IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ANN M HUBBARD
Claimant

1ST CLASS SECURITY INC
Employer

APPEAL NO: 18A-UI-07564-TN-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 06/24/18
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge

STATEMENT OF THE CASE:

1st Class Security, Inc., the employer, filed a timely appeal from a representative's unemployment insurance decision dated July 13, 2018, (reference 01) which held claimant eligible to receive unemployment insurance benefits, finding that she was dismissed from work on June 27, 2018 under non-disqualifying conditions. After due notice was provided, a telephone hearing was held on August 2, 2018. Claimant participated. Participating on behalf of the claimant was Mr. Scott Edwards, Attorney at Law. The employer participated by Mr. James "Mike" Carlson, Company President/Owner. Employer's Exhibits A, B, and C were admitted into the hearing record.

ISSUE:

The issue is whether the claimant was discharged for work connected misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

Having considered all of the evidence in the record, the administrative law judge finds: Ann Hubbard was employed by 1st Class Security, Inc. from February 22, 2013 until June 28, 2018 when she was discharged from employment. Ms. Hubbard was employed full-time as a loss prevention officer, assigned to work at a Menards location. The claimant was paid by the hour. Her immediate supervisor was Casey Henman, loss prevention supervisor.

Ms. Hubbard was discharged by 1st Class Security, Inc. on June 28, 2018 after the employer was notified by Menards, Inc. on June 27, 2018, that Ms. Hubbard would no longer be allowed to perform security work at Menard locations, stating the client company's belief that Ms. Hubbard had left the Menards store on eight occasions between June 4, 2018 and June 26, 2018, without punching out, to purchase food, alleging the claimant did not perform her loss prevention duties for amounts of time that vary from seven to 12 minutes during the eight occasions.

At the time that she was hired, Ms. Hubbard was provided a copy of the company's policy manual, the time recording portion of the manual instructs employees that they are to clock in

and out for the day using 1st Class Security, Inc.'s telephone timekeeping system and informing employees that all breaks and meal periods are to be taken using the standard operating procedure of the company job site where they are assigned.

During the approximate three years that Ms. Hubbard was assigned to work at the Menards location, she had not been provided a copy of the Menards policy about clocking in or out for lunch or break periods. Ms. Hubbard observed Menard employees punching in and out from lunch and break periods, but did not know the company applied that rule to its own loss prevention specialist.

Ms. Hubbard was initially told that the company did not authorize break or lunch times but that she could eat her lunch as she performed her loss prevention duties. Later, when another loss prevention specialist was hired, and the lunch and break rule was questioned, the claimant's immediate supervisor explained that employees were allowed two ten-minute break periods per day and one 15 minute lunch period and that the loss prevention specialist were not required to clock out for these times. Ms. Hubbard's supervisor further explained that it was only necessary to clock out if the specialist left the client's property on break or lunch, or if the specialist was going outside to smoke.

While assigned to Menards facility by 1st Class Security, Inc., Ms. Hubbard at times went out to the parking lot adjacent to the store to purchase lunch from a truck vendor. Before returning a few minutes later that afternoon, her practice was to consume her food while monitoring company security cameras.

During the approximate three years of the assignment, Ms. Hubbard had not been warned or counseled by anyone associated with the Menards Company or 1st Class Security, Inc. that she was violating policy by failing to clock in or out for each occasion. Claimant received no warnings and was not aware her job was in jeopardy.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes intentional job-related misconduct on the part of the claimant sufficient to warrant the denial of unemployment insurance benefits. It does not.

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:
>
> 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 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.

> 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).

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." Unsatisfactory work performance is not misconduct in the absence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. 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, it incurs potential liability for unemployment insurance benefits related to that separation.

In the case at hand, the claimant was assigned to work at a remote client location and was not directly supervised by her employer. Claimant was informed that she must call in to report her beginning and ending times using 1st Class Security, Inc.'s telephone attendance system and that break times and eating periods were governed by the rules at the claimant's company. Claimant was not given a copy of the Menards rule, and while she observed some Menards employees and Menards employees clocking in or out from lunches or breaks, she was unaware what rules were applied to Menards own loss prevention workers, as their tasks differed from those of other hourly employees. The claimant was also told on one occasion by her supervisor that the most recent rule was that employees were allowed to take two ten minute breaks and one 15 minute eating period per shift and they were not required to clock in or out, provided that they did not leave Menards property or go outside to smoke. Because the claimant was not violating either of these rules, she believed she was in compliance with company policy. Menards employees who had observed the claimant's practice of running to the company parking lot for a few minutes to purchase lunch did not object or indicate Ms. Hubbard was violating policy.

While the decision to separate Ms. Hubbard from employment may have been a sound decision from a management viewpoint, inasmuch as the employer had not previously warned the

claimant about any of the issues leading to the separation, it did not meet the burden of proof to establish the claimant acted deliberately or negligently in violation of company policy, procedure, or prior warning. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given.

DECISION:

The representative's unemployment insurance decision dated July 13, 2018, reference 01 is affirmed. Claimant was discharged under non-disqualifying conditions. Unemployment insurance benefits are allowed, provided the claimant meets all eligibility requirements of Iowa law.

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Terry P. Nice
Administrative Law Judge

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Decision Dated and Mailed

tn/scn