IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

BRANDON MELING Claimant **BURKE MARKETING CORPORATION** Employer	**APPEAL 19A-UI-05104-SC-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 06/02/19** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

On June 25, 2019, Brandon Meling (claimant) filed an appeal from the June 21, 2019, reference 01, unemployment insurance decision that denied benefits based upon the determination Burke Marketing Corporation (employer) discharged him for violation of a known company rule. The parties were properly notified about the hearing. A telephone hearing was held on July 24, 2019. The claimant participated personally. The employer participated through HR Manager Shelli Seibert. The Employer's Exhibits 1 through 3 were admitted into the record.

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 Maintenance Technician beginning on June 18, 2018, and was separated from employment on May 29, 2019, when he was discharged. The employer has a lock-out/tag-out (LOTO) policy which states the first violation will usually result in a suspension and written warning. A second violation in a 24-month period will result in immediate discharge. The employer does reserve the right to discharge an employee if the first LOTO violation is severe enough.

On May 23, the employer found a pair of safety glasses in the manufactured product. An investigation was conducted to determine who had dropped the safety glasses. During the investigation, the employer reviewed security footage and determined the claimant was responsible for the safety glasses falling into product. The claimant denied they were his safety glasses.

The employer also observed the claimant engage in two LOTO violations during his shift on May 23. The first involved the dumper which had a swing gate that needed to be welded preventing proper locking of the machine. Swangel directed the claimant to proceed without locking the machine and was present when the claimant engaged in the violation. He was suspended for his involvement in the first LOTO violation. The second incident occurred when the claimant was observed entering the hopper without properly locking the hydraulics. The claimant did not have enough locks and he told Swangel about the situation. Swangel directed

him to proceed and then Swangel stood by the controls to ensure no one operated the hopper while the claimant was inside the machine. The employer assumed Swangel was not involved in the second incident as it did not observe him at the hopper with the claimant. As the claimant had two LOTO violations in one night, the employer made the decision to discharge him rather than suspending him with a warning.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

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 provides, in relevant part:

> 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). 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). 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). 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.

The decision in this case rests, at least in part, upon the credibility of the parties. The employer did not present a witness with direct knowledge of the LOTO violations. No request to continue the hearing was made and no written statement of the individual was offered. As 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. The employer has an interest in keeping its employees safe and it has an interest in having its employees follow the directions of their supervisors. The claimant's unrefuted testimony is that his supervisor directed him to violate the LOTO policy. The claimant was placed in the untenable position of either violating the LOTO policy or being insubordinate to his supervisor. While his decision may not have been the one preferred by the employer, he did not engage in willful or deliberate misconduct as either option would have violated the employer's interests. Additionally, an employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. 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 claimant was not discharged for disqualifying misconduct. Accordingly, benefits are allowed.

DECISION:

The June 21, 2019, 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.

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Stephanie R. Callahan
Administrative Law Judge

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Decision Dated and Mailed

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