IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

GEORGE GARCIA Claimant **TSI ENTERPRISES INC** Employer	**APPEAL 18A-UI-03496-NM-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 01/28/18** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the March 6, 2018, (reference 01) unemployment insurance decision that denied benefits based on his discharge for violation of a known company rule. The parties were properly notified of the hearing. A telephone hearing was held on April 11, 2018. The claimant participated and testified. The employer participated through Human Resource Generalist Sarah Fiedler. Employer Exhibits 1 through 7 were received into evidence.

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 process operator from June 14, 2017, until this employment ended on January 15, 2018, when he was discharged.

The employer has a policy in place which requires employees in claimant's position to be available to work on an on-call basis on certain days. The on-call schedule is posted with the regular schedule at the work site. On January 8 and 9, 2018, claimant was scheduled to be on-call, but failed to answer when he was called to work. (Exhibit 2). Claimant had two prior warnings, one for sleeping on the job and another related to his attendance. The employer's attendance policy allows employees to accumulate six points within a year prior to termination. Employees are issued a half point if they are tardy or leave early and a full point for a full absence. An additional half point is issued if an employee does not properly report the absence or tardy. As on January 30, 2018, when the warning was issued, claimant had five and a half attendance points. The warning indicated that claimant missed work on August 29, 2017, was late due to car troubles on August 30, missed a mandatory meeting on September 21, was a no-call/no-show on November 25, and was late and did not call on November 26. (Exhibit 3). The warning advises that further attendance incidents could lead to termination. Following claimant's failure to come to work while he was on call on January 8 and 9, the decision was made to terminate his employment, taking into consideration his two prior warnings.

Claimant testified he did not respond to the calls on January 8 or 9 because he did not realize he was on-call that weekend. According to claimant, while he understood individuals in his position were expected to be on-call at times, he did not realize that he was one of those employees. Claimant explained that when he was first hired he was told he would not be added to the on-call list immediately, giving him time to first learn his position. Claimant testified no one ever informed him he was added to the list, so he never checked it. Fiedler testified claimant should have known he was on the on-call list because he had been asked to cover before. Fiedler got this information from claimant's on-site supervisor, who was not available to testify, and did not have specific dates or other information about claimant being called. Claimant further testified, that while he has previously been asked to stay beyond his scheduled time to cover for a late employee, he had never before been called into work when he was not already there.

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:
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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.

871 IAC 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 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.

The decision in this case rests, at least in part, on the credibility of the witnesses. 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, reviewing the exhibits submitted by the parties, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the claimant's version of events to be more credible than the employer's recollection of those events. The employer's version of events relied entirely on second-hand information that lacked specific detail. The claimant, on the hand was able to provide a detailed, first-hand account of the incidents in question.

The conduct for which claimant was discharged was merely an isolated incident of misunderstanding and carelessness. The final incident for which claimant was discharged involved a situation where he did not come to work on days he was on-call. Claimant did not come to work those days because he did not realize he had been added to the on-call schedule. While claimant should have been more diligent in checking the on-call schedule to see if he had been added, his failure to do so amounts to ordinary negligence. 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. Accordingly, benefits are allowed, provided claimant is otherwise eligible.

DECISION:

The March 6, 2018, (reference 01) unemployment insurance decision is reversed. 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.

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Nicole Merrill
Administrative Law Judge

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Decision Dated and Mailed

nm/rvs