

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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**DAWN KEMERER JANES**

Claimant

**THE EASTER SEAL SOCIETY OF IA INC**

Employer

**APPEAL NO. 17A-UI-02398-B2T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 02/05/17**

**Claimant: Appellant (1)**

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Iowa Code § 96.5-2-a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

Claimant filed an appeal from a decision of a representative dated February 21, 2017, reference 02, which held claimant ineligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on March 27, 2017. Claimant participated personally and with witness Leonard Lillshau. Employer participated by Sara Hardy and Lexy Ulrich, and Becky Pospisal. Employer's Exhibits 1 through 3 were admitted into evidence.

**ISSUE:**

The issue in this matter is whether claimant was discharged for misconduct?

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: Claimant last worked for employer on January 31, 2017. Employer discharged claimant on February 2, 2017, because claimant was smoking in front of her consumers at work, knowing that this was a violation of company policies.

Claimant was involved in an incident with a client on a bus on January 31, 2017. Claimant stated that for some reason that client got excited, and assaulted her. She was upset about this incident, and when it ended, she went outside and had a cigarette while she was in front of clients and on the job.

Employer stated that through its investigation it was determined that the incident with the client began because claimant was smoking in front of a client. The client asked claimant to quit smoking, but the claimant refused. The client expressed that he had respiratory problems, and the claimant still would not put out her cigarette. Employer's investigation also involved questioning another client who stated that claimant often smoked in front of clients.

Claimant denied smoking in front of the clients on any occasion other than the last, most recent incident that led to her termination. Claimant stated that the other client who claimed claimant often smoked in front of clients was speaking of when that client would see claimant outside of work, not at work. Claimant did not mention to employer that she had smoked in front of clients when she was questioned by employer about the incident.

When claimant was hired, she received an employee handbook which detailed employer's strict policy against employee smoking. Employer deals with people with health problems, and is very concerned about its employees bringing bad health choices in front of its clients. Claimant signed for receipt of this documentation and stated that she knew that she was not to smoke in front of clients.

### **REASONING AND CONCLUSIONS OF LAW:**

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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982), Iowa Code § 96.5-2-a.

In order to establish misconduct as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. Rule 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979);

*Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa Ct. App. 1986). The conduct must show a 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 the employee's duties and obligations to the employer. Rule 871 IAC 24.32(1)a; *Huntoon supra*; *Henry supra*.

The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. Here, a basic part of claimant's job was promoting positive health for her clients. Claimant argues that she was basically forced to smoke through a stressful situation that happened at work. This argument is not convincing. Claimant made a choice to violate essential rules of employer. It is believed that claimant had additionally smoked after other stressful situation. There is no exception to the policy for stressful situations. Otherwise, claimant could constantly smoke and respond that she is constantly stressed. That would eliminate employer's rules entirely.

In this matter, the evidence established that claimant was discharged for an act of misconduct when claimant violated employer's policy concerning smoking at work. The last incident, which brought about the discharge, constitutes misconduct because claimant understood that this rule was an essential part of company policy. The administrative law judge holds that claimant was discharged for an act of misconduct and, as such, is disqualified for the receipt of unemployment insurance benefits.

**DECISION:**

The decision of the representative dated February 21, 2017, reference 02, is affirmed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible.

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Blair A. Bennett  
Administrative Law Judge

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Decision Dated and Mailed

bab/rvs