

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**MARY ALICE TATMAN**

Claimant

**APPEAL NO. 08A-UI-03074-H2T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**LEWIS SYSTEM OF IOWA INC**

Employer

**OC: 02-03-08 R: 02  
Claimant: Appellant (1)**

Iowa Code § 96.4(3) – Able and Available  
Iowa Code § 96.5(2)a – Discharge/Misconduct

**STATEMENT OF THE CASE:**

The claimant filed a timely appeal from the March 24, 2008, reference 02, decision that denied benefits. After due notice was issued, a hearing was held on April 14, 2008. The claimant did participate along with witness Mark Soldat. The employer did participate through Chris White, Controller; (representative) Joe Shey, President; Larry Riley, Cash Services Manager; and Stephanie Tyler, Cash Supervisor.

**ISSUE:**

Is the claimant able to and available for work?

Was the claimant discharged for work-related misconduct?

**FINDINGS OF FACT:**

Having reviewed the testimony and all of the evidence in the record, the administrative law judge finds: Claimant was employed as a cash clerk/teller, full-time, beginning March 7, 2005, through July 13, 2007, when she stopped working due to a work related injury. The employer considers the claimant's employment to have ended on December 17, 2007, when she did not return to work. The claimant was discharged by the employer on December 17, 2007 for her failure to return to work.

The claimant sustained a work-related injury and has been seen and treated by Dr. Terri Formanek, who prescribed, among other things, physical therapy and work restrictions, which include no lifting over five pounds with either hand and no grasping, pushing or pulling with either hand. The claimant believes that she is just physically unable to perform any work right now due to her need for rest and her work restrictions.

The claimant was seen by Dr. David Boarini, M.D., who determined her injury was not work-related and released her to return to work without restrictions on December 5, 2007. The claimant did not return to work because she was physically unable to and believed she was still in need of medical care. The claimant at that time also had work restrictions imposed by Dr. Formanek in August 2007. Dr. Formanek was an authorized treating physician by the

employer's workers' compensation carrier. The claimant currently has a petition for workers' compensation benefits on file before the Iowa Workers' Compensation Commissioner.

The claimant was discharged from employment while still under Dr. Formanek's work restrictions, which the employer did not comply with in an attempt to bring the claimant back to work.

### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes that the claimant is not able to work and available for work

Iowa Code § 96.4-3 provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

871 IAC 24.22(1)a provides:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(1) Able to work. An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.

a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

871 IAC 24.23(35) provides:

Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.

(35) Where the claimant is not able to work and is under the care of a physician and has not been released as being able to work.

Inasmuch as the injury was work-related and the treating physician, Dr. Formanek, has not released the claimant to return to work without restriction, the claimant has not established her ability to work. The claimant herself testified that she is not physically capable of working due to her injury and the work restrictions she currently has as a result of that injury. Benefits are withheld until such time as the claimant obtains a medical release to return to some type of work of which she is capable of performing given any medical restrictions.

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).

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 claimant was under the care of Dr. Formanek at the time she was discharged and had work restriction from that physician. The employer did not attempt to comply with those work restrictions and discharged the claimant while she was not able to return to her normal work duties. The claimant's work restrictions are not misconduct. An injured employee who obtains work restrictions has not committed work related misconduct. The employer did not notify the claimant that there was work available for her within her work restrictions. The employer has established no basis for relying on Dr. Boarini's opinion versus that of Dr. Formanek. Both were treating physicians approved by the workers' compensation carrier. The claimant's failure to return to work due to her injury is not misconduct. Benefits are allowed, provided the claimant is otherwise eligible.

**DECISION:**

The March 24, 2008, reference 02, decision is affirmed. Claimant was discharged from employment for no disqualifying reason. However, the claimant is not able to and available for work effective July 13, 2007. Benefits are withheld until such time as the claimant obtains a full medical release to return to work.

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Teresa K. Hillary  
Administrative Law Judge

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Decision Dated and Mailed

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