IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

DONNA J FREMONT Claimant **ABM INDUSTRY GROUPS LLC** Employer	**APPEAL 17A-UI-08684-DL-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 07/23/17** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the August 18, 2017, (reference 02) unemployment insurance decision that denied benefits based upon a discharge from employment. The parties were properly notified about the hearing. A telephone hearing was held on September 12, 2017. Claimant participated. Employer participated through senior human resources business partner Christine Wetzler, area manager Auna Goodman and district manager Doug Hussa. Pamela Drake of Employers Edge represented the employer. Employer's Exhibit 1 (1 – 13) was received. Claimant's Exhibit A (1-15, 17, 21, 30) was received.

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 as a full-time, first shift general cleaner building lead worker through July 24, 2017. Her last day of work was July 19, 2017, when she was suspended pending investigation of client complaints. A client building manager, who did not participate at hearing, alleged on July 18 that claimant and another employee were "hiding out" in a restricted area on the fourth floor during work hours, that she would lock down elevators to clean on fourth floor, power walk on her afternoon break with a security guard, told the building manager "that's not my job" when asked to clean windows, did not vacuum under a desk where the client staged a pen, did not empty a particular shredder, and assigned some duties to second shift without authority.

Claimant told the client she was walking during her breaks in the empty space on fourth floor. She was late returning from break a couple of times because of disussing personal issues with the person who walked with her. She did not take chairs to the area and was not told the area was off limits. She did not tell the client that window cleaning was not her job, but sometimes asked questions about unclear instructions. Claimant vacuumed under that desk every Friday, did not see or hit it. The vacuum does not have a light on it. She only emptied shredders upon specific direction because of the confidential materials. The client had asked her to empty the shredders on the IBM floor but not her personal shredder. After the client requested the night shift handle auto-scrubbing claimant took some vacuuming duties from second shift. She

notified Hussa about the switch. The client was not happy with that arrangement so it stopped in September 2016.

The employer had not previously warned claimant in writing that her job was in jeopardy for any reason until she was suspended pending investigation on July 19, 2017. There were meetings for redirection but not discipline. The employer did not document these communications. She does recall Hussa speaking to her about following the chain of command in June 2017.

REASONING AND CONCLUSIONS OF LAW:

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

When the record is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. *Schmitz v. Iowa Dep't Human Servs.*, 461 N.W.2d 603, 607 (Iowa Ct. 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.

The decision in this case rests, at least in part, upon the credibility of the parties. The employer did not present a witness with direct knowledge of the building manager's complaints. Noting that the claimant presented direct, first-hand testimony while the employer relied upon second-hand reports, the administrative law judge concludes that the claimant's recollection of the events is more credible than that of the employer.

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 employer has not established the veracity of the building manager's complaints. Further, inasmuch as employer had not previously warned claimant about the issues 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. Accordingly, benefits are allowed.

DECISION:

The August 18, 2017, (reference 02) unemployment insurance decision is reversed. 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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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

dml/rvs