IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

DESIREE M PEACHEE Claimant **TYSON FRESH MEATS INC** Employer	**APPEAL 15A-UI-12930-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 10/25/15** **Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the November 17, 2015 (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on December 10, 2015. Claimant did not participate. Employer participated through human resources clerk Kristi Fox.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the Agency be waived?

Can charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a production from December 15, 2014 and was separated from employment on October 21, 2015; when she was discharged.

From October 8, 2015 through October 20, 2015, claimant called in sick everyday she was scheduled to work. The employer did not have any leave of absence on file for claimant for these absences. The employer also did not have a doctor's note from claimant regarding these absences. The employer allows employees to use a leave of absence when they are sick five days or more. A leave of absence prevents an employee from accruing any points for being absent. To obtain a leave of absence, the employee must give the employer a doctor's note.

On October 14, 2015, the employer sent a 72-hour letter (hereinafter "letter") to claimant. The letter informed claimant she had to respond by October 19, 2015 and to provide documentation to the employer for her absences. Claimant did not respond to the 72-hour

letter. The letter states that if an employee does not respond to the letter, it is grounds for termination. Claimant told the employer she did not receive the letter. The letter was sent to claimant's last-known address that the employer had but she told the employer this was no longer her address. The employer sent the letter certified to claimant. Ms. Fox was not sure if the letter was successfully delivered to claimant. When claimant would call in to report her absences due to illness, the employer did not mention the letter to claimant.

Ms. Fox testified the employer did not discharged claimant for absenteeism, she was discharged for failing to respond/report to the letter. When employees go through orientation the letter is explained. When employees receive their first leave of absence, the letter is explained in more detail. Claimant had five leave of absences prior to this incident. Each time, claimant would do the same thing; she would call out for multiple days and then at the end of her absences, she would bring in her paperwork for a leave of absence. The employer never sent claimant a 72-hour letter on her five prior occasions. The employer never sent a letter because it was never reported to human resources by her supervisor. Ms. Fox is not aware if claimant was made aware of the 72-hour letter was going to be enforced on this occasion. Claimant had no prior warnings for not responding to a 72-hour letter.

The employer participated in the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

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:
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> 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 and (4) provides:

> Discharge for misconduct.
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> (1) Definition.
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> 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.
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> 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).
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> (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.

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). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. 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." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.,* 391 N.W.2d 731 (Iowa Ct. App. 1986). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988). An employer is entitled to expect its employees to report to work as scheduled or to be notified when and why the employee is unable to report to work.

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.

Claimant properly reported her absences from October 8, 2015 through October 20, 2015 were due to illness. The employer discovered that claimant did not have a leave of absence on file and sent her a letter via certified mail. The letter requested documentation from a doctor regarding her absences by October 19, 2015. When claimant spoke to the employer she stated she never received the letter because she was no longer at the address the employer sent it too. The employer failed to provide any evidence the letter was actually delivered to claimant. The employer also did not mention to claimant when she would call in to report her absences that she needed to respond to the letter. Prior to this incident, claimant had been on five leave

of absences. Each time, claimant would do the same thing; she would call out for multiple days and then at the end of her absences, she would bring in her paperwork for a leave of absence. The employer never sent claimant a 72-hour letter during these five leave of absences. The employer's argument that it did not send out a letter because claimant's supervisor never notified human resources is not persuasive. It is also not persuasive that the letter stated failure to respond is grounds for termination. Claimant never received a letter the previous five times she had multiple absences with no leave of absence approved until she returned to work. Even though the letter may have been explained to her for each leave of absence and during orientation, the employer failed to follow its procedure and send her a letter on the five prior occasions. Furthermore, no evidence was presented claimant actually received the letter regarding her October 2015 absences. The employer never put claimant on notice it would start utilizing the letter for her absences. The employer also never mentioned to claimant when she would call in to report her absences that she needed to respond to the letter. The employer failed to satisfy its burden of proof in establishing job-related misconduct for claimant failing to respond to the letter.

Claimant had no prior disciplinary warnings for failing to respond to a letter. The conduct for which claimant was discharged was merely an isolated incident of poor judgment and 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. Furthermore, claimant committed the same conduct on five prior occasions and the employer never sent her a letter. 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. Benefits are allowed.

Because, for the reasons stated above, claimant is eligible for benefits, provided she is otherwise eligible, the issue of whether claimant was overpaid benefits is moot.

DECISION:

The November 17, 2015 (reference 01) unemployment insurance decision is affirmed. Claimant 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.

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Jeremy Peterson
Administrative Law Judge

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Decision Dated and Mailed

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