IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

STEPHEN W BAKER Claimant **CASEY'S MARKETING CO** Employer	**APPEAL 14A-UI-12414-LT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 10/26/14** **Claimant: Respondent (1)**

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

STATEMENT OF THE CASE:

The employer filed an appeal from the November 24, 2014, (reference 01) unemployment insurance decision that allowed benefits based upon a discharge from employment. The parties were properly notified about the hearing. A telephone hearing was held on December 22, 2014. Claimant did not respond to the hearing notice instruction and did not participate. Employer responded to the hearing notice instructions but employer witnesses, Area Supervisor Sue Michaelson and Store Manager Jean Yamagata, were not available at the number provided when the hearing was called and did not participate. Alisha Weber of Talx/Equifax participated and waived the opening statement. She offered testimony about the fact-finding participation issue only. The administrative law judge took official notice of the administrative record, including fact-finding documents from November 19, 2014. Both claimant and Michaelson called after Weber's testimony concluded and after notice of the fact-finding documents was made. Employer's Exhibit 1 (fax pages 6, 7, 8 and 11) was received. The CD of the surveillance video was not viewable/readable by the claimant, and was not dispositive of the issue to be decided (was the policy violated rather than was the food/"garbage" consumed) so was not admitted to the record or viewed by the ALJ.

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 part time as a cook from May 7, 2014, and was separated from employment on October 29, 2014, when he was discharged. On October 24 he worked with new cook Zach and oven cook Rick who instructed him to make a taco pizza but did not give him a written order ticket. He later found one ticket with two pizza orders written on it. Rick left before a customer picked up one of the pizzas. No one picked up the taco pizza. The taco pizza sat on the oven for a half hour when claimant and Zach talked about putting it in the warmer to try to sell it. Cashier Mindy said they could not put it in the warmer because the lettuce and tomato would make it inedible and told them it was garbage and to throw it away. Claimant asked generally to those present if anyone wanted to "eat a piece of this garbage?" Claimant and Zach and

another male cashier Cody each ate a piece and threw the rest of the pizza away. None of them paid for it. They did not see Mindy eat any of it.

Yamagata who was watching video footage for an unrelated incident, noticed the incident. The employer's policy requires employees pay for food before consuming it, specifically: "This includes payment for products pulled from the food warmers, staled donuts, or damaged and outdate items." (Employer's Exhibit 1, fax p. 8) The policy rationale is to keep employees from making too much warmer food knowing it would not sell in time and then eat it, which creates a loss for the employer. Zach was not discharged but was warned because he was a new employee training under claimant. Cody was discharged for being in the kitchen under 18 after having been warned but not for consuming food without paying for it. He would have been discharged for eating pizza without paying for it had he not had the other warning. Rick and Mindy were not disciplined. The employer had not previously warned claimant his job was in jeopardy for any similar reasons.

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.

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).

Iowa Admin. Code r. 871-24.32(4) provides:

> (4) Report required. The claimant's statement and the employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

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 conduct for which claimant was discharged was merely an isolated incident of poor judgment and misunderstanding that the policy covered food intended to be thrown away. While the employer's policy calls for discipline up to and including discharge, 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's simple accrual of a certain number of warnings counting towards discharge does not establish repeated negligence or deliberation and is not dispositive of the issue of misconduct for the purpose of determining eligibility for unemployment insurance benefits. Furthermore, since the consequence was more severe than other employees received for similar conduct, the disparate application of the policy cannot support a disqualification from benefits.

DECISION:

The November 24, 2014, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

dml/css