offered one exhibit, which was marked for identification as Exhibit One. Exhibit One was received into evidence.

ISSUE:

The issue is whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds that: The claimant was hired on November 15, 2004, as a full-time Regional Manager. The claimant signed for receipt of the company handbook on November 13, 2004. The claimant was to service 1,500 to 1,600 customers and to obtain new customers for the company. In the year 2005, the company had a quota of 415 face-to-face visits. The claimant made 439 face-to-face visits in 2005. The employer increased the quota to 900 face-to-face visits in 2006. The claimant performed 633 face-to-face visits and increased his travel. The employer did not issue the claimant any warnings during his employment.

The employer terminated the claimant on January 10, 2007, for failure to travel as requested, make enough face-to-face visits (especially with larger established customers), follow up on accounts, maintain contact with existing accounts, and meet performance requirements. The employer terminated the claimant based on figures which did not include the claimant's end of employment figures. If the employer had used all of the claimant's sales figures, he would have been ranked ninth out of 14 in bringing in new customers and first out of 14 in increasing existing sales. The employer's figures without the end of employment figures showed the

claimant ranked eleventh out of 14 for obtaining new customers and seventh out of 14 for increasing existing sales.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was not discharged for misconduct.

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 employer discharged the claimant and has the burden of proof to show misconduct. 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). The employer discharged the claimant for poor work performance and has the burden of proof to show evidence of intent. The employer did not provide any evidence of intent at the hearing. The claimant's poor work performance was a result of his large workload and lack of warnings to put him on notice of an impending termination. Consequently, the employer did not meet its burden of proof to show misconduct. Benefits are allowed.

DECISION:

The representative's February 7, 2007 decision (reference 01) is affirmed. The claimant was discharged. Misconduct has not been established. Benefits are allowed, provided the claimant is otherwise eligible.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/kjw