

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DEBRA K UPAH
Claimant

APPEAL NO. 11A-UI-16251-AT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**AVENTURE STAFFING & PROFESSIONAL
SERVICES**
Employer

**OC: 11/13/11
Claimant: Appellant (2)**

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Debra K. Upah filed a timely appeal from an unemployment insurance decision dated December 12, 2011, reference 01, that disqualified her for benefits. After due notice was issued, a telephone hearing was held January 27, 2012 with Ms. Upah participating and being represented by Jean Pendleton, Attorney at Law. Claimant Exhibits B through H were admitted into evidence. (There was no Exhibit A). Cyd Hall, Susan Mulvania and Jennifer Grant participated for the employer, Aventure Staffing & Professional Services. Employer Exhibits One through Nine were admitted into evidence.

ISSUE:

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

FINDINGS OF FACT:

Debra K. Upah was employed by Aventure Staffing & Professional Services from November 16, 2009 until she was discharged November 17, 2011. She last worked as Branch Sales Manager for the employer's office in Grinnell, Iowa. Operations Vice President Susan Mulvania discharged Ms. Upah following a conversation on November 17, 2011. She was discharged for five reasons. On or about September 16, 2011, Office Manager Cyd Hall had sent an e-mail to Ms. Upah instructing her to copy and post an IOSHA settlement agreement. Ms. Upah responded by e-mail with a single word, "done." She had not yet posted the agreement. Immediately upon sending the e-mail, she was interrupted by a matter involving one of the employer's larger clients. She forgot about posting the document. Some days later, she noticed the document which contained language indicating that it was to remain posted until the violations outlined in the settlement had been corrected or for three working days, whichever was longer. During a visit to the Grinnell office, Operations Manager Jennifer Grant noticed that the settlement was not posted. Ms. Grant notified Office Manager Cyd Hall. Ms. Hall called Ms. Upah to find out why it had not been posted. Ms. Upah responded that she had not done so because it was unclear to her whether it still needed to be posted. At Ms. Hall's instruction, Ms. Upah did so. The employer also discharged Ms. Upah scheduling an employee for third

party drug testing three or four weeks earlier after the company had changed its policy so that it no longer performed those tests for its clients.

The employer believed that Ms. Upah had not followed state law and company policy in handling an injury suffered by one of its employees while working on the site of one of its customers. The company also discharged Ms. Upah because of a complaint from an employee that Ms. Upah had been harsh with the employee while questioning the employee about prior attendance problems.

Prior to November 1, 2011, Ms. Upah had held the title of branch manager. Roxane Minner was hired in September to become the operational manager of the Grinnell office while Ms. Upah concentrated her efforts on sales. Ms. Minner officially became the office manager on November 1, 2011. Ms. Minner was out of the office for several days in November. In her absence, Ms. Upah reviewed some of the work that Ms. Minner had completed and left notes for her. The employer discharged Ms. Upah for reviewing that work and for spending time on matters other than sales.

REASONING AND CONCLUSIONS OF LAW:

The question is not the legality or the advisability of the employer's decision to discharge Ms. Upah. The sole issue for this administrative law judge is whether the evidence establishes that Ms. Upah was discharged for misconduct in connection with her employment.

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. See Iowa Code § 96.6-2. Among the elements it must prove is that the final incident leading directly to the discharge was a current act of misconduct. Ms. Mulvania's first stated reason for the discharge was that Ms. Upah was "untruthful" in their discussion about the OSHA matter. Administrative law judge concludes that the evidence does not establish that Ms. Upah was untruthful when speaking to Ms. Mulvania on November 17, 2011. She had been less than forthright with Ms. Hall during their conversation in October. The record shows, however, that Ms. Upah promptly posted the settlement agreement after the October conversation.

The evidence fails to establish that it was Ms. Upah or Ms. Minner, who, by the way, was not called to testify, scheduled the employee for the third party drug testing or mishandled the worker's comp injury. The evidence falls short of establishing that Ms. Upah deliberately berated an employee or failed to follow company policy in the incident leading to the complaint.

Ms. Mulvania characterized Ms. Upah's review of the work that Ms. Minner had done as "auditing." Auditing can have a very different connotation than the terms reviewing or training. There is nothing in the evidence to indicate that Ms. Upah's review of Ms. Minner's work was anything more than an attempt to assist a new worker. There is insufficient evidence to establish that Ms. Upah had been told that she was to work exclusively on sales rather than to manage operations during Ms. Minner's absence.

Upon a careful review of the testimony and the documentary evidence, the administrative law judge concludes that the employer has not established disqualifying misconduct. Benefits are allowed.

DECISION:

The unemployment insurance decision dated December 12, 2011, reference 01, is reversed. The claimant is entitled to receive unemployment insurance benefits, provided she is otherwise eligible.

Dan Anderson
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs