

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

EMILY L BRUEGGEMAN
Claimant

APPEAL NO. 09A-UI-03477-A

**ADMINISTRATIVE LAW JUDGE
DECISION**

ENT CLINIC OF IOWA PC
Employer

**Original Claim: 04/20/08
Claimant: Respondent (2-R)**

Section 96.5-2-a - Discharge

STATEMENT OF THE CASE:

ENT Clinic of Iowa, PC filed a timely appeal from an unemployment insurance decision dated February 24, 2009, reference 07, that allowed benefits to Emily L Brueggeman. After due notice was issued, a hearing was held in Des Moines, Iowa, on April 8, 2009, with Ms. Brueggeman participating. She was represented by Charles E. Gribble, attorney at law. Exhibits One through Four were admitted into evidence on her behalf. Fred L. Dorr, attorney at law, appeared on behalf of the employer. Kay Spear, Michelle Posey, and Joy Hesse testified. Employer Exhibits A through R were admitted into evidence.

ISSUE:

Was the claimant discharged for misconduct in connection with her employment?

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: Emily L. Brueggeman was employed as an LPN by ENT Clinic of Iowa, PC from May of 2008 until she was discharged February 3, 2009. She was a full-time employee.

The events that caused the separation occurred on February 3, 2009. Douglas R. Hoisington, D.O., the owner of the business, called a staff meeting for noon. Ms. Brueggeman and approximately 17 other coworkers attended. At the outset of the meeting, Dr. Hoisington told the employees to put down their paper and pencils because he wanted them to listen. Ms. Brueggeman did not do so. Dr. Hoisington repeated his instruction. Ms. Brueggeman picked up her belongings and started to leave the meeting. Dr. Hoisington said, "If you leave the room now, you're done." Ms. Brueggeman paused but left the room, saying nothing. The meeting, which was on the subject of office procedures, continued. Ms. Brueggeman returned to her desk.

After the meeting, Ms. Brueggeman called Kay Spear, the office manager, to ask what had transpired. Ms. Spear replied that she thought that Ms. Brueggeman had just been or would

soon be discharged. Ms. Brueggeman stated that she would not leave the premises unless she received a written notice of discharge or was escorted out of the office.

A short time later, Dr. Hoisington presented Ms. Brueggeman with an employee performance evaluation form on which he had written, "Employee was terminated for failure to accomplish tasks for which she was hired. Failure to stay at a meeting that was mandatory on office policy and instruction." The document was signed by Dr. Hoisington and dated February 3, 2009.

Prior to this time, Ms. Brueggeman had never received a formal evaluation or discipline.

Ms. Brueggeman has received unemployment insurance benefits since filing an additional claim during the week of February 1, 2009.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence record establishes that the claimant was discharged for misconduct in connection with her employment.

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.

The employer has the burden of proof. See Iowa Code section 96.6-2. Continued failure to follow reasonable instructions is one form of misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). Failure to perform a specific task does not

constitute misconduct, however, if the failure is in good faith or for good cause. See Woods v. Iowa Department of Job Service, 327 N.W.2d 768 (Iowa App. 1982). In cases such as this, the administrative law judge evaluates both the reasonableness of the employer's request in light of all circumstances and the employee's reason for non-compliance. See Endicott v. Iowa Department of Job Service, 367 N.W.2d 300 (Iowa App. 1985).

The administrative law judge concludes that the employer was justified in calling the staff meeting to discuss matters he felt important. If it was his intention to maintain the employees' full attention, his direction to put down paper and pencils was reasonable.

Ms. Brueggeman did not explain why she felt it necessary to disregard the initial instruction to put down her paper and pencil. She explained her reason for preparing to leave the meeting by stating that the doctor raised his voice. The administrative law judge concludes that raising one's voice is a reasonable step when trying to get the attention of all 18 people in a conference room. There is no evidence that the employer's words, as opposed to his volume, were out of the ordinary for such a meeting. Finally, the administrative law judge concludes that the employer's threat of discharge was appropriate in the face of an act of defiance made in front of the entire staff. In short, the administrative law judge concludes that the employer was the more reasonable person.

The definition of misconduct excludes isolated instances of poor judgment or poor performance. The evidence establishes that these events were not ones in which the claimant was called upon to make a judgment call. Sometimes the only appropriate response to an employer's order is obedience. The administrative law judge notes evidence in the record concerning a civil rights complaint filed by Ms. Brueggeman concerning a member of the staff, not Dr. Hoisington. While this may explain, it does not justify the claimant's decision to fail to follow three separate specific instructions from the employer that led to the separation. Benefits are withheld.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

The question of whether the claimant must repay benefits already received is remanded to the Unemployment Insurance Services Division.

DECISION:

The unemployment insurance decision dated February 24, 2009, reference 07, is reversed. Benefits are withheld until the claimant has worked in and has been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The question of repayment of benefits is remanded to the Unemployment Insurance Services Division.

Dan Anderson
Administrative Law Judge

Decision Dated and Mailed

kjw/kjw