



## REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2015) provides:

*Discharge for Misconduct.* If the department finds the individual has been discharged for misconduct in connection with the individual's employment:

The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(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 the 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 Iowa Supreme court has accepted this definition as reflecting the intent of the legislature. *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 665, (Iowa 2000) (quoting *Reigelsberger v. Employment Appeal Board*, 500 N.W.2d 64, 66 (Iowa 1993)).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Board*, 616 NW2d 661 (Iowa 2000).

Both parties agree that the Claimant made an inappropriate comment that offended another co-worker for which the Claimant apologized to no avail. And although the Employer testified that the Claimant was on a final warning regarding any future 'customer' complaints (customer having a baby at the New Year's Day handbag sale), we note that that warning, specifically, involved an incident with a customer that occurred over two and half years prior to the final incident. And "while past acts and warnings can be used to determine the magnitude of a current act of misconduct..." (See, 871 IAC 24.32(8), we find that that incident was too remote in time to be considered in determining its impact on the final act.

The Claimant had no other customer complaints made against her after since early January 2013. In fact, she provided credible evidence that many customers specifically requested her assistance, which we find more credible than not in light of testimony regarding her unrefuted annual, positive performance evaluations. Additionally, the Employer failed to provide any corroborating documentation to show that the Claimant was ever issued any warning or put on notice of this final warning that her job was in jeopardy.

In looking at the final incident, we find that her comment did not involve a customer. Rather, she made an insensitive, observational statement that caused offense, but certainly was not intended to cause harm to the co-worker nor the Employer. The record contained no evidence of past similar comments by the Claimant. At worst, Ms. Rasmussen used poor judgement that didn't rise to the legal definition of misconduct such that she should be disqualified for benefits. Based on this record, we conclude that the Employer failed to satisfy their burden of proof.

**DECISION:**

The administrative law judge's decision dated January 12, 2016 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was discharged for no disqualifying reason. Accordingly, she is allowed benefits provided she is otherwise eligible.

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Kim D. Schmett

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Ashley R. Koopmans

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James M. Strohman

AMG/fnv