IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

STEPHEN A DEHNER Claimant **KWIK SHOP INC** Employer	**APPEAL 15A-UI-13156-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 11/01/15** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the November 19, 2015 (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on December 16, 2015. Claimant participated. Employer participated through division training manager Lindsay Flesher. Barbara Henson, Billy Colemire, and Bruce Vorderstrasse appeared on behalf of the employer but did not testify. Rosemary Boyert registered on behalf of the employer but did not appear for the hearing. Employer's Exhibit One was admitted into evidence with no objection.

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 district trainer/CAM (certified assistant manager) from October 4, 2010 and was separated from employment on November 3, 2015; when he was discharged.

The employer has a policy that rest breaks and meal breaks are not required or provided (Employer's Exhibit One). If an employee goes outside to smoke, they are required to complete job related tasks while smoking; such as sweeping the lot (Employer's Exhibit One). Claimant was aware of the policy. The policy is written in the orientation manual. The disciplinary policy allows for anywhere from a verbal warning up to discharge depending on the severity of the offense. Claimant also teaches the smoking policy during orientation classes.

In May 2014, claimant was given a verbal warning by Ms. Boyert about not performing job related tasks while smoking (Employer's Exhibit One). Claimant was not told his job was in jeopardy. Claimant was not aware his job was in jeopardy.

On August 7, 2015, there was a conference call that included claimant and Ms. Flesher. During the conference call, Ms. Flesher stated that during breaks in orientation, the new associates did not have to do any job related tasks while on break but this only applied during orientation, not when the associates were at the store.

On October 27, 2015, Mr. Colemire, Mr. Vorderstrasse, and Ms. Henson observed that claimant had taken seven smoke breaks for five to ten minutes per break (Employer's Exhibit One). Claimant was not doing any job related activities while outside on his smoke breaks. As a district trainer, claimant did not have any outside job related tasks. The breaks were captured by surveillance video.

On November 3, 2015, Ms. Boyert and the division human resources manager had a conversation with claimant about his smoke breaks on October 27, 2015 (Employer's Exhibit One). Claimant was discharged for taking excessive smoke breaks and not doing any job tasks and for taking too many breaks (Employer's Exhibit One).

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes 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(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 Dep't of Job Serv.,* 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). 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). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.,* 391 N.W.2d 731 (Iowa Ct. App. 1986). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. 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, 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.

On October 27, 2015, claimant took seven smoke breaks while teaching an orientation class. Each break averaged five to ten minutes at a time. The employer's argument that his breaks were excessive is not persuasive. The orientation schedule called for three, 15-minute breaks throughout the day; which would be a total of 45 minutes. Claimant's smoke breaks totaled anywhere from 35 to 70 minutes. Depending on how long claimant actually took for each break, he may have actually taken less time away from orientation for breaks than the schedule provides for. Claimant also had no prior warnings for taking too many smoke breaks. Claimant's only prior warning for smoke breaks was a verbal warning over a year ago that reinforced he had to be performing work for the employer while smoking. The employer's argument that claimant was not performing any job related tasks, such as sweeping, while he was taking his smoke break, which was in violation of the employer's policy is also not persuasive. Although claimant may not have been performing any job duties while on his smoke breaks, he was instructed by the employer in August 2015 that during orientation, employees did not need to perform job duties while on break.

The conduct for which claimant was discharged was merely an isolated incident of poor judgment and inasmuch as employer had not previously warned claimant about excessive smoke breaks and had instructed him that employees did not need to perform job duties while on break during orientation, 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. 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 failed to meet its burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). Benefits are allowed.

DECISION:

The November 19, 2015 (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.

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Jeremy Peterson
Administrative Law Judge

_____
Decision Dated and Mailed

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NOTE TO EMPLOYER:
If you wish to change the address of record, please access your account at: https://www.myiowaui.org/UITIPTaxWeb/.
Helpful information about using this site may be found at:
http://www.iowaworkforce.org/ui/uiemployers.htm and
http://www.youtube.com/watch?v=_mpCM8FGQoY