IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MITCHELL T LILIENTHAL
Claimant

FAREWAY STORES INC
Employer

APPEAL NO. 08A-UI-07120-LT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 06/29/08 R: 02
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the July 30, 2008, reference 01, decision that allowed benefits. After due notice was issued, a telephone conference hearing was held on August 20, 2008. Claimant participated. Employer participated through Garrett Piklapp, corporate counsel.

ISSUE:

The issue is whether claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant was employed as a full time warehouse worker operating pallet jacks from May 15, 2006 until June 29, 2008 when he was discharged because he had pleaded guilty on December 20, 2007 to use of a controlled substance (marijuana) while off duty in November 2007 and employer was concerned about the potential impact on his use of heavy equipment but did not request or require a drug screen. Employer first found out about the charge and plea when another employee complained when he was fired for a similar issue in mid-June 2008. On June 23 employer suspended him pending investigation until June 26 to provide information to contradict the information that he had pleaded guilty. Background checks are not done regularly and employer relies on employees to self report but has no policy requiring reporting of any criminal charges or their outcome. Claimant did not refute he pleaded guilty but provided employer with information about his successful completion of a treatment program. He did not test positive on drug screens during probation. Employer's outside activity policy addresses the negative impact of such behavior on Fareway's reputation. Tony Johnson, assistant foreman, knew claimant was in treatment even if he did not know about the criminal charge and at least one other coworker was also going through treatment. Other employees arrested for illegal behavior such as operating a motor vehicle while intoxicated (OWI) and theft were allowed to continue working.

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 § 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.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 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. IDJS*, 364 N.W.2d 262 (Iowa 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. IDJS*, 425 N.W.2d 679 (Iowa 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 Department of Job Service*, 351 N.W.2d 806 (Iowa 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, employer incurs potential liability for unemployment insurance benefits related to that separation. The public

record of the criminal proceeding was readily available in public records but employer opted not to regularly review them or require reporting. Given the lack of personnel policy guidance it appears that there is an inconsistent, if not intentionally disparate, application of disciplinary measures towards employees with various criminal charges. While consumption of marijuana is illegal and reflects poorly upon the employer if the association is apparent to the public, so is OWI or theft. Since there was no reporting requirement, employer did not attempt to perform regular background checks, claimant did not hide his court ordered treatment from employer, he was successful in that endeavor, he provided information to employer when requested, no request for a drug screen was made, and there was no apparent negative impact on employer, the November 2007 misconduct does not rise to the level of disqualification for the June 2008 separation. See, *Kleidosty v. EAB*, 482 N.W.2d 416, 418 (Iowa 1992) and *Diggs v. EAB*, 478 N.W.2d 432 (Iowa App. 1991). An employee is entitled to clear and fair notice or warning that the employer has certain expectations about off-duty conduct and this policy was extremely vague. Furthermore, inasmuch as the consequence to claimant was more severe than others received for their criminal offenses, the disparate application of the policy cannot support a disqualification from benefits. Benefits are allowed.

DECISION:

The July 30, 2008, reference 01, decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

dml/pjs