IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

SALLIE J MALY Claimant **CASEY'S MARKETING COMPANY** Employer	**APPEAL 15A-UI-11128-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 09/06/15** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the September 28, 2015, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on October 19, 2015. Claimant participated. Claimant also participated through her attorney Jordan Glaser. Employer participated through area supervisor, Stacie Hansen. Employer Exhibit One was admitted into evidence with no objection.

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 full time as a store manager from September 13, 1993, and was separated from employment on August 28, 2015, when she was discharged.

Claimant was discharged for failing to report an employee that she managed had worked while not clocked in. The employee in question was paid whenever the employee did clock in. the employer did repay the employee for the hours that the employee worked while not clocked in. There was not testimony as to the amount of hours that the employee was repaid for. There was no testimony as to the last time the employee worked while not clocked in. Through video surveillance, the employer was able to go back three months from August 28, 2015 to determine when the employee was working while not clocked in. Ms. Hansen did not know of any reason why the employee did not clock in. The employee would come in 30 minutes before the start of the employee's shift and start working. Claimant would rarely be working at or before the employee's shift would start. The employee would work approximately 30 minutes before clocking in. Employees are not to come into work early without manager's approval. Claimant would have had to give the employee approval to start early.

During the past winter, claimant did have one conversation with the employee about not working off the clock. During this incident, claimant had been working when the employee came in and started to work without clocking in. Claimant immediately told the employee to stop working and

clock in. After this incident, claimant spot checked for the next week or so to determine if the employee was clocking in on time. Claimant also checked with co-workers that worked with the employee to make sure the employee was clocking in before starting to work. Based on her review, claimant believed the employee was clocking in on time after their conversation.

On August 18, 2015, claimant received a complaint from the employee about some missing money. On August 24, 2015, claimant was watching surveillance video regarding the employee's complaint when it caught her eye that the employee was working without having clocked in. Claimant reviewed the company policy and started working on a corrective action for the employee. Claimant knew that Ms. Hansen was coming to her location on August 28, 2015, so she waited for Ms. Hansen to ask for help before issuing the employee the corrective action. On August 28, 2015, claimant spoke with Ms. Hansen about the situation with the employee and the corrective action claimant was going to give the employee. Ms. Hansen then called human resources and her direct supervisor. Ms. Hansen and claimant watched the video to determine when the employee started each day and when she clocked in. After reviewing video, claimant was discharged. The employee was given a written warning for failure to follow the clock-in procedure.

Claimant had no prior warnings for similar conduct. Ms. Hansen testified this happened to another store manager, but that manager reported the incident to Ms. Hansen immediately. Ms. Hansen testified that the employee working prior to clocking in could have been caught by claimant's supervisor. Ms. Hansen had watched video surveillance from claimant's store prior to August 28, 2015, but she had not identified the issue.

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.

It is the duty of an administrative law judge and the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge, as the finder of fact, may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other evidence you believe; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. This administrative law judge reviewed the exhibit submitted. This administrative law judge finds claimant's version of events to be more credible than the employer's recollection of those events.

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 provides:

> Discharge for misconduct.
>
> (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.

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).

Iowa Admin. Code r. 871-24.32(4) provides:

> (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).

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.

This past winter, claimant had warned the employee in question to clock in prior to performing any work for the employer. Claimant reviewed video and spoke with co-workers after giving this directive to the employee to make sure the employee was clocking in correctly. After a week or so of monitoring this employee, claimant determined that the employee was following directions. August 24, 2015, was the next time claimant became aware that the employee would work prior to clocking in. Claimant then began the paperwork to give the employee a corrective action; however, claimant wanted to make sure she was proceeding correctly, so she elected to bring it to Ms. Hansen's attention when she came to her location on August 28, 2015, less than a week after claimant discovered what the employee had been doing. Upon bringing the matter to Ms. Hansen's attention, claimant was then discharged for allowing the employee to work without clocking in. The employer's argument that claimant's failure to report the incident was disqualifying misconduct is not persuasive. Claimant had the authority to issue disciplinary actions. Employer Exhibit One. During the past winter, claimant made the decision to only verbally correct the employee's behavior and then she closely monitored the employee for approximately a week. After that week, claimant was unaware of any issues until August 24, 2015. It is also noted, that claimant's supervisors did not discover the employee was not clocking in until claimant notified Ms. Hansen, even though they had access to the surveillance video and Ms. Hansen had viewed the video prior to August 28, 2015. Once claimant discovered that the employee had stopped following her directions about clocking in before working, she started preparing a corrective action. Instead of just issuing the corrective action, claimant wanted to make sure that she was following the employer's proper procedure and waited for Ms. Hansen to come to her location on August 28, 2015. Claimant waited less than a week to inform her supervisor. Claimant was then discharged after bringing the matter to the employer's attention. Claimant had no prior warnings for failing to report an employee that worked while not clocked in.

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. 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.

DECISION:

The September 28, 2015, (reference 01) 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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Jeremy Peterson
Administrative Law Judge

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Decision Dated and Mailed

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