IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

RICHARD W MYERS Claimant **HOFFMAN MANUFACTURING INC** Employer	**APPEAL 16A-UI-07151-NM-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 06/05/16** **Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-26.9(8) – Sanctions, Failure to Comply with Discovery

STATEMENT OF THE CASE:

The claimant filed an appeal from the June 24, 2016, (reference 01) unemployment insurance decision that denied benefits based upon his discharge for excessive absenteeism. The parties were properly notified of the hearing. A hearing was originally scheduled for July 18, 2016 at 1:00 p.m. Prior to the hearing, on July 6, 2016, the claimant's attorney mailed written interrogatories and requests for production to the employer and Iowa Workforce Development. On July 11, 2016, Iowa Workforce Development sent copies of the interrogatories and requests for production to the employer. The hearing was postponed until August 1, 2016 at 2:00 p.m. to allow sufficient time for the employer to respond to the claimant's discovery request. The employer's response to discovery was due on July 21, 2016. The employer did not respond to the claimant's discovery requests by this date.

On July 26, 2016 claimant's attorney filed a Motion to Compel and to Continue and sought sanctions against the employer due to their failure to provide information requested and to answer questions posed. An Order to Compel was issued by the administrative law judge on July 26, 2016. The order directed the employer that all discovery should be produced no later than 4:30 p.m. on July 28, 2016. The order also warned that failure to respond to the discovery request could result in the employer being excluded from participation in the hearing. In order to ensure the employer had sufficient time to respond before the second discovery deadline, appeals staff contacted the employer, Jeff Hoffman, directly to obtain an email address to expedite notice of the order. A copy of the order was sent to both parties via email at approximately 10:30 a.m. on July 26, 2016 and was also later sent via regular mail.

On July 29, 2016, the claimant's attorney renewed his request for sanction, indicating that he still had not received a response to discovery. A telephone hearing on the motion was held on August 1, 2016. The claimant Richard Myers participated and was represented by attorney Michael Tulis. The employer Hoffman Manufacturing participated through owner Jeff Hoffman. Also present on behalf of the employer were Barry Baker and Ben Kutzner.

At the time of the hearing on the Motion for Sanctions, claimant's attorney noted he had just received the requested discovery shortly after noon that day. According to claimant's attorney,

the tracking information indicated the documents were mailed by the employer at 3:44 p.m. on Friday, July 29, 2016. Claimant's attorney argued his late receipt of the documents, less than two hours prior to the hearing, did not provide him with sufficient opportunity to prepare with his client for the hearing. According to Hoffman he was out of town on business from July 8 through July 20, 2016. Hoffman he did not assign anyone at the employer to review his mail during this time and did not open the mailed discovery requests until the evening of July 21, 2016. Hoffman was out of town again from July 25 through July 30, 2016. Hoffman did not respond to the discovery or assign someone to respond to the discovery on his behalf during the four days he was back in town. Hoffman denied receiving the July 26 order, but confirmed his email and mailing addresses were both correct. Claimant's attorney noted that Hoffman signed the discovery requests on July 28, 2016 and his fax number was listed on multiple documents submitted to Hoffman. Claimant's attorney noted the documents could have been sent to him via fax either on July 28, when Hoffman signed them, or the following day, providing him with sufficient time to prepare for the hearing. Hoffman had no explanation for why he did not do this, other than noting he had not been specifically directed to do so.

After allowing the parties to be heard on the matter, the administrative law judge concluded the employer should be excluded from further participation in the appeal hearing for failure to fully comply with discovery in a timely manner. The administrative law judge found the claimant would be unfairly prejudiced by further delaying the hearing further or by allowing the employer to present testimony, which the claimant did not have a fair opportunity to prepare for. The employer provided insufficient explanation as to why it was not able to respond to the claimant's discovery request after being given multiple opportunities to do so over a more than three week period. While the employer did eventually provide the information requested, it was only made available to the claimant's attorney less than two hours before the scheduled hearing, giving him insufficient time to properly prepare for the hearing with his client. The employer's testimony that he was unable to respond in a timely manner is not credible, as he first learned of the discovery request and deadline on July 21, 2016 and appears to have been able to sign and send the discovery via regular mail prior to returning to town from his second trip. No explanation was given as to why an expedited form of return of the discovery, such as a fax machine, could not have been used.

A telephone hearing on the substantive issues involving unemployment insurance benefits was held immediately following the hearing on claimant's Motion for Sanctions. The claimant Richard Myers participated and was represented by attorney Michael Tulis. The employer was excluded from participation.

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 roundabout from January 9, 2009, until this employment ended on June 9, 2016, when he was discharged.

On June 9, 2016, claimant was called into the office by Hoffman. Hoffman told claimant his services were no longer needed and he needed to get out of the building. No further explanation was given. Claimant was issued a warning for his attendance back in March 2016, but had not missed work since then. Claimant had no warning that his job was in jeopardy and is not sure why he was terminated.

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).

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.

Here, the employer has not shown that claimant engaged in any misconduct leading to the separation. Furthermore, 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. The only thing claimant had been warned about was his attendance, which he testified was not an issue after March 2016. Inasmuch as employer has no identified any misconduct and 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.

DECISION:

The June 24, 2016, (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.

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Nicole Merrill
Administrative Law Judge

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Decision Dated and Mailed

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