

**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: 04A-UI-12581-LT
OC: 10-24-04 R: 01
Claimant: Appellant (2)**

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:

Claimant filed a timely appeal from the November 10, 2004, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on December 16, 2004. Claimant did participate with Cheri Daniels and was represented by Michael Johnson, Attorney at Law. Employer did participate through Kenna Skalicky.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed as a full-time manager through October 25, 2004 when she was discharged for an alleged third violation of the chain of command policy. Employees are encouraged to share their concerns about their employment according to company policy. Claimant addressed her concerns to Kenna Skalicky, area supervisor and claimant's immediate supervisor, in a meeting

on October 20. Claimant and Cheri Daniels, assistant manager, were dissatisfied because Skalicky did not promptly return phone calls about problems, spoke about her predecessor "babysitting and covering for" claimant the past 14 years, and told claimant and Daniels different things but told each not to tell the other. Skalicky did not address the issues to claimant's or Daniels' satisfaction but merely kept repeating her answers, so claimant allowed the meeting to come to an end. After the meeting, Daniels called district manager, Kim Perrin, and left a message for her requesting a meeting without Skalicky's presence. There was no response to the message and claimant was fired early the next week for violating the chain of command by calling Perrin when she had not done so. Daniels was not reprimanded for calling Perrin outside of the chain of command.

Employer claimed that claimant had been disciplined for a similar issue on October 19 but no notice of any disciplinary action was given to claimant from that date until she was discharged. Employer had warned claimant about violating the chain of command on September 10 when claimant called the human resources office to notify them that an employee was having surgery a week earlier than expected. That office did not advise claimant that it was inappropriate for her to contact them directly.

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 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.

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).

An employer may discharge an employee for any number of reasons or no reason at all, 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. None of the events described by employer constituted a violation of the chain of command of which policy claimant had not been provided a copy. A simple notification of a surgery date change was efficient and there was no actual second warning on October 19 until the separation date which did not allow claimant time to correct any alleged missteps. Finally, it was Daniels who requested the meeting with Perrin, not claimant. Since Daniels was not disciplined for the request that employer fired claimant for allegedly making, the employer's treatment of claimant was disparate and suggests pretext. Whatever the real motivation for the discharge, employer has failed to meet its burden of proof to establish disqualifying conduct. Benefits are allowed.

DECISION:

The November 10, 2004, reference 01, decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

dml/tjc