IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

PAMELA LANKEN Claimant **KWIK TRIP INC** Employer	**APPEAL 21A-UI-08410-SN-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 01/31/21** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the March 16, 2021, (reference 01) unemployment insurance decision that denied benefits based upon the conclusion she was discharged based on the conclusion she was dishonest in connection with her work. The parties were properly notified of the hearing. A telephone hearing was held on May 11, 2021. The claimant participated. Chantel Gordan provided testimony in support of the claimant. The employer participated through Store Leader Sabrina Wohlford. Exhibits 1, 2, 3, 4, 5, and 6 were admitted into the record.

ISSUE:

Whether the claimant's separation from employment disqualifies her from benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

The claimant, Pamela Lanken, was employed for the employer, Kwik Trip Inc., full-time as a guest service from September 6, 2019, until this employment ended on January 27, 2021, when she was terminated. The claimant's immediate supervisor was Sabrina Wohlford. The claimant received on-the-job training from Food Service Leader Erin Coleman.

The employer has a food service sanitation policy. (Exhibit 6) Under a section labeled store sanitation / food safety, is the pertinent paragraph, "Soup temperature log must be maintained. Logs containing three consecutive missed temperatures in a day or indicating a pattern of missed temperatures are unacceptable." Under a section labeled important notes, is the pertinent information, "Dishonesty in any form or degree is not acceptable conduct. For example, co-workers choosing to falsify documentation is unacceptable. This behavior would be considered a violation of out Code of Conduct and Core values and would not be subject to the stepped discipline standard outlined in this policy." The claimant received a certificate after she completed her training and received a copy of the policy manual. The employer provided a copy

of the certificate the claimant received. (Exhibit 4) The employer provided a copy of the digital record when she was trained on various policies. (Exhibit 5)

During most of the claimant's tenure, soups were not something that came up due to the employer's response to the Covid19 pandemic closing this offering. About a month and a half after bringing these services back, Ms. Coleman instructed the claimant that if the restaurant was busy, then she could shut the alarm off and return to take soup temperatures later.

On January 14, 2021, the claimant turned off the alarm which signaled the time to take soup temperatures. Ms. Wohlford was watching that video because she became aware that Ms. Coleman had been falsifying soup temperatures on that date.

On January 24, 2021, the claimant was suspended pending the results of the investigation.

On January 27, 2021, Ms. Wohlford terminated the claimant during an in-person meeting. The termination notice states the claimant was viewed entering false temperatures into the i-Pad, which records soup temperatures. It also notes the claimant had not been honest and forthright during the investigation. The employer provided a copy of the termination notice issued to her on that day. (Exhibit 3)

The claimant had not been warned regarding similar misconduct in the past.

Ms. Coleman engaged in similar behavior, but Ms. Wohlford was not able to substantiate her misconduct. However, Ms. Wohlford terminated her employment under another policy.

Chris Jensen engaged in similar behavior, but Ms. Wohlford was not able to substantiate his misconduct. However, Ms. Wohlford terminated his employment under another policy.

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.

It is the duty of the administrative law judge as 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 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. *Id.*. 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 believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id*.

After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using his own common sense and experience, the administrative law judge finds the claimant's allegation credible that she merely turned off the timer as instructed by Ms. Coleman.

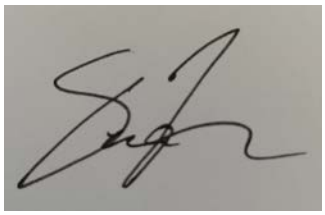
The employer contends it did not have to warn the claimant because she falsified documents. This may be immediately disqualifying under the employer's policy. Theft from an employer is

generally disqualifying misconduct. *Ringland Johnson, Inc. v. Hunecke*, 585 N.W.2d 269, 272 (Iowa 1998). In *Ringland*, the Court found a single attempted theft to be misconduct as a matter of law. The employer is not accusing the claimant of theft in this case, as a result, it must warn her of the standard.

The conduct for which claimant was discharged was merely an isolated incident of poor judgment. To the extent that the circumstances surrounding each accident were not similar enough to establish a pattern of misbehavior, the employer has only shown that claimant was negligent. "[M]ere negligence is not enough to constitute misconduct." *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 666 (Iowa 2000). A claimant will not be disqualified if the employer shows only "inadvertencies or ordinary negligence in isolated instances." 871 IAC 24.32(1)(a). When looking at an alleged pattern of negligence, previous incidents are considered when deciding whether a "degree of recurrence" indicates culpability. Claimant was careless, but the carelessness does not indicate "such degree of recurrence as to manifest equal culpability, wrongful intent or evil design" such that it could accurately be called misconduct. Iowa Admin. Code r. 871-24.32(1)(a); *Greenwell v. Emp't Appeal Bd.*, No. 15-0154 (Iowa Ct. App. Mar. 23, 2016). Ordinary negligence is all that is proven here. Because the employer has failed to establish disqualifying misconduct, benefits are allowed, provided claimant is otherwise eligible. 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. 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. Accordingly, no disqualification pursuant to Iowa Code § 96.5(2)a is imposed.

DECISION:

The March 16, 2021, (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.



Sean M. Nelson
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June 2, 2021
Decision Dated and Mailed

smn/scn