IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

68-0157 (9-06) - 3091078 - EI

KELLIE MONTOUR
Claimant

AEROTEK INC
Employer

APPEAL NO. 18A-UI-08208-S1-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 06/24/18
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

Aerotek (employer) appealed a representative's July 23, 2018, decision (reference 02) that concluded Kellie Montour (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for August 23, 2018. The claimant participated personally. The employer participated by Stefanie Riesenberg, Account Manager, and Andrea Rohde, On Premise Manager. Exhibit D-1 was received into evidence. The employer offered and Exhibit 1 was received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on August 21, 2017, as a full-time recruiter. She signed for receipt of the employer's Code of Conduct and Ethics before she was hired on August 3, 2017. Once the claimant was hired, the employer did not print a copy of the document for her and she did not access it. The document states the company is committed to never making false verbal or written statements. The document does not indicate the consequences for making false verbal or written statements.

The claimant was often scheduled to take contractors to breakfast. On June 14, 2018, the claimant was dizzy, nauseous, and had diarrhea. She knew the contractor would not be going to breakfast. She did not tell the employer about the situation. Instead, she sent a text to the account manager that said, "Just got done with breakfast. I don't feel well so I'm going home to poop really quick cuz it's right by my place. I'll be in in like 15 mins, just a heads up!" The claimant arrived at work seventy-five minutes after the time she should have been at work had she not taken a contractor to breakfast.

On June 18, 2018, the employer asked the claimant for a receipt for a breakfast. The claimant responded to the employer's email by saying the receipt was with the receipt for breakfast on June 14, 2018. The claimant realized there would be a problem because there was no

breakfast receipt from June 14, 2018. She spoke with a co-worker/friend. The co-worker/friend told the claimant she should tell the account manager the truth. The co-worker/friend said that she lied about taking a contractor to breakfast on June 14, 2018, told the account manager, did not receive any warnings, and she felt better. The claimant was reluctant. She was busy that day and the next but said she would. That day she also heard about another co-worker who lied about taking a contractor to breakfast that morning.

On June 20, 2018, the claimant told the account manager that she did not take the contractor to breakfast on June 14, 2018. She apologized and said she felt terrible. The account manager sent her home for the day. On June 21, 2018, the co-worker received a written warning for lying to the employer about taking a contractor to breakfast.

On June 21, 2018, the director and the account manager met with the claimant. The director said the account manager did not want the claimant on her team. Even though the director would have kept the claimant at work, there was nowhere else to put her. The director terminated the claimant's employment.

The claimant filed for unemployment insurance benefits with an effective date of June 24, 2018. The employer provided the name and number of Stephanie Riesenberg as the person who would participate in the fact-finding interview at 11:40 a.m. on July 20, 2018. The fact finder called Ms. Riesenberg at 11:46 a.m. on July 20, 2018, but she was not available. The fact finder left a voice message with the fact finder's name, number, and the employer's appeal rights. The employer did not respond to the message until after the time for participation in the fact finding had ended. Ms. Riesenburg asserts that she did not participate because her assistant put the interview on her calendar incorrectly. The time was listed on her calendar on July 20, 2018, from 11:20 a.m. to 11:50 a.m. She left her desk at 11:40 a.m. on July 20, 2018, when the fact finder did not call. The employer provided some documents for the fact finding interview. The employer did not submit the specific rule or policy that the claimant violated which caused the separation.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

Iowa Code section 96.5(2)a provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 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 disqualification shall continue 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).

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). An employer may discharge an employee for any number of reasons or no reason at all, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, the employer incurs potential liability for unemployment insurance benefits related to that separation. Inasmuch as the employer had not previously warned the claimant about any of the issues leading to the separation, it has not met the burden of proof to establish the claimant acted deliberately or negligently in violation of company policy, procedure, or prior warning. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given.

In this case, the claimant would not have known that her conduct would have warranted discharge because other employees engaged in the same behavior without termination. There was disparate treatment among employees and the employer selected the claimant for discharge. The employer did not provide sufficient evidence of job-related misconduct. It did not meet its burden of proof to show misconduct. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The representative's July 23, 2018, decision (reference 02) is affirmed. The employer has not met its burden of proof to establish job-related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/rvs