IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

ASHLEY R THOMAS Claimant **PELLA CORPORATION** Employer	**APPEAL 17A-UI-11279-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 10/15/17** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the October 31, 2017, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on December 4, 2017. Claimant participated. Attorney Matthew Denning participated on claimant's behalf. Employer participated through department manager Tanisha Arellano and human resources representative Jennifer Grandgenett.

Claimant Exhibits 2 and 3 were admitted into evidence with no objection. Claimant offered to play a telephone recording into the record. The employer objected to the telephone recording being admitted as testimony because it contained hearsay evidence. The employer's objection was overruled and claimant was allowed to play the telephone recording into the record. The employer offered Employer Exhibits A, C, D, and E into evidence. Claimant objected to Employer Exhibits A, C, D, and E because claimant did not receive them prior to hearing. The relevant portions of Employer Exhibits A, C, D, and E were read to claimant and it was noted that Employer Exhibits A, C, D, and E were mailed to claimant at her address of record, although it did not include the PO Box she provided at the hearing. Claimant's objection was overruled and Employer Exhibits A, C, D, and E were admitted into evidence. The employer offered Employer Exhibit B into evidence. Claimant objected to Employer Exhibit B because it was not relevant. Claimant's objection was overruled and Employer Exhibit B was admitted into evidence.

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 factory hourly 2 employee from February 10, 2014, and was separated from employment on October 11, 2017, when she was discharged.

The employer has a written policy that prohibits employees from retaliating against other employees. Employer Exhibit D. Claimant was aware of the policy. Employer Exhibit E.

On October 7, 2017, during claimant's scheduled shift, the employer received a complaint that claimant was moving tags on windows to make it difficult for another employee (Benita) to scan the tags. The tags are scanned to verify a customer's order. On October 7, 2017, claimant was not responsible for moving tags on the windows. After the employer received the complaint, it conducted an investigation. The employer interviewed multiple employees, including Benita, Linda Carpenter, Mike Cook, Christina Siebert, Lauren Staples, and Al; the employees were not all interviewed on the same day. The employer made the determination that claimant was moving tags to make it difficult for Benita. The employer also made the determination that the reason claimant was trying to make it difficult for Benita to scan the tags was because approximately a month prior Benita had made a complaint that claimant was not properly locking out a machine. The employer further determined that claimant moved multiple tags during her shift. Claimant admitted to moving two tags during her shift so she could get the wrinkles out to allow her to scan the tags. Claimant denied that she moved any other tags during her shift. Claimant denied hiding the tags to make it difficult for Benita to scan the tags. Claimant denied talking to Mr. Cook and Ms. Carpenter on October 7, 2017.

On October 9, 2017, the employer met with claimant regarding what happened October 7, 2017. This meeting was the first time claimant became aware that employees were telling the employer that she was moving tags. During the meeting, the employer asked claimant about what happened on October 7, 2017. Claimant testified her anxiety got too high and she left without discussing the incident with the employer. After claimant left the employer, she went to the hospital because of her anxiety. Ms. Grandgenett called claimant, but she told Ms. Grandgenett that she could not talk to her and the call ended. Ms. Grandgenett then left claimant a message that she was suspended and to call Ms. Grandgenett back.

On October 10, 2017, claimant called the employer. Claimant denied moving the tags on October 7, 2017. Claimant told the employer that they needed to speak to Christina Siebert.

On October 11, 2017, the employer made the decision to discharge claimant. Claimant Exhibit 2. The employer sent claimant a letter informing her she was discharged.

Approximately a month prior to October 7, 2017, Benita made a complaint to the employer that claimant was not properly locking out a machine. The employer did not discipline claimant for this incident. Claimant testified she did not have any issues with Benita and she was not mad at Benita for reporting the incident approximately a month prior to October 7, 2017.

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.

It is the duty of an administrative law judge and 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, as the finder of fact, 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. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). 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 evidence you believe; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory

and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. This administrative law judge reviewed the exhibits that were admitted into the record. This administrative law judge finds claimant's version of events to be more credible than the employer's recollection of those events.

Iowa Code section 96.5(2)a provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
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> 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 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:

> 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.

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).

Iowa Admin. Code r. 871-24.32(4) provides:

> (4) Report required. The claimant's statement and 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.

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.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. *Crosser v. Iowa Department of Public Safety*, 240 N.W.2d 682 (Iowa 1976). The employer had the power to present testimony from Benita, Mr. Cook, Ms. Carpenter, or Ms. Siebert, but the employer instead choose to rely on Ms. Arellano and Ms. Grandgenett's testimony about what the other employees told the employer during its investigation. The employer also did not provide any witness statements from its employees about the incident on October 7, 2017. Ms. Arellano and Ms. Grandgenett's testimony as to what the other employees said happened on October 7, 2017 does not carry as much weight as live testimony because live testimony is under oath and the witnesses can be questioned. Even though Ms. Arellano testified to the conversation she observed between claimant and Mr. Cook on October 7, 2017, Mr. Cook did not testify and the employer did not provide a witness statement from Mr. Cook to corroborate Ms. Arellano's observation and rebut claimant's denial about the conversation. Claimant provided direct, credible, first-hand testimony that she did not move any tags to make it more difficult for Benita to scan the tags.

The employer did not provide first-hand testimony at the hearing and, therefore, did not provide sufficient eye witness evidence of job-related misconduct to rebut claimant's denial of said conduct. "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." Iowa Admin. Code r. 871-

24.32(4). The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

DECISION:

The October 31, 2017, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

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Jeremy Peterson
Administrative Law Judge

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Decision Dated and Mailed

jp/rvs