

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

KAREN NORRIS
PO BOX 6
BRIGHTON IA 52540

REM-IOWA INC
6921 YORK AVE SO
EDINA MN 55435

Appeal Number: 05A-UI-06158-E
OC: 02-27-05 R: 03
Claimant: Appellant (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319.***

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the June 2, 2005, reference 02, decision that denied benefits. After due notice was issued, a hearing was held in Cedar Rapids, Iowa, before Administrative Law Judge Julie Elder on July 21, 2005. The claimant participated in the hearing. Lisa Pakkebie, Program Director and Jill McNurlen, Social Services Coordinator, participated in the hearing on behalf of the employer.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time resident counselor for REM-Iowa from April 18, 2005 to May 6, 2005. On May 5, 2005, two employees reported to the employer that they had concerns about how the claimant was "redirecting" consumers. One reported that when a consumer came to the dinner table with his hands in his pants April 30, 2005, the claimant slapped his hands. The claimant testified that the consumer did come to dinner with his hands in his pants but she simply said, "Michael, hands" and he removed his hands from his pants. Another employee said that on May 3, 2005, the same consumer kept running outside wanting to sit in the van and the claimant repeatedly brought him back inside. The co-worker reported that the claimant slapped him on the forearm loudly. The only similar incident the claimant could recall was that on that day she was to start giving him his bath at night instead of during the day and she went in the living room and said, "Let's go take a bath" and held out her hand, which Michael took and they went to the room for him to prepare for his bath and there were no other incidents. Co-workers also stated that on May 3, 2005, a consumer named Everett had a pair of scissors and was cutting the cord to the television. The co-worker reported that the claimant said Everett "should be shot." The claimant testified it was her understanding that Everett was deaf and she went to him, tapped him on the shoulder and held out her hands for the scissors. He gave her the scissors and she pointed to a chair and he went and sat there. She did not speak to him because he was deaf. Also on May 3, 2005, a co-worker reported that the claimant was in the kitchen with a consumer putting away dishes and the claimant asked her to leave because "she was not doing it right" and the consumer left the kitchen extremely upset. The claimant testified she and the consumer were cooking in the kitchen when she whispered, "Why don't you go to the bathroom and then come back and help me some more." She made the suggestion because that consumer was to be reminded to use the restroom every two hours. On May 5, 2005, Social Services Coordinator Jill McNurlen met with the claimant and told her there had been complaints about her treatment of the consumers but she could not state specifically what the complaints were until after she investigated. The claimant was "shocked" and the employer sent her home. On May 6, 2005, Ms. McNurlen met with the claimant again and told her the employer was terminating her employment because she slapped Michael. The employer reported the incidents to DIA and DIA determined the reports were unfounded.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proving disqualifying job misconduct. 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. Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984). While the employer was understandably concerned about the reports it was receiving from the claimant's co-workers and the potential liability if the allegations were true, the evidence provided during the hearing does not establish that that the claimant did any of the things she was accused of doing. Instead, the claimant offered plausible explanations for every incident cited by the employer. Additionally, the employer's witnesses were not present during any of the alleged incidents. If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. Crosser v. Iowa Department of Public Safety, 240 N.W.2d 682 (Iowa 1976). In this case, the co-worker's who made the complaints were not present to testify and be cross-examined at the hearing. Finally, DIA determined the allegations of abuse were unfounded. The administrative law judge found the claimant's testimony to be extremely credible and consequently concludes the evidence provided by the employer does not rise to the level of disqualifying job misconduct as defined by Iowa law. Benefits are allowed.

DECISION:

The June 2, 2005, reference 02, decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

je/pjs