

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DEBRA L WATERS
Claimant

APPEAL NO. 07A-UI-01803-M

**ADMINISTRATIVE LAW JUDGE
DECISION**

FMC/MARC INC
ARBIES
Employer

OC: 01/14/07 R: 02
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated February 7, 2007, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on March 20, 2007 at Mason City. Claimant participated personally. Employer participated by Penny Alden, District Manager, and Amy Grady, Assistant Manager. Exhibits One and Two 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 having considered all of the evidence in the record, finds: Claimant last worked for employer on December 26, 2006.

Claimant was discharged on December 26, 2006 by employer because claimant made an inappropriate comment to a customer. Claimant worked as a cashier. Claimant commented on a customer's physique. The customer's sister overheard the comment. Employer discharged claimant pursuant to the harassment and discourteous behavior policy. Claimant had no final warnings on her record.

REASONING AND CONCLUSIONS OF LAW:

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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

In this matter, the evidence fails to establish that claimant was discharged for an act of misconduct when claimant violated employer's policy concerning harassment. Claimant was not warned concerning this policy by any formal written or verbal warning.

The last incident, which brought about the discharge, fails to constitute misconduct because claimant did not intentionally violate the policy. The rude comment was meant as private. It was an accident that the customer became aware of the discourteous remark. Claimant had a clean record of employment with this employer. There are no prior situations which demonstrate a pattern of behavior contrary to the best interest of employer. This is an isolated instance of poor judgment on a clean record of employment. A single incident does not constitute misconduct. Benefits allowed. The administrative law judge holds that claimant was not discharged for an act of misconduct and, as such, is not disqualified for the receipt of unemployment insurance benefits.

DECISION:

The decision of the representative dated February 7, 2007, reference 01, is reversed. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements.

Marlon Mormann
Administrative Law Judge

Decision Dated and Mailed

mdm/kjw