IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

JUSTEN E ROLSTON Claimant **ARCHER-DANIELS-MIDLAND CO** Employer	**APPEAL 17A-UI-10369-DL-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 09/17/17** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the October 4, 2017, (reference 01) unemployment insurance decision that denied benefits based upon a discharge from employment. The parties were properly notified about the hearing. A telephone hearing was held on October 31, 2017. Claimant participated. Employer participated through human resource manager Bryce Albrechtsen and maintenance manager Andy Hardigan. Employer's Exhibit 1 (fax pages 4 – 24) was received.

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 as a full-time senior maintenance department mechanic from 2007, through September 18, 2017. His discharge was confirmed in writing on September 25, 2017. Sometime during the week of September 5, maintenance supervisor Mike King instructed claimant to "lend a hand" to an oil department group working with a dryer cooler contractor making a repair, but was not designated as a supervisor or qualified employee. (Employer's Exhibit 1 p. 19) The contractor had to leave for another job so oil department supervisor Doug Larson was pressing the group to speed up the work. There was other work being done on the corn expeller project and there was "a lot of pressure" for Webb to work on that too.

On September 14, claimant, corn oil department production operator Irvin Webb, Dan Schumake, Jim Franzen, and Ocondor Kelm were to work on a germ dryer, while Jacobs Engineering was installing a flash curtain. All were considered authorized employees for the purpose of performing the lock-out/tag-out (LOTO), try-step procedure on the equipment. At least one representative from each work group was supposed to conduct the try-step after the LOTO. (Employer's Exhibit 1 p. 18)

The group had been performing this procedure on equipment before working on the project during the past week. An oil department worker turned off the breaker to the corn germ blower,

instead of the main drive, and installed the department lock. Claimant and two others installed their locks as they had multiple times in past. In retrospect there was some confusion of multiple breaker labeling clarity. Because only a single piece of equipment was to be locked out the group was not required to use a check list for multiple lock outs. The equipment is interlocked so power would have to go through the cooler, the air lock and then the blower. Interlock system creates a fail-safe situation so if the blower or any equipment downstream is not working, the upstream equipment will not work. In this case the main drive could not have started when the blower was locked. Others knew claimant was going to the shop from the breaker area. There was no communication about who would perform the try-step and attempt to turn on the equipment at the repair area to ensure the LOTO procedure worked. Claimant was in the process of installing guards on the dryer and went directly from the breaker area to the shop to cut expanded metal and get bolts for that installation. He assumed one of the others from the work group going back to the work area would perform the try-step procedure. While in the shop, claimant received a radio call from Larson to shut the job down because of a lock-out problem.

Claimant and the rest of the work group had not taken lunch that shift because they were too busy trying to get the job done so the contractor could leave. Larson did not go to the breaker area and was not disciplined. Claimant and Webb were fired. (Employer's Exhibit 1 p. 4) Two other maintenance department mechanics were suspended but not discharged. All were trained and authorized to follow the lock-out/tag-out and try-step procedure. (Employer's Exhibit 1 pp. 11, 12, 14) Claimant has no record of prior safety violations and the employer had not previously warned claimant his job was in jeopardy for any similar reasons.

The employer's policy may call for termination from employment on a first violation of cardinal rules, including willful misconduct or grossly negligent violation of LOTO policy. (Employer's Exhibit 1 pp. 6, 7) Other employees had been discharged for a sole reason in past three years and yet other workers were disciplined but not discharged. The employer looks to three factors to determine if a separation should be made upon a first policy violation: first, if it is clear to the employee what the expectation is regarding the lock-out/tag-out procedure; second, if there had been proper training; and third, if it is the practice in that department to lock out equipment.

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:

> **Causes for disqualification.**
>
> 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. *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).

Misconduct "must be substantial" to justify the denial of unemployment benefits. *Lee*, 616 N.W.2d at 665 (citation omitted). "Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of benefits." *Id.* (citation omitted). …the definition of misconduct requires more than a "disregard" it requires a "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." Iowa Admin. Code r. 871–24.32(1)(a) (emphasis added).

Whether an employee violated an employer's policies is a different issue from whether the employee is disqualified for misconduct for purposes of unemployment insurance benefits. *See Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000) ("Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of benefits." (Quoting *Reigelsberger*, 500 N.W.2d at 66.)).

The conduct for which claimant was discharged was an isolated incident of assuming another employee in the work group would conduct the try-step at the work area while he went to get materials from the shop. While the ALJ understands that the potential risk of harm is significant, claimant has adequately rebutted the employer's evidence with information about the equipment at issue being subject to an interlock, which rendered the equipment in the process stream nonfunctional even if the wrong breaker in the panel was locked out. Further mitigation was the supervisor's pressure to work quickly on two projects to the extent that the work group did not receive a break and failure to designate a supervisor, whether claimant or someone else. Finally, even though the employer argues it applied the three-prong test to the cardinal rule violation to determine discipline or discharge for a sole violation, the agency is not bound by an employer's policies or procedures. 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. 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. Further, even though the claimant may have violated a cardinal rule, since the consequence

was more severe than other employees received for similar conduct, the disparate application of the policy cannot support a disqualification from benefits.

DECISION:

The October 4, 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.

_____
Dévon M. Lewis
Administrative Law Judge

_____
Decision Dated and Mailed

dml/rvs