

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

MITCHELL L PORRETTO
Claimant

ABRH LLC
Employer

APPEAL 19A-UI-03878-NM-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 04/14/19
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(1)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:

On May 13, 2019, the employer filed an appeal from the May 1, 2019, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on June 4, 2019. Claimant participated and testified. Employer participated through Hearing Representative Thomas Kuiper and General Manager Emily Burger.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid benefits?
Should benefits be repaid by claimant due to the employer's participation in the fact finding?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for employer on October 17, 2018. Claimant last worked as a full-time cook, approximately 35 hours per week. Claimant was separated from employment on April 12, 2019, when he was discharged.

On April 12, 2019, the kitchen was running behind, as a lot of orders had come in at once and there was a new employee being trained. The operations director, Mike Halepis, stepped into help and indicated that the radio needed to be turned off. The radio was not claimant's so he continued working. Halepis then turned the radio off himself and said the kitchen employees were no longer allowed to listen to it while on the line. Claimant protested, saying that was not fair. Halepis responded that listening to the radio would not be a problem if the kitchen employees were doing their job. This comment upset claimant, as he felt he was a good and hard worker. Claimant told Halepis he was doing his job. Claimant admitted he was frustrated and his voice was raised. Halepis responded by discharging claimant from employment for

insubordination. Claimant did not realize, up until that point, that the conversation could lead to his discharge and at no point during the conversation did Halepis warn him of this was if he did not stop the conversation and get back to work. Claimant had no prior warning or disciplinary action.

The claimant filed a new claim for unemployment insurance benefits with an effective date of April 14, 2019. The claimant filed for and received a total of \$1,464.00 in unemployment insurance benefits for the weeks between April 14 and May 25, 2019. Both the employer and the claimant participated in a fact finding interview regarding the separation on April 30, 2019. The fact finder determined claimant qualified for benefits.

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:

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.

Here, the claimant was discharged for alleged insubordination. However, there was no evidence provided to indicate claimant refused to follow a directive he was given. Claimant admitted, the situation was frustrating and he raised his voice, but there is no indication that he was otherwise inappropriate or used foul or threatening language. Claimant was not told at any point that if he did not do or stop doing something he would be discharged. 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. The employer has not met the burden of proof to establish that claimant was insubordinate or otherwise acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. Benefits are allowed. As such, the issues of overpayment and participation are moot.

DECISION:

The May 1, 2019, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid. The issues of overpayment and participation are moot.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

nm/rvs