IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

LIZABETH A BOGARD Claimant **MASON CITY COMMUNITY SCHOOL DIST** Employer	**APPEAL 15A-UI-02897-KC-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 02/08/15** **Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant filed an appeal from the February 24, 2015, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on August 5, 2015. The claimant participated. The employer's representative Jodie Anderson, Human Resources Director, registered for the call but elected to withdraw her participation when called for the hearing. Claimant's Exhibit A was received into evidence.

ISSUE:

Was the claimant discharged for disqualifying, work-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed part-time as a food service worker beginning in August 2003. In 2008, she became the full-time head cook. She was separated from employment on February 25, 2015, when her employment was terminated.

The claimant was called to a meeting on January 30, 2015, with the school superintendent, her supervisor, the school board secretary; and a union representative. The school staff told her that they intended to terminate her employment based on verbal and written warnings from: April 2012, June 2013; and April 2014. School staff advised the claimant that she was going to be discharged for the following reasons: she sent the wrong quantity of food to schools in January 2015; she was late to work on one occasion; she did not show adequate respect to her supervisor; her actions expressed willful noncompliance; and she did not adequately remove food from dishes. She was not given specific dates or incidents of the events for which the employer intended to terminate her employment. The union representative advised the employer that it had not followed the full procedure for termination based on progressive discipline and it could not rely on the warnings it outlined for termination. Consequently, the employer suspended the claimant pending further action. A second meeting was scheduled

four days later. At that meeting, the employer informed the claimant that her employment was terminated.

The claimant refuted the employer's bases for termination. First, she and other staff prepared food for two schools. When the actual head count was transmitted, she realized that the amount of food was incorrect. She and two other cooks delivered the food and all three cooks checked the quantity. This all occurred before the children were served. Second, the claimant does not know when she was purportedly late to work. Third, the employer did not identify an incident on which to base an assertion that the claimant did not respect her manager. Fourth, the claimant hand-washed dishes because the manager did not want staff to use the dishwasher. She did not know what the manager was concerned about unless it was baked on oil in the corners of cookie sheets. Fifth, the manager identified no "actions which expressed willful non-compliance" in the meeting and the claimant had received no disciplinary action regarding such an allegation.

The basis of the warnings the claimant had received were not the reasons for which she was told her employment would be terminated. The employer reclassified some verbal warnings as written warnings to comply with the progressive discipline standards of the school district.

REASONING AND CONCLUSIONS OF LAW:

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

The Iowa Supreme Court has ruled that if a party has the power to produce more explicit and direct evidence than it chooses to present, the administrative law judge may infer that evidence not presented would reveal deficiencies in the party's case. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976). Mindful of the ruling in *Crosser*, *id.,* and noting that the claimant presented direct, first-hand testimony while the employer did not participate in the hearing, the administrative law judge concludes that the claimant's recollection of the events is more credible than that of the employer.

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:
>
> 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. *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.

Iowa Admin. Code r. 871-24.32(9) provides:

> (9) Suspension or disciplinary layoff. Whenever a claim is filed and the reason for the claimant's unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as discharged, and the issue of misconduct must be resolved. Alleged misconduct or dishonesty without corroboration is not sufficient to result in disqualification.

Iowa Admin. Code r. 871-24.32(8) provides:

> (8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The acts for which the claimant was discharged were not identified by date. The bases of the warnings she received were not the same as the bases on which the employer relied for termination. The employer did not identify a final act.

In reviewing past acts as influencing a current act of misconduct, the ALJ should look at the course of conduct in general, not whether each such past act would constitute disqualifying job misconduct in and of itself. *Attwood v. Iowa Dep't of Job Serv.*, No. _-__, (Iowa Ct. App. filed __, 1986).

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.

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 its burden of proof to establish a current or final act of misconduct, and, without such, the history of other incidents need not be examined. Accordingly, benefits are allowed.

DECISION:

The February 24, 2015, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. The benefits claimed and withheld shall be paid, provided she is otherwise eligible.

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Kristin A. Collinson
Administrative Law Judge

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Decision Dated and Mailed

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