IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

YAMINETTE ROSARIO Claimant **WEST LIBERTY FOODS LLC** Employer	**APPEAL 15A-UI-08683-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 07/12/15** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the July 28, 2015, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on August 25, 2015. Claimant participated through interpreter Ike Rocha. Employer participated through human resource specialist Lindy Helm. Human resources manager Kathy Truelson was present for the hearing on behalf of the employer, but did not testify. Nikki Bruno registered for the hearing on behalf of the employer, but was not present for the hearing.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a process waiter from November 24, 2014, and was separated from employment on July 10, 2015, when she was discharged.

The employer has an attendance policy which applies point values to attendance infractions, including absences and tardies, regardless of reason for the infraction. The policy also provides that an employee will be warned as points are accumulated (three separate warning levels before discharge), and will be discharged upon receiving eight points in a rolling twelve-month period. Claimant was made aware of the employer's policy at the time of hire.

The final incident occurred when claimant was absent on June 21, 2015, for her shift. Claimant called the employer and told them she was going to be late because of daycare issues. Claimant did not report to work at all for her shift on June 21, 2015. The employer considered this a no-call/no-show and awarded her three points, which gave claimant eight and a half points. The employer's attendance system is a week behind. The system generated the claimant's attendance points on June 30, 2015. Ms. Helm testified claimant's attendance points were then routed for approval of termination. Ms. Helm testified because claimant works the night shift, it was difficult to schedule a meeting in the office to inform claimant she was

discharged. Claimant was ultimately discharged on July 10, 2015. Claimant's supervisor had spoken with her after June 21, 2015 and said her attendance was really high. No one else from the employer spoke to claimant about her attendance issues until she was discharged on July 10, 2015, 19 days after her last absence.

Claimant was never warned about any attendance issues from her hire date on November 24, 2014 until she was discharged (July 10, 2015). On June 21, 2015, claimant was unaware of how many points she had accumulated. Claimant was also unaware her job was in jeopardy.

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. Benefits are allowed.

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.

Iowa Admin. Code r. 871-24.32(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.

Iowa Admin. Code r. 871-24.32(7) provides:

> (7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

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 Dep't of Job Serv.*, 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. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. 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. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000).

Although claimant's supervisor spoke with her after her absence on June 21, 2015, the supervisor merely told claimant her attendance points were really high. The employer waited 19 days before discharging claimant. Claimant was never told her job was in jeopardy. It is not persuasive that the employer's attendance system takes a week to process her absence and that claimant was hard to bring into the office to discharge because she works the night shift. Claimant had no notice her job was in jeopardy. The employer's attendance policy provides for three warnings to be issued to employees before they reach eight points. Claimant did not receive any warnings. 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. Training or general notice to staff about a policy is not considered a disciplinary warning. The employer's simple accrual of a certain number of points counting towards discharge without providing notice to claimant does not establish repeated negligence or deliberation and is not dispositive of the issue of misconduct for the purpose of determining eligibility for unemployment insurance benefits. The employer has not met its burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. Furthermore, because the act that claimant was discharged for was not current and claimant may not be disqualified for past acts of misconduct, benefits should be allowed. Benefits are allowed.

DECISION:

The July 28, 2015, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible. The benefits withheld based upon this separation shall be paid to claimant.

_____
Jeremy Peterson
Administrative Law Judge

_____
Decision Dated and Mailed

jp/pjs