IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

AZUSENA MORA MONTIEL Claimant **IA VETERANS HOME MARSHALLTOWN** Employer	**APPEAL 21A-UI-04775-DZ-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 12/20/20** **Claimant: Respondent (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quit
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer Participation in Fact-Finding Interview

STATEMENT OF THE CASE:

IA Veterans Home – Marshalltown, the employer/appellant, filed an appeal from the January 28, 2021, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified of the hearing. A telephone hearing was held on April 13, 2021. The employer participated through Melissa Sienknecht, human resources bureau chief and Barbara Buss, hearing representative. Ms. Mora Montiel participated and testified. Tara Rathjen, a family member of Ms. Mora Montiel's, observed the hearing. Official notice was taken of the administrative record. Employer's Exhibit 1 was admitted into evidence.

ISSUE:

Was Ms. Mora Montiel discharged for disqualifying job-related misconduct?
Was Ms. Mora Montiel overpaid benefits?
If so, should she repay the benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Ms. Mora Montiel began working for the employer on December 4, 2019. She worked as a temporary employee until May 14, 2020. On May 15, 2020, Ms. Mora Montiel began working for the employer as a full-time resident treatment worker. The employer terminated her employment on August 20, 2020.

The employer's COVID-19 Personal Protective Equipment policy provides that all employees must wear a face mask at all time when they are in the facility with one exception. Employees are allowed to remove their face mask when they are on break. However, employees must maintain a distance of six feet from all other employees when they remove their face mask. Ms. Mora Montiel testified that she knew about the policy.

On June 1, 2020, Ms. Mora Montiel did not have her mask on properly. Ms. Mora Montiel was issued a verbal warning. Ms. Mora Montiel's supervisor told her that if she violated the policy again she would be issued a final warning and that if she violated the policy a third time she would be investigated and her employment could be terminated. Ms. Sienknecht testified that she did not know why Ms. Mora Montiel's supervisor told her this since the employer had decided to terminate the employment of any full-time, probationary employee who violated the policy after being issued a verbal warning.

On August 20, 2020, Ms. Mora Montiel was in the break room getting a drink of water. She removed her mask to drink. Ms. Mora Montiel saw another employee in the break room and engaged in small talk with that employee while her mask was not on and she was less than six feet away from the other person. Ms. Mora Montiel's supervisor saw the interaction. Ms. Mora Montiel's employment was terminated that day for violating the employer's COVID-19 policy.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes Ms. Mora Montiel was discharged from employment for no disqualifying reason.

Iowa Code section 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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

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). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. 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, it incurs potential liability for unemployment insurance benefits related to that separation. 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.

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 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.

In this case, the employer did warn Ms. Mora Montiel about wearing her mask and did warn her that she could be disciplined if she violated the policy again. However, the employer did not warn Ms. Mora Montiel that the very next violation would result in termination. Furthermore, ms. Mora Montiel's conduct on August 20 was merely an incident of poor judgment. The employer has not met the burden of proof to establish that Ms. Mora Montiel acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. Benefits are allowed.

Because Ms. Mora Montiel is eligible for benefits, the issues of repayment and chargeability are moot.

DECISION:

The January 28, 2021, (reference 01) unemployment insurance decision is reversed. Ms. Mora Montiel was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

Daniel Zeno
Administrative Law Judge
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April 19, 2021
Decision Dated and Mailed

dz/kmj