IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

DERGENOT CASSEUS Claimant **SWIFT PORK COMPANY** Employer	**APPEAL 17A-UI-02302-SC-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 01/29/17** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

Degenot Casseus (claimant) filed an appeal from the February 23, 2017, reference 01, unemployment insurance decision that denied benefits based upon the determination Swift Pork Company (employer) discharged him for failing to follow instructions in the performance of his job. The parties were properly notified about the hearing. A telephone hearing began on March 24, 2017 and ended on April 17, 2017. The claimant participated. The employer participated through Human Resources/FMLA Coordinator Kristy Knapp. Emmanuel (employee number 4932) from CTS Language Link provided Haitian Creole interpretation services. Employer's Exhibits 1 through 5 were received.

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: The claimant was employed full-time as a Forklift Driver beginning on March 16, 2015, and was separated from employment on January 27, 2017, when he was discharged. The employer covers its handbook during orientation and asks employees to sign off on each policy stating they understand. The employer has a policy related to misuse of company time which is covered in orientation. The employer did not provide the claimant a Haitian Creole interpreter during his orientation.

The claimant received a warning on July 22, 2016 for misusing company time when he took a 25-minute break. He met with management and a union representative. He did not understand what was being discussed and requested an interpreter. The employer was unable to obtain an interpreter. On September 29, 2016, the claimant received a second written warning for misusing company time when it determined he was not working but talking to another employee. The claimant again met with management and a union representative. He did not understand what was being discussed and requested an interpreter. The employer was unable to obtain an interpreter. On January 24, 2017, the claimant's supervisor Dee Gergoud reported that the claimant was not working but talking to an employee on another line. The claimant denied this

conduct. The employer determined the claimant was again misusing company time and discharged him.

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 law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id*. Iowa regulations define misconduct, stating:

> "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.

Iowa Admin. Code r. 871-24.32(1)a. 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).

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. 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." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). Additionally, the misconduct must be a current act and cannot be based on past acts of misconduct. Iowa Admin. Code r.871-24.32(8). 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.

When the record is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. *Schmitz v. Iowa Dep't Human Servs.*, 461 N.W.2d 603, 607 (Iowa Ct. App. 1990). Both the quality and the quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See, Iowa Code § 17A.14 (1). In making the evaluation, the fact-finder should conduct a common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be fulfilled. *Schmitz*, 461 N.W.2d at 608. The Iowa Supreme Court has ruled that if a party has the power to produce more explicit and direct evidence than it chooses to present, the administrative law judge may infer that evidence not presented would reveal deficiencies in the party's case. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976).

The decision in this case rests, at least in part, upon the credibility of the parties. The employer contends the claimant was observed by Gergoud misusing company time on January 24, 2017. The claimant denies this occurred. The employer did not have Gergoud testify at the hearing nor did it provide a statement from her. The employer has not established that the claimant misused company time on January 24, 2017 and violated its policy. The employer has not established that the claimant engaged in a current act of misconduct prior to his discharge. Additionally, the claimant contends he did not understand his prior warnings as he was not provided an interpreter. The employer's witness was not present during the warning meetings and the employer does not have a written policy related to interpreters during disciplinary meetings. Mindful of the ruling in *Crosser*, *id.,* and noting that the claimant presented direct, first-hand testimony while the employer relied upon second-hand reports, the administrative law judge concludes that the claimant's recollection of the events is more credible than that of the employer. The employer has not met the burden of proof to establish that the claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. Accordingly, benefits are allowed.

Even if the employer had established that the claimant violated its policy on January 24, 2017, benefits would still be allowed. 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, detailed, and reasonable notice should be given. As the claimant did not understand the prior warnings due to a language barrier, he was not given fair warning about his conduct. The claimant did not know what he was doing was a violation of the employer's policy and, if he continued, it would lead to his discharge.

DECISION:

The February 23, 2017, reference 01, unemployment insurance decision is reversed. The 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.

_____
Stephanie R. Callahan
Administrative Law Judge

_____
Decision Dated and Mailed

src