IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

PETER CHUOL Claimant **TYSON FRESH MEATS INC** Employer	**APPEAL 16A-UI-05383-DB-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 04/17/16** **Claimant: Appellant (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant/appellant filed an appeal from the May 9, 2016 (reference 01) unemployment insurance decision that disallowed benefits based upon claimant's discharge from employment. The parties were properly notified of the hearing. A telephone hearing was held on May 25, 2016. The claimant, Peter Chuol, participated personally. Interpretation services were provided to claimant by CTS Language Link. The employer, Tyson Fresh Meats, Inc., participated through Human Resource Manager Maria Villalpando. Employer's Exhibits One through Three were admitted.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Did claimant voluntarily quit the employment with good cause attributable to employer?

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 worker. This employer prepares food for public consumption. Claimant was employed from January 23, 2012 until April 18, 2016, when he was discharged from employment. Claimant's job duties involved several tasks along the production line, including opening boxes and putting product on the line.

This employer has a progressive disciplinary policy. The written policy states that the employer can impose counseling, written warnings, suspensions, and discharge. See Exhibit Three. If an employee receives four written warnings under any company policy (excluding the attendance policy) within a 12-month time period they will be subject to discharge. See Exhibit Three.

Claimant had several disciplinary actions within the previous twelve month time period. On February 16, 2016, claimant received a counseling discipline for job performance when he went home early from his shift without supervisor approval.

On October 30, 2015, claimant received a written warning for job performance when he put frozen product on the line when he was not supposed to which caused thirty minutes of down time for the production line. On October 28, 2015, claimant received a counseling discipline for walking away from the production line to get drinks of water in the hallway when he was supposed to use the drinking fountain close to his production line. On October 7, 2015, claimant received a written warning for safety violations when he used a hook he was using to work with to scratch his nose with. This was unsafe for the claimant's own welfare and not allowed under the United States Department of Agriculture ("USDA") guidelines that the employer must comply with. On October 2, 2015, claimant received a counseling discipline for an unauthorized break.

On August 28, 2015, claimant received a written warning for product safety sanitation violation when he was wearing the wrong frock and gloves to open boxes and move product onto the production line. His actions could have resulted in contaminated product. On August 6, 2015, claimant received a counseling discipline for product safety sanitation violation when he was chewing gum on the production floor.

The final incident occurred on April 15, 2016, when claimant was observed by Jack Liford, who is one of claimant's supervisors, chewing gum on the production floor. See Exhibit Two. He was told to put the gum in the trash can and he did so. See Exhibit Two. Only a few minutes later claimant was observed by Rich Hilt, another supervisor, chewing gum again and putting his hand in the sterilizer. See Exhibit One. Mr. Hilt instructed claimant that he could not chew gum on the production floor and could not put his hand in the sterilizer because it was 180 degrees. See Exhibit One. Claimant continued to put his hand in the sterilizer and then spit his gum out into the trash can but spit it across the production line into the trash can rather than walking it to the trash can as instructed. See Exhibit One. Claimant was taken to Ms. Villalpando's office at that time. She asked claimant why he had put his hands in the hot water and he explained that his hands were cold. Claimant was discharged as this was his fourth written warning received in a 12-month time period for safety and sanitary violations.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged for job-related misconduct. Benefits are denied.

As a preliminary matter, I find that the claimant did not quit. Claimant was discharged from employment.

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:
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> 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 and (4) provides:

> Discharge for misconduct.
>
> (1) Definition.
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> 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.
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> 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).
>
> (4) Report required. The claimant's statement and the employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

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). 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). Further, 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). 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).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence, and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory, and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias, and prejudice. *Id*. After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the Administrative Law Judge finds that Ms. Villalpando's testimony and the submitted written statements of Mr. Hilt and Mr. Liford are more credible than claimant.

While Exhibits 1 and 2 both contain hearsay statements, administrative agencies are not bound by the technical rules of evidence. *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 630 (Iowa 2000). A decision may be based upon evidence that would ordinarily be deemed inadmissible under the rules of evidence, as long as the evidence is not immaterial or irrelevant. *Clark v. Iowa Dep't of Revenue*, 644 N.W.2d 310, 320 (Iowa 2002). Hearsay evidence is admissible at administrative hearings and may constitute substantial evidence. *Gaskey v. Iowa Dep't of Transp.*, 537 N.W.2d 695, 698 (Iowa 1995). In considering whether specific hearsay testimony is "the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs" there are five factors to be considered. *Schmitz v. Iowa Dep't of Human Servs.*, 461 N.W.2d 603, 607-08 (Iowa Ct. App. 1990)(citing Iowa Code § 17A.14(1)). Those factors include: (1) the nature of the hearsay, (2) the availability of better evidence, (3) the cost of acquiring better information, (4) the need for precision, and (5) the administrative policy to be fulfilled. *Id*. at 608. The two statements as well as Ms. Villalpando's testimony and claimant's own admission are all consistent in that claimant put his hands in the water. In fact when Ms. Villalpando asked why claimant put his hands in the water he stated to her that he was trying to warm his hands. There was no reasonable explanation provided as to why Mr. Liford and Mr. Hilt would be motivated to provide false information regarding the fact claimant was chewing gum on the production floor that day. Further, the claimant has failed to establish any pretext for the separation. As such, I find the two consistent statements that claimant was chewing gum on the floor persuasive.

Prior to his discharge claimant had committed in four violations which involved his own health and safety and the food product safety and sanitation. Claimant's job duties included following the necessary and required guidelines that were in place for sanitation and safety purposes.

The final incident involved two further violations, one of which was the exact same type that he had been previously counseled about in August. Claimant's continued actions of failing to follow the employer's policies regarding safety and sanitation constitute an intentional and substantial disregard of the employer's interest and is indicative of a deliberate disregard of the employer's interests. This recurrent negligence after being warned rises to the level of willful misconduct. As such, benefits are denied.

DECISION:

The May 9, 2016 (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

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Dawn Boucher
Administrative Law Judge

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Decision Dated and Mailed

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