IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DEBRA J SORENSEN
Claimant

ENCOMPASS
Employer

APPEAL NO. 13O-UI-03383-S2T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 11/18/12
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Encompass (employer) appealed a representative's December 12, 2012 decision (reference 01) that concluded Debra Sorensen (claimant) was discharged and there was no evidence of willful or deliberate misconduct. Administrative Law Judge Lewis issued a decision on February 4, 2013, reversing the representative's decision. A decision of remand was issued by the Employment Appeal Board on March 21, 2013. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for April 30, 2013. The claimant did not provide a telephone number for the hearing and, therefore, did not participate. The employer participated by Dan Shipley, Senior Human Resources Consultant; Cheri Keuck, Quality and Accountability Manager; and Mark Mitchell, Quality and Accountability Manager. The employer offered and Exhibit One was received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on October 16, 2006, and at the end of her employment she was working as a full-time senior review coordinator. The claimant signed for receipt of the employer's handbook on October 16, 2006, and annually. The employer issued the claimant a written warning for attendance on January 9, 2009. The employer notified the claimant that further infractions could result in termination from employment. On August 26, 2010, the employer issued the claimant a written warning for failure to follow instructions and poor performance. The employer notified the claimant that further infractions could result in termination from employment. On July 18, 2012, the employer issued the claimant a written warning for saying to a co-worker "what goes around comes around." The employer notified the claimant that further infractions could result in termination from employment.

On November 3, 2012, the claimant was working from home. She logged into the employer's Firepass system and worked for five hours and forty six minutes. The claimant recorded

fourteen hours of work on her timecard. The remaining hours of work on November 3, 2012, the claimant spent doing research not using the employer's Firepass system.

On November 9, 2013, the employer saw the claimant's timecard and questioned her. The employer requested the Firepass report and received it on or about November 13, 2012. The employer decided to terminate the claimant because it did not believe the claimant when she said she was working for fourteen hours on November 3, 2012. The employer terminated the claimant on November 19, 2013.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

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.

871 IAC 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.

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 employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The last incident provided by the employer occurred on November 3, 2012. The claimant was not discharged until November 19, 2012. The employer did not provide sufficient evidence of job-related misconduct. The claimant's and the employer's testimony is inconsistent. The administrative law judge finds the claimant's testimony to be more credible because she was an eye witnesses to the events for which she was terminated.

DECISION:

The representative's December 12, 2012 decision (reference 01) is reversed. The employer has not met its proof to establish job-related misconduct. Benefits are allowed.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

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