IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

BLAKE P HARPER Claimant **VAN DIEST SUPPLY CO** Employer	**APPEAL 16A-UI-10237-DL-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 08/21/16** **Claimant: Respondent (1)**

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

STATEMENT OF THE CASE:

The employer filed an appeal from the September 13, 2016, (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 October 4, 2016. Claimant participated. Employer participated through personnel manager Carolyn Cross, plant operations director Kevin Spencer and company vice president Lee Trask. The employer was represented by Espnola Cartmill, Attorney at Law. The administrative law judge took official notice of the administrative record, including fact-finding documents.

ISSUES:

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 as a full-time production operator through August 25, 2016. Claimant underwent training for confined space entry and lock-out/tag-out in the classroom but had not demonstrated competency outside the classroom and was not signed off as an entrant or attendant for confined space entry or permit completion. On August 19, 2016, there was no supervisor present for the clean-out process after supervisor Scott Hamilton went to another part of the plant and signed out the process to Dakota Feickert. Confined space permit team leader Ryan Tuvell arrived only long enough to test the oxygen level but did not perform the electrical lock-out/tag-out procedure and told subordinate employees in the area they were "good to go." Claimant and other employees in the area believed this to mean Tuvell had also locked out the vessel electrical system permitting entry and broke the plane of the vessel by reaching inside to remove cartridges as he had done before without comment from supervisors Tuvell, Hamilton or Autin Hildebrand. When another employee Maurice entered the vessel the explosion suppression system control and canons were not locked out, and the suppression system discharged and injured his upper thighs.

Tuvell and all involved employees were discharged. During the investigation the employer discovered that on August 18 confined space entries were also made without suppression lock

out. Confined space entry permit to fill out and attach to what is locked out. The employee must certify the lock out is complete with a date and time stamp of all involved individuals. The employer had not previously warned claimant his job was in jeopardy for any similar reasons. He was discharged rather than disciplined because he was trained but not authorized to enter a vessel and had not conducted the lock-out/tag-out procedure. Claimant had entered multiple vessels before then and did not know he was not qualified to enter. The employer had not made clear to him that the classroom training alone was insufficient to allow entry. There was a verbal mention during classroom training but no written outline, procedure or checklist.

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 section 96.5(2)a provides:

> **Causes for disqualification.**
> 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. *Reigelsberger v. Emp't Appeal Bd.*, 500 N.W.2d 64, 66 (Iowa 1993); *accord Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000).

Misconduct "must be substantial" to justify the denial of unemployment benefits. *Lee*, 616 N.W.2d at 665 (citation omitted). "Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of benefits." *Id.* (citation omitted). …the definition of misconduct requires more than a "disregard" it requires a "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." Iowa Admin. Code r. 871–24.32(1)(a) (emphasis added).

Whether an employee violated an employer's policies is a different issue from whether the employee is disqualified for misconduct for purposes of unemployment insurance benefits. *See Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000) ("Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of benefits." (Quoting *Reigelsberger*, 500 N.W.2d at 66.)).

The conduct for which claimant was discharged was merely an isolated incident of miscommunication from the employer about being authorized to proceed according to the training process and the lock-out/tag-out procedure being completed. Furthermore, 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.

DECISION:

The September 13, 2016, (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/rvs