IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

ESEF SPIJODIC Claimant **WAL-MART STORES INC** Employer	**APPEAL 16A-UI-05313-JP** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 04/10/16** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the May 3, 2016, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. An in-person hearing was held on July 15, 2016 and August 19, 2016, at 1000 East Grand Avenue, Des Moines, Iowa. Claimant participated. Claimant was represented by attorney Phill Miller and attorney Bo Woolman. Nihad Spijodic attended the hearing on claimant's behalf, but did not testify. Karmela Lofthus interpreted on claimant's behalf. Employer participated through hearing representative David Williams, personal manager Lisa Schweitzer, asset protection manager Dzemila Lilic, and maintenance worker Tina Noring. Employer Exhibits One, Two, Three, Four, and Five were admitted into evidence with no objection. Claimant Exhibit A was admitted. Claimant Exhibits B, D, and E were admitted into evidence with no objection. Claimant Exhibit C was admitted into evidence over the employer's objection. The employer objected to the exhibit due to relevance. The employer's objection was overruled.

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 maintenance associate from July 13, 2010, and was separated from employment on April 13, 2016, when he was discharged.

Claimant was discharged for not following the employer's safety procedures and policies on March 26, 2016. The employer has written safety policies, training and orientation, safety meetings, and signage (including pictures). Employee Exhibits One, Two, Three, and Four. There are certain unsafe practices that may lead to discharge. The employer expects employees to report safety violations. Claimant signed the "New Associate Safety Checklist – General Checklist" and the "New Associate Safety Checklist – Department Checklist". Employer Exhibit One. Claimant testified he did not go through any training and the employer did not explain the documents to him that he was signing. The policies were not written in Bosnian. Claimant speaks and reads very little English.

The incident that led to claimant's discharge occurred on March 26, 2016. On March 26, 2016, claimant was working his scheduled shift. During part of his shift, claimant worked with Ms. Noring. Ms. Noring observed claimant put his foot on a shelf. Ms. Noring spoke to claimant about it and claimant responded "it's good". Claimant testified he did not understand what Ms. Noring was saying. Ms. Noring observed that claimant did not stop putting his foot on the shelf. Ms. Noring also observed claimant motion her out of the way and then a box dropped on the floor. Ms. Noring was not injured and she told claimant that employees are not supposed to throw boxes on the ground. Claimant responded to Ms. Noring, "it's good". Later, during his shift on March 26, 2016, claimant was coming down a ladder and he missed a step and fell, causing an injury. Claimant Exhibits D and E. Claimant then reported the fall and injury to the employer. When Ms. Lilic received the incident report, she conducted an investigation. Ms. Lilic reviewed the security video and observed claimant stepping on a shelf, throwing boxes down to the ground, and walking down the ladder with his back to the ladder, which were safety violations. Ms. Lilic then obtained statements form Ms. Noring and claimant. Ms. Noring did not report any safety violations that she observed to the employer, until Ms. Lilic asked for a statement. On April 1, 2016, claimant gave a written statement regarding the incident to the employer. Claimant admitted he put his foot on the shelf, but did not know that he was not supposed to put his foot on the shelf. Claimant also stated that the boxes he was moving were heavy. Claimant testified that he did not throw the box down; the box was too heavy and fell.

Claimant testified that he was not aware he was not supposed to stand on the shelves. Claimant testified was not able to read or understand the stickers that were on the shelves. Employer Exhibits Two, Three, and Four.

Ms. Noring has observed other employees committing similar safety violations (throwing boxes and stepping on shelves) as claimant, but Ms. Noring is not aware if they were disciplined. Claimant did not have any prior disciplinary warnings for similar incidents (safety violations).

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.

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.

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).

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.

Claimant was discharged for violating the employer's safety rules and procedures. It is noted that the procedures and rules are written in English, not Bosnian, and claimant credibly testified

that he does not speak or read English very well. Employer Exhibits One, Two, Three, and Four and Claimant Exhibit B. Claimant further testified that although he signed the "New Associate Safety Checklist – General Checklist" and the "New Associate Safety Checklist – Department Checklist", the employer did not explain them to him when he signed them. Employer Exhibit One.

It is clear from the evidence presented that on March 26, 2016, that claimant was standing on at least one shelf and dropped at least one box, which were violations of the employer's safety rules and procedures. Employer Exhibit Five. However, claimant had no prior disciplinary warnings for any safety violations.

The conduct for which claimant was discharged was merely an isolated incident of poor judgment and inasmuch as employer 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. 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 employer has not met its burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. Benefits are allowed.

DECISION:

The May 3, 2016, (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/pjs