IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MARK D WILLIAMS
Claimant

KARL CHEVROLET
Employer

APPEAL NO. 07A-UI-11391-LT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 11/11/07 R: 02
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the December 3, 2007, reference 01, decision that denied benefits. After due notice was issued, a telephone conference hearing was held on December 28, 2007. Claimant participated. Employer participated through Mike Moots and Tammy Six. Employer's Exhibit 1 was received.

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 welcome center greeter from May 15, 2006 until November 12, 2007 when he was discharged. Patricia Walker, coworker, reported to Six, claimant's supervisor, on November 9 that claimant said to her about another employee, Marilyn Raleigh, that "she had to take care of herself (masturbate) before reporting to work" and he brought fabric cleaner so he could clean the seats. In fact, Walker is the one that told him Raleigh asked her if she had ever masturbated in the booths before and there were stains of some sort on the booths so claimant brought in fabric cleaner. Six did not confront claimant about the report but interviewed Raleigh about a prior incident on an unknown date when there was a dead animal smell coming from the heater in the welcome booth. She alleged claimant closed the windows, turned on the air and asked Raleigh to come to the booth causing her to get physically sick from the smell. Claimant actually ran the air to get rid of the smell and did not close windows. He did not call Raleigh to the booth but they traded booths every two hours and it was her turn to switch. Six did not confront claimant about this allegation either. Walker also reported on November 9 that claimant told her that he asked one of the porters if Raleigh was giving him blow jobs for rides to her booth because of her injury. Claimant admits he did joke with the porter one time about whether he was getting anything out of Raleigh for giving her rides but said nothing sexually specific and Walker was not present for the conversation. On November 9 Walker also reported that shortly before August 1 claimant told her that Raleigh had better be gone before he gets back and he was trying to ruin Raleigh's reputation. Claimant

said nothing about ruining Raleigh's reputation but he and Walker and Six talked amongst themselves about how it would be nice if Raleigh was not there since she always got away with things; for example, claimant had complained to Six twice about Raleigh reporting to work drunk and making a scene in June and throwing a newspaper in a quick lube employee's face in front of a customer without consequence to Raleigh in spite of a policy forbidding reporting to work under the influence of alcohol. Walker had no explanation about why she withheld these allegations from employer for so long. Six recalled that in October claimant said that the general manager needed to get a prostitute to make him feel better after he made claimant stand on the cement for his entire shift during bad weather after he returned from major back surgery (workers' compensation issue unrelated to this employer). She did not confront him or discipline him for the remark. Employer had not warned him his job was in jeopardy for any reason. Employer did not provide a copy of the "zero tolerance" policy or call Walker, Raleigh or the porter as witnesses.

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). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Employment Appeal Board*, 423 N.W.2d 211 (Iowa App. 1988).

When the record is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. *Schmitz v. IDHS*, 461 N.W.2d 603, 607 (Iowa 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.

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. Since Six thought his comment in October about getting the general manager a prostitute was inappropriate (and it was) but smiled and said nothing to claimant, she, as a supervisor, acquiesced in this type of banter. Had employer interviewed or confronted claimant prior to deciding to terminate him and failing to give specific reasons for the separation when asked, it might have found out that the reporting hearsay witnesses also played similar parts in the incidents. Since employer failed to present Walker, Raleigh and the porter as witnesses, and claimant had reasonable responses to their allegations once he actually heard the details of the reports, his testimony is credible. While claimant's admitted statements were inappropriate and not funny and would normally constitute misconduct, employer allowed this type of behavior from other employees (Six, Walker and Raleigh) without consequence to them and did not warn claimant that further conduct of a similar nature (after Six's October observation) could result in his discharge. A disparate application of a so-called "zero tolerance" policy (a copy of which was not provided for the hearing) cannot support a disqualification from benefits. Thus, employer 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. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Benefits are allowed.

DECISION:

The December 3, 2007, reference 01, decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise

eligible. The benefits withheld effective the week ending November 17, 2007 shall be paid to claimant forthwith.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

dml/css