

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MARIA J JEBENS

Claimant

APPEAL NO. 11A-UI-09738-LT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DREUSICKE HOLDINGS INC

TOYOTA OF IOWA CITY

Employer

OC: 06/19/11

Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The employer filed an appeal from the July 12, 2011 (reference 01) decision that allowed benefits. After due notice was issued, a hearing was held by telephone conference call on August 17, 2011. Claimant participated. Employer participated through owner Jim Dreusicke. Employer's Exhibits 0 and 1 through 4 were admitted to the record.

ISSUE:

The issue is whether claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a customer service manager at Abra Auto Body & Glass and was separated from employment on June 17, 2011. That week, she used her cell phone according to a report from her supervisor, general manager John Grolmus. She took a call from a friend about a car carpet cleaning issue and took calls from her mother, who acts as her child care provider. The employer warned her not to use her cell phone at work for non-emergency (family or work) reasons on July 9, 2010 verbally (Employer's Exhibit 0) and again in the probationary guideline issued May 5, 2011 (Employer's Exhibit 2). The men in the shop area were allowed to use their cell phones and e-mail for personal use at work without disciplinary consequence. She did not handle an Allied claim but simply asked Grolmus about the file she had worked up before the May 5, 2011 probationary memo. Grolmus did not participate in the hearing.

REASONING AND CONCLUSIONS OF LAW:

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). Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. IDJS*, 391 N.W.2d 731 (Iowa App. 1986). 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).

In an at-will employment environment, 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. Since she did not work on Allied claims or violate any other point after the May 5, 2011 probationary memo,

the employer has not established a current act of misconduct. Even had claimant used the cell phone for personal issues beyond the allowable scope, since the consequence was more severe than others received for the same offense, the disparate application of the policy cannot support a disqualification from benefits. Benefits are allowed.

DECISION:

The July 12, 2011 (reference 01) decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/kjw