

**BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319**

MARVINIA L TAYLOR

Claimant,

and

ABCM CORPORATION

Employer.

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HEARING NUMBER: 14B-UI-09986

**EMPLOYMENT APPEAL BOARD
DECISION**

NOTICE

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A **REHEARING REQUEST** shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-2-A

DECISION

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The Claimant appealed this case to the Employment Appeal Board. Two members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The Claimant, Marvinia L. Taylor, worked for ABCM Corp. from September 21, 2009 through September 4, 2014 as a full-time laundry aid. (12:20-12:45) The Claimant's supervisor was Brett Rasmussen (Facilities Director), whose office was located in an open unlocked area. (29:17-29:24) Brett frequently left papers, i.e., applications, evaluations, employee write-ups, etc., on top of his desk in plain view. (29:25-30:34; 35:00-35:08) The company phone which is available for employee use for emergencies and personal calls is located close by. (29:08-29:16; 35:08-35:12)

On September 4th, the Employer received a report from Tracy, who is no longer employed there, that the Claimant obtained and read confidential employee information from her supervisor's desk to another person over the Claimant's cell phone. (13:05; 32:52-33:42) The Claimant denied the allegation. (38:34; 39:31-39:52; 41:31-41:36; 42:15-42:24) Additionally, the Claimant did not use her cell phone while in Brett's office, as she was on the company phone.

The Employer's personnel handbook includes a confidentiality clause, which provides that a violation of this policy may result in termination. (13:56-14:01) Ms. Taylor received training on the Employer's policies, a copy of this handbook at the start of her employment, as well as an update in 2012. (14:07-14:21) The Employer never issued any prior warnings to the Claimant prior to terminating her on September 4, 2014. (13:48; 30:59-31:33)

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2013) provides:

Discharge for Misconduct. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:

The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(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 the 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 Iowa Supreme court has accepted this definition as reflecting the intent of the legislature. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665, (Iowa 2000) (quoting Reigelsberger v. Employment Appeal Board, 500 N.W.2d 64, 66 (Iowa 1993)).

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 substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 NW2d 661 (Iowa 2000).

The record established that the Employer terminated the Claimant based solely on hearsay that she was observed reading confidential information into her cell phone off papers on Brett's desk, i.e., a breach of confidentiality violation. While hearsay evidence is generally admissible in administrative proceedings and may constitute substantial evidence to uphold a decision of an administrative agency (*Gaskey v. Iowa Dept. of Transportation*, 537 N.W.2d 695 (Iowa 1995), whether or not hearsay, an agency must have based its findings "upon the kind of evidence on which reasonably prudent persons are accustomed to rely on for the conduct of their serious affairs and may be based upon such evidence even if it would be inadmissible in a jury trial". Iowa Code Section 17A.14(1); see also, *McConnell v. Iowa Dept. of Job Service*, 327 N.W.2d 234 (Iowa 1982).

In the instant case, however, the Employer's reliance on that hearsay was not reasonable. Ms. Taylor provided credible testimony to refute the Employer's hearsay evidence. First off, she vehemently denied the allegation altogether; and more specifically denied being on her cell phone. Rather, she was on the company phone, which was unrefutably and purposefully available for all employees' use. Just because the phone was in close proximity to Brett's desk, which usually contained easily viewable confidential documents, is not probative that the Claimant was reading them. Not only is Tracy no longer an employee, the Employer failed to provide any documentation, i.e., affidavit or statement from her or any other witness, to corroborate the Employer's allegation.

871 IAC 24.32(4) provides:

Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established...

Both parties admit that no prior warnings were ever issued to the Claimant even though the Employer submitted a document (Exhibit 1) showing she had been both verbally, and in writing, warned in the past. Ms. Taylor credibly testified that the first time she was presented with this document showing alleged warnings was at the hearing. Based on this record, we conclude that the Employer failed to satisfy their burden of proof.

DECISION:

The administrative law judge's decision dated October 15, 2014 is **REVERSED**. The Employment Appeal Board concludes that the claimant was discharged for no disqualifying reason. Accordingly, she is allowed benefits provide she is otherwise eligible.

Kim D. Schmett

Ashley R. Koopmans

AMG/fnv

DATED AND MAILED _____

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