

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TINA F FISCHER

Claimant

APPEAL NO. 11A-UI-13171-SW

**ADMINISTRATIVE LAW JUDGE
DECISION**

HEARTLAND PAPER COMPANY

Employer

OC: 09/11/11

Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

The employer appealed an unemployment insurance decision dated September 29, 2011, reference 01, that concluded the claimant's discharge was not for work-connected misconduct. A hearing was held on January 24, 2012. The parties were properly notified about the hearing. The claimant participated in the hearing with her representative, Grant Beckwith, attorney at law. Abigail Moland, attorney at law, participated in the hearing on behalf of the employer. Exhibits 1 through 4, 6 through 8, 10 and 11 and A were admitted into evidence at the hearing.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant worked full time for the employer as an office supervisor in the employer's Sioux City office from October 15, 1996, to September 7, 2011. Her supervisor was the office services manager, Blake Johnson, who worked in the Sioux Falls office. Sandra Christensen is the vice president of human resources.

The claimant was informed and understood that under the employer's work rules, her work hours were from 8 a.m. to 5 p.m. with a 30-minute lunch and she was to accurately report her time worked on her time card.

After receiving reports in August 2011 that the claimant was late for work and was gone from the office during the day, the sales manager, Bob Zacher, asked a sales representative, Mike Jost, who works from the office to keep track of the claimant's arrivals and departures from the office at the end of August.

On September 2, Jost reported to Bob Zacher his written observations for August 29, August 30, and September 1. For August 29, he noted the claimant left the office from 10:50 a.m. to 12:25 p.m. and then returned to work and ate lunch at her desk. On August 30, he noted that the claimant arrived at 8:35 a.m., left for lunch at 11:45 a.m. to 12:20 p.m., and left again at 1 p.m. On September 1, he noted she arrived at 8:20 a.m.

In fact, on August 29, the claimant arrived at work at 8 a.m., she left the office for business purposes from about 10:50 a.m. to 11:05 p.m., took lunch from 11:30 p.m. to noon, and left work at 5 p.m. On August 30, the claimant arrived at work at 8 a.m., took a 30-minute lunch, and left work at 5 p.m. She did not take a long lunch or leave work at 1 p.m. on August 30. She arrived at work at 8 a.m.

After receiving the document that Jost had provided to Zacher, Christensen instructed Johnson to go to Sioux City on September 7, 2011, and discharge her if she did not admit to being late and out of the office without authorization. Because Johnson arrived unannounced at the Sioux City office, the claimant asked him if he was there to discharge her. He told her that he had been instructed to terminate her employment. The claimant insisted that she worked her scheduled hours. The claimant had not completed her time card for the two-weeks ending September 10 yet. She wrote in her normal work schedule with 30-minutes lunch each day.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

The unemployment insurance law disqualifies claimants discharged for work-connected misconduct. Iowa Code § 96.5-2-a. The rules define misconduct as (1) deliberate acts or omissions by a worker that materially breach the duties and obligations arising out of the contract of employment, (2) deliberate violations or disregard of standards of behavior that the employer has the right to expect of employees, or (3) carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design. 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 misconduct within the meaning of the statute. 871 IAC 24.32(1).

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 N.W.2d 661, 665 (Iowa 2000).

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. 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.

The findings of fact show how I resolved the disputed factual issues in this case by carefully assessing the credibility of the witnesses and reliability of the evidence and by applying the proper standard and burden of proof. Since the employer is required to show a current act of misconduct, the crux of this case has to be the alleged conduct on August 29, August 30, and September 1. The employer's evidence regarding the claimant's arrivals and departures on these days was equivocal, contradictory, and vague. Jost had no clear recollection of what took place each day and admitted it. He first testified that he was at work when the claimant arrived

at 8:20 a.m. or so on August 29, August 30, and September 1. Exhibit 11, however, notes only one 8:20 arrival on September 1, no late arrival on August 29, and an 8:35 arrival on August 30. Exhibit 4 contains a handwritten note that the claimant was late (8:30 a.m.) on Monday, but nothing corroborates this and the employer did not adjust that time entry. I believe the claimant's testimony that Jost was not at work until about 10:30 a.m. on August 29, which Jost admitted was possible. Jost testified that he was in and out of the office on August 29, undercutting his assertion that the claimant was at lunch from 10:50 to 12:45 a.m. The driver, Randy Tate, testified that he saw the claimant drive up to the office at 8:20 a.m. and he left the office at 8:30 a.m., which is inconsistent with what Jost wrote down. In contrast, the claimant testimony was specific and consistent and entitled to greater weight.

No current act of work-connected misconduct has been proven by the preponderance of the evidence in this case.

DECISION:

The unemployment insurance decision dated September 29, 2011, reference 01, is affirmed. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

Steven A. Wise
Administrative Law Judge

Decision Dated and Mailed

saw/pjs