

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

MICHAEL D FLIEHE
Claimant

VAN DIEST SUPPLY CO
Employer

APPEAL 17A-UI-12395-NM-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 10/29/17
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the November 30, 2017, (reference 01) unemployment insurance decision that denied benefits based on his discharge for wanton carelessness. The parties were properly notified of the hearing. A telephone hearing was held on December 21, 2017. The claimant participated and testified. The employer participated through attorney Espnola Cartmill and witnesses Carolyn Cross and Lee Trask. Also present on behalf of the employer, but not participating, was Ms. Cartmill's associate attorney Erika Bertrand.

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 production operator from November 30, 2015, until this employment ended on October 26, 2017, when he was discharged.

On October 26, 2017, claimant was working on the fifth floor of a building doing some cleaning. Claimant did not have a trash bag, so he bundled some trash together and wrapped it in tape to dispose of it. According to claimant, while he was finishing up he heard the phone on the fourth floor buzzing for him. Not knowing if the call was related to some kind of emergency, he hurried to finish bundling and taping the trash and then moved quickly to the stairs. Claimant testified there was a service elevator available, but he did not want to wait for it, so he chose to take the stairs, with the bundle of trash in tow. Claimant testified as he was approaching the door he pulled it back very quickly, which knocked him back causing him to lose his balance and drop the bundle of trash. The bundle of trash then went over the stair rail, falling three floors before hitting and breaking a light, and ultimately landing on the first floor. Claimant immediately reported what had happened to his supervisor and then relayed the same version of events to the safety committee, including Trask. Trask had doubts about claimant's story based on the excessive amount of tape and wrapping on the bundle, but claimant stuck to his original version of events. Trask believed claimant had deliberately thrown the trash over the stair rail, as a

means of horseplay, though he did not believe claimant intended to do any damage to the employer's property. The claimant was subsequently discharged for the suspected horseplay and damage to company property. Claimant had no prior warnings or disciplinary action.

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 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 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.

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).

The employer has the burden of proof in establishing disqualifying job misconduct. *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). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

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, it incurs potential liability for unemployment insurance benefits related to that separation. A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

The conduct for which claimant was discharged was, at best, purely accidental and, at worst, merely an isolated incident of poor judgment. "[M]ere negligence is not enough to constitute misconduct." *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 666 (Iowa 2000). A claimant will not be disqualified if the employer shows only "inadvertencies or ordinary negligence in isolated instances." 871 IAC 24.32(1)(a). Even assuming Trask was correct and claimant was engaging in horseplay, the employer has only shown he was careless, but the carelessness does not indicate "such degree of recurrence as to manifest equal culpability, wrongful intent or evil design" such that it could accurately be called misconduct. Iowa Admin. Code r. 871-24.32(1)(a); *Greenwell v. Emp't Appeal Bd.*, No. 15-0154 (Iowa Ct. App. Mar. 23, 2016). Ordinary negligence is all that is proven here.

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. Inasmuch as employer had not previously warned claimant about the issue leading to the separation, it 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.

DECISION:

The November 30, 2017, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

nm/rvs