

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

MACKENZIE J SALAZAR
Claimant

KMS ENTERPRISES LLC
Employer

APPEAL 15A-UI-10744-JCT
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 08/30/15
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the September 24, 2015, (reference 02) unemployment insurance decision that denied benefits based upon separation. The parties were properly notified about the hearing. A telephone hearing was held on October 8, 2015. The claimant participated personally. The employer participated through Karissa Schreurs, owner.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed part-time as a daycare attendant and was separated from employment on April 2, 2015, when she was discharged.

The claimant began her employment on February 4, 2015 and was on a 60-day probationary period when discharged. The employer's handbook, which the claimant acknowledged receipt, notifies employees may be discharged during this period of time. In addition, the employer also has a disciplinary policy that assigns point values to various infractions, and some infractions, such as failure to feed or water the dogs at the daycare are grounds for immediate discharge. Prior to the claimant's discharge, she had verbal discussions about not correctly handling the dogs, which resulted in a bite on her nose, and excessive cell phone use, but had no written warnings or notice that her job was in jeopardy.

The final incident occurred when the claimant's manager reported the claimant did not give water to the dogs before leaving her shift. The claimant stated she did complete her watering before leaving her shift. The claimant's manager did not participate in the hearing or offer a written statement in lieu of appearance. The claimant was subsequently discharged, and told it wasn't working out and she was not a good fit for the job. The claimant denied being told anything about the watering incident at the time of separation.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the 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.

Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, 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 is misconduct that warrants denial of unemployment insurance benefits are two separate matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits, an employer must establish the employee was responsible for a deliberate act or omission that was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior that 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984). The reason cited by the employer for discharging the claimant is her conduct during her probationary period. A failure to do the job to the employer's satisfaction, is not misconduct, and the claimant had never sustained satisfactory performance during her short employment.

Iowa Admin. Code r. 871-24.32(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 addition, the most recent incident leading to discharge must be a current act of misconduct in order to disqualify an individual from receiving benefits, and the employer has failed to establish a final act of misconduct. The employer alleged the claimant did not water the dogs on April 1, 2015 but did not provide any written or first-hand testimony to substantiate the assertion. The claimant testified first-hand that she did in fact provide water to the dogs before completing her shift that day. The Iowa Supreme Court has ruled that if a party has the power to produce more explicit and direct evidence than it chooses to present, the administrative law judge may infer that evidence not presented would reveal deficiencies in the party's case. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976). The claimant's manager did not participate in the hearing or offer a written statement in lieu of appearance. Mindful of the ruling in *Crosser, id.*, and noting that the claimant presented direct, first-hand testimony, while the employer relied upon hearsay testimony, the administrative law judge concludes that the claimant's recollection of the events is more credible than that of the employer. The employer has not established a current or final act of misconduct, and, without such, the history of other incidents need not be examined. While the employer may have been justified in discharging the claimant, work-connected misconduct as defined by the unemployment insurance law has not been established in this case.

Nothing in this decision should be interpreted as a condemnation of the employer's right to terminate the claimant for violating its policies and procedures. The employer had a right to follow its policies and procedures. The analysis of unemployment insurance eligibility, however, does not end there. This ruling simply holds that the employer did not meet its burden of proof to establish the claimant's conduct leading separation was misconduct under Iowa law. Since the employer has not met its burden of proof, benefits are allowed.

DECISION:

The September 24, 2015, (reference 02) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. The benefits claimed and withheld shall be paid, provided she is otherwise eligible.

Jennifer L. Coe
Administrative Law Judge

Decision Dated and Mailed

jlc/pjs