

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

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Appeal Number: 06A-UI-07326-LT
OC: 06-18-06 R: 01
Claimant: Respondent (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

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

STATEMENT OF THE CASE:

Employer filed a timely appeal from the July 10, 2006, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on August 8, 2006. Claimant participated. Employer participated through Greg Duncan, Jim Sheffield and Stacy Schalk and was represented by Lucie Hengen of Unemployment Services. The issue is whether claimant was discharged for reasons related to job misconduct. Employer's Exhibit 1 was received.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed as a full-time sales manager through June 16, 2006 when he was discharged for allegedly impeding an EEO investigation regarding a complaint about him by Angie Neil, an indirect subordinate, and for his alleged relationship with Neil while in an authority role.

Another employee, Joanna Gillespie, was assigned to his team on May 24 and filed a complaint on May 25 or 26 because she felt threatened by his alleged relationships with Neil and another subordinate Tiffany Menckie who both denied a physical relationship with claimant. His only other contact with Gillespie was when he sat in on a meeting warning her of possible dismissal about her one month earlier. Claimant was suspended and was not working during the investigation period beginning May 30.

The personnel department investigated and during her May 31 interview Neil “adamantly denied” a physical relationship with claimant saying only that she “interacted” with claimant once outside of the work place at a team building function that her fiancé took her to. On June 12 or 13 Neil changed her statement and alleged that there was a physical relationship. Employer did not discipline her for giving employer a false statement. The personnel department completed the investigation and drafted a final report on June 15 but did not provide management or claimant with a copy or even a detailed summary.

During the investigation, employer instructed each witness and claimant not to communicate with others. In spite of this directive, Angie Neil contacted claimant the afternoon of June 12 and was upset that her fiancé Greg Chavez was being questioned about the alleged physical relationship between claimant and Neil. She called him again later and said Chavez had become angry, threatened to break off the engagement, hit her and left her house. Neil was “bawling” because she thought Chavez was going to break off the engagement so claimant did not hang up on her. Chavez contacted claimant later that day asking claimant if he had a physical relationship with Neil. Claimant and Chavez drove around for about an hour while claimant reassured him there was no physical relationship and discussed similar issues. On June 13 Neil notified claimant Chavez was going to be interviewed by Mackie so claimant text messaged the intention that he was not going to tell Mackie Chavez had hit Neil. Claimant reported contact with Neil and Chavez on the same day to Duncan and to Sheffield on June 13. Neither Neil nor Chavez were disciplined for communicating with claimant during the course of the investigation.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

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).

When the record is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. *Schmitz v. IDHS*, 461 N.W.2d 603, 607 (Iowa App. 1990). Both the quality and the quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See, Iowa Code §17A.14 (1). In making the evaluation, the fact-finder should conduct a common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be fulfilled. *Schmitz*, 461 N.W.2d at 608.

Since Neil changed her statement to employer her allegation is not credible. Since employer presented none of the witnesses purportedly involved in the alleged events and there was conflicting information between witnesses, claimant's response to employer's allegations is considered credible. 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. Since the other two employees were the ones that initiated contact with claimant and were not similarly disciplined, employer's disparate treatment of claimant indicates it was willing to tolerate the communication, thus claimant did not engage in misconduct sufficient to rise to the level of disqualification. Since he has credibly established he did not engage in a personal, physical or otherwise, relationship with Neil, there was no conflict of interest policy violation. Benefits are allowed.

DECISION:

The July 10, 2006, reference 01, decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

dml/pjs