IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

68-0157 (9-06) - 3091078 - EI

BRANDON R SUTTON
Claimant

SLB OF IOWA LC
PANERA BREAD OF IOWA
Employer

APPEAL NO. 07A-UI-11358-LT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 11/04/07 R: 02
Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge/Misconduct
Iowa Code § 96.6(2) – Timeliness of Appeal

STATEMENT OF THE CASE:

The claimant filed an appeal from the November 28, 2007, reference 01, decision that denied benefits. After due notice was issued, a telephone conference hearing was held on December 27, 2007. Claimant participated and was represented by Jane Orlanes, Attorney at Law. Employer participated through Linda Zachar. Lindsey Kerr observed. Department's Exhibit D-1 was received.

ISSUE:

The issue is whether claimant's appeal was timely and, if so, whether he was discharged for reasons related to job misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: A disqualification decision was mailed to claimant's last-known address of record on November 28, 2007. Claimant did receive the decision on November 29 or 30. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by Saturday, December 8, 2007. Claimant's mother faxed his appeal to a wrong number (515-242-***8***144; the Appeals Bureau fax number is 515-242-***5***144) on December 8. Claimant hand-delivered his appeal to Iowa Workforce Development on Monday, December 10, 2007 and it was forwarded to the Appeals Bureau on December 12, 2007.

Claimant was employed as a part time shift supervisor from October 2, 2005 until November 2, 2007 when he was discharged. He decided not to serve a high profit menu item (crispani pizza) on the busiest night of the week on Friday, November 2. A customer who ordered it and was told it was not available knows Mike Young, Operating Partner, and called to complain. That night he said it was not offered because they were short staffed, he could not find the dough in the cooler and he did not know how to make it. He could have tried to call in more staff or find product at the two other stores within five miles. It is the manager's or shift supervisor's job to make crispani if the store is short staffed. The manager arrived later in the evening and found

the dough behind other items in the cooler. There are detailed schematics of how to make the pizza and subordinate Michael knows how to make it but was not asked to do so or to look for the dough. Crispani had been on the menu since he began working at that store two months earlier. Employer gave him no prior warnings on that or any other issue and he was being groomed for promotion. Employer does not have a written policy or verbal instruction that a shift manager may not remove an item from the menu or that violation of that will result in immediate termination. The franchise agreement is at risk by not offering a product on the menu unless all other alternatives are exhausted but a copy of this agreement was not made available to claimant nor were the consequences explained to him.

REASONING AND CONCLUSIONS OF LAW:

The first issue to be considered in this appeal is whether the claimant's appeal is timely. The administrative law judge determines it is.

Iowa Code § 96.6-2 provides:

> 2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of section 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to section 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 10, and has the burden of proving that a voluntary quit pursuant to section 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 1, paragraphs “a” through “h”. Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

Since the appeal deadline fell on a Saturday and claimant filed his appeal in person on the following Monday, in spite of the appeal being faxed to a wrong number on December 8, the appeal is considered timely.

The remaining issue is whether claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of unemployment benefits.

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:
>
> 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.

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). 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. IDJS*, 364 N.W.2d 262 (Iowa 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. IDJS*, 425 N.W.2d 679 (Iowa 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." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Employment Appeal Board*, 423 N.W.2d 211 (Iowa App. 1988).

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, employer incurs potential liability for unemployment insurance benefits related to that separation. While claimant's excuses for failing to offer the pizza on the menu that evening are flimsy, employer had not communicated clearly, either verbally or in writing, that he had no authority to remove the item from the menu or that if he did he may be fired without prior warning. Thus, his conduct was an isolated incident of poor judgment and inasmuch as employer had not previously warned claimant about

this or any other issue, 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. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Benefits are allowed.

DECISION:

The November 28, 2007, reference 01, decision is reversed. Claimant's appeal is timely and he was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. The benefits withheld effective the week ending November 10, 2007 shall be paid to claimant forthwith.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

dml/css