

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

WILLIAM A DONAHUE
Claimant

APPEAL NO. 09A-UI-00640-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FLYING J INC
Employer

**OC: 12/07/08 R: 04
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed an appeal from a decision of a representative dated January 9, 2009, reference 01, which held the claimant eligible for unemployment insurance benefits. After due notice a telephone conference hearing was scheduled for and held on January 30, 2009. The claimant participated. A potential witness, Ryan Nass, was contacted but did not participate. The employer participated by Frances Landolphi, Hearing Representative, and witness Lou Kokinis, Financial Manager. Exhibits One through Seven were offered into evidence. Exhibits Three, Five, Six, and Seven were received into evidence.

ISSUE:

The issue is whether the claimant was discharged for misconduct in connection with his employment.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: The claimant worked for this employer from April 23, 2007 until December 9, 2008 when he was discharged from employment. Mr. Donahue held the position of full-time financial services representative. The claimant was scheduled to work 8:00 a.m. to 5:30 p.m. and was paid by the hour.

The claimant was discharged after it was reported that company customers were attempting to locate the claimant at the Flying J facility in Davenport, Iowa on December 8 but that the claimant could not be located. Subsequently it was determined that Mr. Donahue had failed to clock out for lunch and was at a Wal-Mart facility having the oil changed on his personal vehicle. As the employer had also received previous complaints that Mr. Donahue could not be located during working hours, a decision was made to discharge Mr. Donahue from his position with the company.

The claimant had been previously warned on March 10, 2008 for failure to take a minimum of a 30-minute lunch break and was warned that he must clock in and out in a timely fashion. The claimant had also been warned for reporting to work late.

In his position of financial services representative, Mr. Donahue was expected to man the company's office at the Flying J location in Davenport, Iowa and to be available to sell debit and credit cards and associated products at that facility. Because the claimant had no direct supervisory personnel at the location. Mr. Donahue would post a sign on the office door when he was taking his one hour lunch break and routinely would provide a cell phone number to another management individual so that he could be located if needed during lunch.

When Mr. Donahue began performing his services for the Flying J company, the company's expectations were less structured. In the beginning of 2008, the employer emphasized to Mr. Donahue the necessity of working and being available during posted office hours. When variations from normal working hours occurred, the claimant would attempt to secure permission from his immediate supervisor, who was at another location, as well as posting a sign in the window and leave his cell phone number with local Flying J manager. The claimant at times took extended lunch periods or took time to accompany his wife to the doctor with the permission of his regional manager. Mr. Kokinis, The company's director of business development does not recall if the claimant provided any explanation of extenuating circumstances when the company was making a decision to terminate Mr. Donahue.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Donahue was discharged for intentional misconduct in connection with the employment. It does not.

The evidence in this unique case is highly disputed. Mr. Donahue appeared and provided sworn firsthand testimony; in contrast the evidence presented by the employer is based primarily on hearsay. Although hearsay evidence is admissible in administrative proceedings, it cannot be accorded the same weight as sworn, direct testimony. The claimant testified that initially when employed by the company his work was more of an unstructured nature but that subsequently the employer emphasized to him the need to work and be available at the facility during the posted hours. Mr. Donahue testified that he complied. The claimant testified that when a variation from regular hours would occur, he would secure the permission of his district manager who was at a different location as well as posting a "gone to lunch" sign in the window and would leave his cell phone number with Flying J management so that he could be reached. The claimant further testified that although he was warned in the past, his warnings were for arriving late on one occasion and for failing to take a 30-minute lunch hour on another occasion. The claimant was warned to clock in and out in conjunction with his warning about taking a minimum of a 30-minute lunch.

The claimant testified that on the date of the final incident he had followed his usual procedures of posting his gone to lunch sign and leaving his cell phone number with a local manager and at most he had been gone from the facility for one hour and 15 minutes. The claimant testified that although he had inadvertently forgotten to clock out that his direct manager had chosen not to impose any form of discipline when the claimant had done the same thing a few weeks before.

In contrast it is the employer's position that the claimant was repetitively gone from work and company customers were unable to reach him. The employer's witness believes that the claimant was gone an extended period on the date of the incident but could provide no direct testimony about the time, the manner of notice that the claimant had provided or whether similar

conduct by the claimant in the past had been allowed by the claimant's direct supervisor. The administrative law judge also notes that there were issues regarding employer dissatisfaction with Mr. Donahue's productivity. The employer's witness was unable to testify with specificity as to the circumstances of the incident that led to the claimant's discharge or extenuating reasons that Mr. Donahue may have provided about the incident.

The question before the administrative law judge in this case is not whether the employer has a right to discharge Mr. Donahue for these reasons, but whether the discharge is disqualifying under the provisions of the Iowa Employment Security Act.

The employer has the burden of proof in this matter. See Iowa Code section 96.6-2. Misconduct must be substantial in order to justify a denial of unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee may not be necessarily serious enough to warrant a denial of unemployment insurance benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. of Appeals 1992).

Allegations of misconduct without additional evidence are not sufficient to result in a disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegations, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiency in that party's case. See Crosser v. Iowa Department of Public Safety, 240 N.W.2d 682 (Iowa 1976).

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.

While the decision to terminate Mr. Donahue may have been a sound decision from a management viewpoint, for the above-stated reasons, the administrative law judge must conclude that the employer has not sustained its burden of proof in establishing intentional disqualifying misconduct at the time of separation. The claimant's direct supervisor had acquiesced to the claimant's minor time discrepancies and his failure to clock in or out even after the claimant had been previously warned. The claimant's conduct on or about December 8, 2008, therefore, did not rise to the level of intentional disqualifying misconduct.

DECISION:

The representative's decision dated January 9, 2009, reference 01, is affirmed. The claimant was dismissed under non disqualifying conditions. Unemployment insurance benefits are allowed, provided the claimant meets all other eligibility requirements of Iowa law.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs