IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

HERMAN CULPS
Claimant

HY-VEE INC
Employer

APPEAL NO. 08A-UI-07298-LT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 07/13/08 R: 04
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the August 7, 2008, reference 02, decision that allowed benefits. After due notice was issued, a telephone conference hearing was held on August 26, 2008. Claimant responded to the hearing notice instructions but was not available when the hearing was called and did not participate until after the hearing had begun. Employer participated through Bill Stevens, store manager.

ISSUE:

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

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant was employed from February 1, 2007 until June 24, 2008 when he was discharged. He was promoted from stocker to night stock manager in October 2007. Doug Dopps told him he was fired because of an incident on June 24, a truck delivery night, when he walked by the cash register area and did not wait on three or four customers in line after he had been warned about the issue on March 8, 2008. He had also been told that on truck delivery nights that stock personnel would not have to work the registers until 11 p.m. unless paged to do so. No one paged him or asked him to help while he was in the area to check the stock of large bags of dog food. He argued with Riherd, did not call her racist, but did refer to "racist [disparate application of] policies and later apologized to Riherd for becoming upset. He told Mike Helmick, stocker, former night shift manager and trainer, that he did not feel well after the confrontation and was going home. Helmick said "okay, I'll see you tomorrow." Claimant was not provided with formal training, no specific rules were explained about notification to management about leaving and other issues, and the only way he found out about mistakes was when he got written up. He clocked out and left via the cash register area doors in full view of the registers. He was not given notice of discipline for an incident when he told a subordinate employee to work alone rather than spending time in another aisle with his girlfriend or go home. He did not call him a "stupid little bastard."

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).

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 employer had not provided training, guidance, or instruction to claimant about how to handle a situation when he might need to leave during his shift, he did notify a person working that night who formerly held his job, did not attempt to conceal his leaving, and because he was not paged to assist at the registers as he was told would happen if he were needed there before 11 p.m., employer has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Benefits are allowed.

DECISION:

The August 7, 2008, reference 02, decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

dml/pjs