IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

KATHY S JAHNKE
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DES MOINES IA 50315

GOODWILL INDUSTRIES OF CENTRAL IOWA INC
4900 NE 22ND ST
DES MOINES IA 50313

Appeal Number: 04A-UI-12064-LT
OC: 05-16-04 R: 02
Claimant: Respondent (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

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

STATEMENT OF THE CASE:

Employer filed a timely appeal from the November 4, 2004, reference 05, decision that allowed benefits. After due notice was issued, a hearing was held on December 3, 2004. Claimant did participate. Employer did participate through Larry Hollingworth and Robert Ives. Employer's Exhibits 1 through 5 were received.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed as a full-time truck driver through October 13, 2004 when she was discharged. No written warnings were issued until October 12, the day before the discharge.

On October 5 Robert Ives and Robin Hill asked claimant if she had been smoking in the truck that day and claimant said she had not. Hill had followed claimant in her vehicle and reported she saw her throw a cigarette butt out of the vehicle's window onto a patron's property. Hill also claimed she saw claimant actually smoke and smoke coming from the truck. Employer's policy prohibits smoking within 50 feet of the truck. Claimant received a copy of the policy on June 18, 2004. Claimant was trying to quit smoking so she had an unlit cigarette in her mouth but did not allow smoking in the truck. She noticed that other trucks had full ashtrays in spite of the policy.

Hill also alleged that claimant did not use the right turn signal and left taillight on the truck and did not check the lights before she drove it. Hill followed claimant around throughout the day but did not notify her about the lights. Claimant did walk around the truck with the rental clerk and confirmed everything was operational. Drivers must perform a pre-trip safety check on the trucks they drive each morning pursuant to written policy. No prior warning had been issued about this issue. Hill did not participate in the hearing.

Employer accused claimant of taking an item from a patron for her personal use. However, the patron clearly wrote that the item was not considered a donation to Goodwill and the patron insisted claimant take it for her use. (Claimant's Exhibit A) On July 16 and August 4 claimant went to the Goodwill store during an unpaid break, bought an item, and showed the receipt to Ives who said she must pick it up after work or put it in her car, which she did.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

Iowa Code section 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, (8) provide:

> 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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

> (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 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).

When the record is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. Schmitz v. IDHS, 461 N.W.2d 603, 607 (Iowa App. 1990). Both the quality and the quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See, Iowa Code §17A.14 (1). In making the evaluation, the fact-finder should conduct a common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be fulfilled. Schmitz, 461 N.W.2d at 608. An employer may discharge an employee for any number of reasons or no reason at all, 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.

The primary accuser, Hill, did not participate in the hearing. Where employer's testimony or evidence conflicts with claimant's recollection of events, claimant's testimony shall be considered credible. Claimant may have had a cigarette in her mouth and she did not lie, as it was not lit in violation of employer's policy. Furthermore, employer appears to be applying its policy in a disparate manner as other trucks had evidence of smoking by full ashtrays.

Employer failed to rebut claimant's testimony that she completed a pre-trip inspection with the rental clerk. If anyone was negligent, it was Hill who knew the lights were not working and

failed to notify claimant of such. Finally, the donor's intent with respect to giving an item, not intended for Goodwill, to claimant prevails over employer's policy.

Inasmuch as employer had not previously warned claimant her job was in jeopardy about any of the issues leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or negligently. If an employer expects an employee to conform to certain expectations or face discharge, appropriate written and reasonable advance notice should be given. Because employer has not established any current or final act of misconduct, benefits are allowed.

DECISION:

The November 4, 2004, reference 05, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

dml/tjc