IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

SOM P SRIBOONREUANG Claimant **ANNETT HOLDINGS INC** Employer	**APPEAL 21A-UI-22666-CS-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 09/05/21** **Claimant: Respondent (1)**

Iowa Code §96.5(2)a-Discharge/Misconduct
Iowa Code §96.5(1)- Voluntary Quit
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:

On October 12, 2021, the employer/appellant filed an appeal from the October 5, 2021, (reference 01) unemployment insurance decision that allowed benefits based on claimant being dismissed but for no willful or deliberate misconduct. The parties were properly notified about the hearing. A telephone hearing was held on December 6, 2021. Claimant participated at the hearing. Employer participated through Vice President of Logistics for the West Division, Steven Feldman. Administrative notice was taken of claimant's unemployment insurance benefits records. Exhibit 1 and 2 were admitted into the record.

ISSUES:

Was the separation a layoff, discharge for misconduct, or voluntary quit without good cause?

Should claimant repay benefits?

Should the employer be charged due to employer participation in fact finding?

Is the claimant overpaid benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for employer on June 15, 2015. Claimant last worked as a full-time Logistics Sales Manager. Claimant was separated from employment on September 3, 2021, when he was discharged.

On August 25, 2021, claimant became upset and posted on his personal Facebook Story Exhibit 1. Specifically the post says: "Fuck my cowoker for saying vaccine passports go against her freedom but the dumb ass bitch has a drivers license and passport #showyourpapersbitch + her entire family got COVID….shocking I know. Fuck my job for telling us we have to use our lunches, breaks or after hours to move our desk stuff to the new building this coming Friday!

Thanks for the 2 day notice you fucking bitch! p/s I aint your slave." (Exhibit 1). The claimant had Exhibit 1 posted for two hours and then took the post down. The claimant did not have anything on his Facebook page that connected himself to the employer. The claimant notified his supervisor of the post and apologized to the parties involved in the matter.

On September 3, 2021, Mr. Feldmann became aware of the post. Mr. Feldmann and a team of executives discussed the post and decided to terminate claimant. Mr. Feldmann fired claimant because it violated their social media policy because of the language used. The employer determined it was directed toward the employer and its workers and thought it would be difficult for claimant to continue managing when he had violated the policy in such a manner.

The employer's social media states: "…if you choose to identify yourself as a TMC employee on a website or blog, you must adhere to the following guidelines:

> (4) Employees are prohibited from posting or displaying comments about co-workers or supervisors or the employer that are threatening, intimidating, harassing, or a violation of the employer's workplace policies against discrimination, bullying, harassment, retaliation, or hostility on account of age, race, religion, sex, ethnicity, nationality, disability, or other protected class, status or characteristic. Avoid using statements, photographs, video or audio that reasonably could be viewed as malicious, obscene or threatening, that defames or libels our employees, customers, partners and affiliates, or that include offensive posts meant to intentionally harm someone's reputation or posts that could contribute to a hostile work environment…."
>
> (6) "Your personal or anyone else's Facebook page, Twitter, or social networking site is not the ideal place to make a complaint regarding alleged discrimination, unlawful harassment, or safety issues. Complaints to the Company regarding these issues should be reported to Human Resources or management so that TMC can address them."

Mr. Feldman notified claimant on September 3, 2021, that he was terminated for violating their social media policy. The claimant was not aware of the social media policy and the employer did not have proof that claimant was aware of the policy. Claimant had no prior verbal or written warnings.

The claimant filed for benefits for week beginning September 5, 2021. Claimant's weekly benefit amount is $531.00 (DBRO). Claimant received benefits for weeks starting September 11, 2021, through October 9, 2021. Claimant has received $2,665.00 in benefits.

The employer and the claimant did not participate in a fact-finding interview.

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). "Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of benefits." *Lee v. Employment Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000).

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.

In this case claimant was unaware the employer had a social media policy. The employer could not prove that claimant was aware of the social media policy. Also, nothing on claimant's personal Facebook page and in the post in Exhibit 1 connect claimant to the employer. The post was distasteful, however, the conduct for which claimant was discharged was merely an isolated incident of poor judgment. The claimant had no other previous verbal or written 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. 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. Benefits are allowed. The employer's account shall be charged.

The issue of whether claimant was overpaid benefits, whether he should pay back the benefits, and whether the employer participated in fact-finding are moot since the claimant is entitled to benefits.

DECISION:

The October 5, 2021, (reference 01) unemployment insurance decision is affirmed. 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.

The issue of whether claimant was overpaid benefits, whether he should pay back the benefits, and whether the employer participated in fact-finding are moot since the claimant is entitled to benefits.

Carly Smith
Administrative Law Judge
Unemployment Insurance Appeals Bureau

January 10, 2022
Decision Dated and Mailed

cs/scn