

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**DUSTIN W HENDERSON**  
Claimant

**D OF S FOODS INC**  
Employer

**APPEAL 21A-UI-04818-AW-T  
ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 11/29/20  
Claimant: Respondent (1)**

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Iowa Code § 96.5(2)a – Discharge for Misconduct  
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment  
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

**STATEMENT OF THE CASE:**

Employer filed an appeal from the February 3, 2021 (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified of the hearing. A telephone hearing was held on April 14, 2021, at 3:00 p.m. Claimant participated. Employer participated through Phillip Mashek, General Manager. Employer's Exhibits 1 and 2 were admitted. Official notice was taken of the administrative record.

**ISSUES:**

Whether claimant's separation was a discharge for disqualifying job-related misconduct.  
Whether claimant was overpaid benefits.  
Whether claimant should repay those benefits and/or whether employer should be charged based upon its participation in the fact-finding interview.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed as a full-time Maintenance Worker from September 15, 2020 until his employment with D of S Foods ended on November 22, 2020. Claimant worked Monday through Friday from 7:00 a.m. until 3:00 p.m. Claimant's direct supervisor was Phillip Mashek, General Manager.

Claimant's job duties included cleaning a fryer. Employer provided a power tool for claimant to use when cleaning the fryer. Employer trained claimant on the use of the tool and directed claimant only to use the tool on the fryer. On November 21, 2020, within a week of the training, claimant used the tool to degrease the stainless steel walls, resulting in thousands of dollars of damage. Claimant used the tool on the walls because the degreaser employer provided was not working to clean the grease from the walls.

On November 22, 2020, employer discharged claimant for damaging the stainless steel walls by using the power tool to clean them after being told to only use the tool on the fryer. Claimant

had no prior warnings regarding using the tool to clean the walls. Claimant did not know that the tool would damage the stainless steel walls.

### REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

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 disqualification shall continue 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:

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 of misconduct has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Reigelsberger v. Emp't Appeal Bd.*, 500 N.W.2d 64, 66 (Iowa 1993); *accord Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000). Further, 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).

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 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). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Bd.*, 616 N.W.2d 661 (Iowa

2000). A failure in job performance is not misconduct unless it is intentional. *Huntoon*, supra; *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000).

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.

Employer discharged claimant for damaging employer's property by misusing a power tool. Claimant received no prior warning for using the tool on a something other than the fryer. There is no evidence that claimant intentionally damaged employer's property. Claimant's misuse of the tool was an isolated instance of negligence. While the incident may have been good cause for employer to terminate claimant's employment, it does not rise to the level of intentional misconduct that would warrant a denial of unemployment insurance benefits. Employer has not met its burden of proving disqualifying, job-related misconduct. Therefore, claimant was discharged for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

Because claimant's separation is not disqualifying, the issues of overpayment, repayment and charges are moot.

**DECISION:**

The February 3, 2021 (reference 01) unemployment insurance decision is affirmed. Claimant was discharged for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. The issues of overpayment, repayment and charges are moot.



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Adrienne C. Williamson  
Administrative Law Judge  
Unemployment Insurance Appeals Bureau  
Iowa Workforce Development  
1000 East Grand Avenue  
Des Moines, Iowa 50319-0209  
Fax (515)478-3528

April 19, 2021  
Decision Dated and Mailed

acw/scn