

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TINA M BANTER
Claimant

APPEAL NO. 07A-UI-01826-DW

**ADMINISTRATIVE LAW JUDGE
DECISION**

GENESIS DEVELOPMENT
Employer

**OC: 01/21/07 R: 02
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Genesis Development (employer) appealed a representative's February 14, 2007 decision (reference 01) that concluded Tina M. Bainter (claimant) was qualified to receive unemployment insurance benefits, and the employer's account was subject to charge because the claimant had been discharged for nondisqualifying reasons. After hearing notices were mailed to the parties' last-known addresses of record, an in-person hearing was held in Des Moines on March 20, 2007. The claimant participated in the hearing with her witness, Anthony Bainter, her son. Carrie Wilde, the vocational director, and Nick Friess, the operations manager, appeared on the employer's behalf. During the hearing, Employer Exhibits One through Five were offered and admitted as evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Did the employer discharge the claimant for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on May 28, 2006. The claimant worked full-time as the second-shift crew leader. Kathy Pittman and Friess were the claimant's supervisors.

On January 5, 2007, the employer gave the claimant a written warning and a one-day suspension for misrepresenting the time she and her employees performed work and for allowing employees she supervised to leave work early without authorization. The employer had recently learned employees left work between 11:00 and 11:15 p.m., but reported on their timecards they had worked until 11:30 p.m. The employer told the claimant that if she knowingly allowed employees to misrepresent the time they worked on their timesheets, the claimant would be discharged. (Employer Exhibit One.)

When Wilde talked to the claimant about the January 5 written warning, she also told the claimant that the employer expected her to make sure her employees worked until 11:30 p.m. If an employee wanted to leave work early, the claimant had to obtain authorization from Pittman

or Friess. (Employer Exhibit Two.) The claimant understood it was her responsibility to make sure employees worked until the end of their shift, which was 11:30 p.m. The employer understood Friday nights were an exception to the policy of working until 11:30 p.m.

The employer gave the employees, who misrepresented the time they worked on their timecards, written warnings. Wilde told employees that if a supervisor did not enforce the rule about working until 11:30 p.m., the employee should report this incident to management.

On January 10, 2007, the claimant had problems with two employees, Tony and Trevor. These employees were goofing around, which delayed the claimant from performing her work. The claimant was in a bobcat and had to wait for one of these employees to move a dumpster or pick up bales before she could continue with her work in the bobcat. While the claimant waited, Anthony approached the claimant to ask why she had not yet come to his area. Anthony was waiting for the claimant to come to his area with the bobcat. Another employee, Paige, also talked to the claimant while the claimant was in the bobcat waiting for the employee to finish a job before she drove the bobcat to Anthony's area. The claimant sent Paige to help Brooke clean in another area. Around 11:20 p.m., the claimant, Anthony and Brooke were sweeping an area in the vicinity of the office. While they were sweeping, they talked and sometimes stopped to talk for a few moments. At 11:30 p.m., claimant and the employees she supervised punched out. Everyone recorded they had stopped working at 11:30 p.m.

The next morning, Trevor told Pittman that the evening before he observed the claimant sitting in the bobcat for ten minutes doing nothing. He also reported that the claimant and other employees wasted five minutes at the end of the shift just talking. When the employer talked to Tony, he verified Trevor's story. Brooke told the employer that she and other employees, including the claimant, had talked for about ten minutes at the end of the shift.

The employer discharged the claimant on January 11, 2007, because she failed to fulfill her job responsibilities as a supervisor by making sure her employees performed work to the end of their shift or until 11:30 p.m. The employer concluded the claimant wasted time and allowed some of her employees to waste 10 to 15 minutes of the employer's time by standing around talking instead of working. The employer has not hired anyone or transferred anyone to replace the claimant. Instead, other employees have assumed her job duties. When the employer discharged the claimant, the employer told her she was discharged because she had been doing nothing for a few minutes when she was on the bobcat.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges her for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000).

For unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a

right to expect from employees or is an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion are not deemed to constitute work-connected misconduct. 871 IAC 24.32(1)(a).

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. 871 IAC 24.32(8).

The employer established business reasons for discharging the claimant. After receiving the January 5, 2007 written warning, the claimant knew and understood she could not allow employees to leave work before the end of a shift and it was her responsibility to keep them working until 11:30 p.m. After the January 5 written warning, the claimant made a concerted effort to follow the employer's directives.

Since neither of the employer's witnesses worked the evening of January 10, the claimant's testimony and her witness's testimony must be given more weight than the employer's reliance on hearsay information from employees who did not testify at the hearing. The evidence shows the claimant reprimanded Tony and Trevor for goofing around on January 10, 2007. The facts do not establish what prompted Trevor to report that the claimant and other employees talked for 10 to 20 minutes instead of working. If Trevor or Tony had been at the hearing, this unexplained action could have been asked. While the employer's conclusion could be true, without Trevor's firsthand testimony, the employer's conclusion is speculation and not fact.

It is troublesome that instead of hiring or transferring another employee to replace the claimant other employees, who previously misrepresented the time they worked for the employer, have absorbed the claimant's job responsibilities. It is also difficult to understand why only the claimant was discharged and other employees who allegedly wasted 10 to 15 minutes talking were not disciplined for not working as the employer warned them about on January 5, 2007.

A preponderance of the evidence indicates the employer discharged the claimant for business reasons. On January 10, 2007, the claimant did not intentionally or substantially disregard the employer's interests. The claimant may not have worked the employees as "hard" as the employer wanted, but she did not permit her employees to waste 10 to 15 minutes by just talking instead of working. The fact the claimant sat on the bobcat for a few minutes does not amount to work-connected misconduct. While the claimant could have made her employees do more work, she did not commit work-connected misconduct on January 10, 2007. Therefore, as of January 21, 2007, the claimant is qualified to receive unemployment insurance benefits.

DECISION:

The representative's February 14, 2007 decision (reference 01) is affirmed. The employer discharged the claimant for business reasons that do not constitute work-connected misconduct. As of January 21, 2007, the claimant is qualified to receive unemployment

insurance benefits, provided she meets all other eligibility requirements. The employer's account may be charged for benefits paid to the claimant.

Debra L. Wise
Administrative Law Judge

Decision Dated and Mailed

dlw/css