

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TAMMY L LEYSE
Claimant

APPEAL NO: 06A-UI-08556-LT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**MID AMERICA HOUSING PARTNERSHIP
METRO AREA HOUSING PROGRAM INC**
Employer

**OC: 07-09-06 R: 03
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the August 16, 2006, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on September 13, 2006. Claimant participated. Employer participated through Amy Hepker and Scott Krchak. Claimant's Exhibit A was received.

ISSUE:

The issue is whether claimant was discharged for reasons related to job misconduct.

FINDINGS OF FACT:

Having reviewed the testimony and all of the evidence in the record, the administrative law judge finds: Claimant was employed as a full-time change out specialist through May 31, 2006, when she was discharged. On May 30 she left a message for supervisor Marilyn Heaverlo about an issue with maintenance worker Bob and quoted his profanity laced statements to her ("Bob just called me up and told me I'd better get his fucking paint brush back to him now.") and also said she was "tired of these fucking people treating me this way." She then called back immediately and left a message apologizing for her language. She had made complaints to Heaverlo about Bob's language and treatment of her in October 2005 and February 2006. When she complained to her immediate supervisor, George, he taunted her stating, "Why don't you just quit if you don't like it." Heaverlo did not participate, and Krchak heard the message but does not recall specifically what she said. Employer warned her on November 10, 2005 about not arguing or disagreeing with management instructions.

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). 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).

"The use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct, even in the case of isolated incidents or situations in which the target of abusive name-calling is not present when the vulgar statements are initially made." *Myers v. EAB*, 462 N.W.2d 734 (Iowa App. 1990).

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. While the lack of prior warnings does not generally excuse this type of conduct, employer apparently tolerated Bob's repeated profanity and verbal abuse of claimant but treated claimant disparately for the isolated incident for which she immediately apologized after venting her frustration because of the way Bob, George and other employees were treating her. If management wishes to be treated with respect, it must enforce respectful treatment amongst coworkers and supervisors and apply those expectations consistently throughout the chain of command. Since employer did not provide this for claimant and she took the brunt of verbal abuse from coworkers, her sole frustrated outburst to a member of management does not rise to the level of disqualification. Benefits are allowed.

DECISION:

The August 16, 2006, reference 01, decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/kjw