IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

EMMETT HALL Claimant **IA DEPT OF CORRECTIONS/FT MADISON** Employer	**APPEAL 20A-UI-09718-ED-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 05/03/20** **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/appellant filed an appeal from the July 29, 2020 (reference 02) unemployment insurance decision that denied benefits based upon his separation from employment. The parties were properly notified of the hearing. A telephone hearing was held on September 22, 2020. The claimant, Emmett Hall, participated personally and testified. Claimant was represented by attorney, Bruce Stoltze Jr. Hearing representative Frankie Patterson represented the employer, Iowa Department of Corrections/Fort Madison. Chris Tripp, Deputy Warden, participated and testified on behalf of the employer.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Did claimant voluntarily quit the employment with good cause attributable to employer?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was hired on April 19, 2019 and his last day of employment was April 2, 2020. Claimant's position was a full time correctional officer. The employer is a maximum security prison. In March, claimant was informed that he was going to be investigated for incidents occurring on February 9, 2020.

Claimant was informed of his termination in person on April 2, 2020. Chris Tripp, John Feddler and Diane Burggess were present during the termination meeting. The reason for claimant's termination was failure to follow security protocol and ethical standards.

Mr. Tripp testified that the events that led to claimant's termination occurred on February 9, 2020. At approximately 7:59 p.m., claimant failed to use a security tether to escort a high risk offender from his cell to a holding area for a cell shake down. A security tether is a device that allows the correctional officer to maintain control of the offender. There is an access through the cell door itself that is used to apply the tether. The tether is attached to the handcuffs by the correctional

officer through the door. It is the policy of the Department that the tether is always attached and used when transporting an offender. The claimant received training on this policy (Policy IO FC 19) on May 8, 2019 and June 3, 2019. The claimant signed an acknowledgement to receiving and understanding this policy. Mr. Tripp testified the claimant's failure to apply the tether when transporting an offender on February 9 at 7:59 p.m. was captured on video, which Mr. Tripp viewed prior to the hearing. The video was not made available for the hearing.

Mr. Tripp further testified that claimant violated another policy that day. The policy is that the offender's door should never be opened without first securing handcuffs and a tether. Claimant received training on this policy on May 8, 2019 and June 3, 2019. Claimant signed an acknowledgement to receiving and understanding the policy. When moving the offender again, this time from the holding cell back to his cell, claimant opened the holding area prior to placing the offender in handcuffs and a tether. Claimant's correctional officer partner used his foot to close the offender's door so his tether and handcuffs could be appropriately applied.

Claimant recognized that he failed to utilize the required tether devices to secure the offender in both occasions on February 9, 2020.

The claimant testified that he had seen other correctional officers fail to use the tether in violation of the policy.

Claimant testified that he did not put a tether on the two inmates on February 9, 2020 for several reasons: 1) because he had been working the yard for a long time and had forgotten the requirement to use tethers, 2) Claimant testified that some sergeants would allow the tether policy to be deviated from if there were two correctional officers transferring the offender instead of only one 3) Claimant also testified that he was overtired and not alert at the time.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged for no disqualifying reason. Benefits are allowed.

As a preliminary matter, I find that the Claimant did not quit. Claimant was discharged from employment.

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).

871 IAC 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.

871 IAC 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.

Further, 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).

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). In this case, the Department of Corrections had possession of direct video evidence. Mr. Tripp viewed the video and testified to the contents of the video. However, this video was not made available to the claimant, claimant's counsel, or presented as evidence in the hearing. Nor did the employer present a witness who was present at the time of the incident in question. However, because the claimant admitted in his testimony to the act in question - failing to place the tether on the offender on the two occasions on February 9, 2020 - an analysis of credibility is not necessary. The claimant also admitted to knowing the employer's policy was to attach a tether. The claimant admitted his acknowledgement of receipt and understanding of this policy.

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). Further, 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 this case, there is no evidence that claimant's failure to attach the tether was deliberate. The claimant's allegations that other sergeants fail to use the tether as well are unpersuasive. Claimant provided no witness or evidence to support this claim. Claimant admitted on cross examination that he did not tell the investigators at the Department of Corrections about other employees violating the policy when his actions were being investigated by the employer.

Instead, the failure to attach the tether on February 9, 2020, was due to his sleepiness from having worked a double shift and his lack of practice in attaching tethers since he had been working in the yard for an extended period.

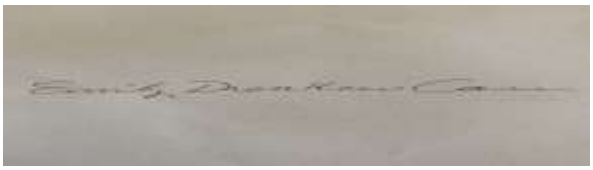
The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation. When based on carelessness, the carelessness must actually indicate a "wrongful intent" 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). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co*., 453 N.W.2d 230 (Iowa Ct. App. 1990); however, "Balky and argumentative" conduct is not necessarily disqualifying. *City of Des Moines v. Picray*, (No. __- __, Iowa Ct. App. filed __, 1986). 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 assess points or impose discipline up to or including discharge for the incident under its policy. 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. Verbal reminders or routine evaluations are not warnings. Claimant's conduct was not unreasonable under the circumstances. He had not been warned for similar conduct prior to the date of separation. Employer did not provide sufficient evidence of deliberate conduct in violation of company policy, procedure, or prior warning. Claimant's conduct does not evince a willful or wanton disregard of an employer's interest as is found in a deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees. Benefits are allowed.

Thus, the employer failed to meet its burden of proof in establishing disqualifying job misconduct. As such, benefits are allowed.

DECISION:

The July 29, 2020 (reference 02) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. The benefits claimed and withheld shall be paid, provided he is otherwise eligible.



Emily Drenkow Carr
Administrative Law Judge

October 1, 2020
Decision Dated and Mailed

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