

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**ROSE M GOOD**  
Claimant

**APPEAL NO. 09A-UI-03337-LT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**HY-VEE INC**  
Employer

**OC: 01/25/09**  
**Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

The claimant filed a timely appeal from the February 23, 2009, reference 01, decision that denied benefits. After due notice was issued, a telephone conference hearing was held on March 26, 2009. Claimant participated. Employer participated through Mark Sifrit and Jill Kent and was represented by Daniel Speir, Attorney at Law. Employer's Exhibit 1 was received. Proposed Employer's Exhibit 2 was not fully legible and was not admitted to the record.

**ISSUE:**

The issue is whether claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of unemployment benefits.

**FINDINGS OF FACT:**

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant most recently worked full-time as a cake decorator and was employed from December 17, 2005 until January 30, 2009 when she was discharged for having failed to clock out for her doctor's appointment on January 30. She gave a list of doctor and physical therapy appointments to Kent who compared the times and dates to her time cards and found the discrepancies. When confronted, claimant refused to answer questions because it was a workers' compensation issue and she wanted her attorney to know about the issue. When she determined that Sifrit already had the termination papers filled out and wanted her to sign them she said she was leaving and would not answer questions. It was then that Sifrit told her he would fire her if she left. After her work injury in July 2008 two employer representatives (Jill Kent and Mark Sifrit of Hy-Vee) and two workers' compensation insurance carrier representatives (Donna Loveland and Faith Jenkins of EMC) gave her at least four sets of conflicting instructions on November 12, December 1, December 12, and December 30, 2008 about how she should keep track of her time for doctor and physical therapy appointments and if she should clock out or not. None of the instructions were placed in writing and employer never advised her that her job would be in jeopardy if she failed to follow certain instructions.

## 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.

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).

In an at-will employment environment 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. The conduct for which she was discharged was based upon a collage of confusing and contradictory instructions and inasmuch as employer had not previously put instructions in writing or otherwise warned claimant that her job was in jeopardy about any of the issues leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Benefits are allowed.

**DECISION:**

The February 23, 2009, reference 01, decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. The benefits withheld effective the week ending January 31, 2009 shall be paid to claimant forthwith.

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Dévon M. Lewis  
Administrative Law Judge

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Decision Dated and Mailed

dml/pjs