IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

KIMELA B WEISENBORN Claimant **AUDUBON FOOD LAND CORPORATION** Employer	**APPEAL 16A-UI-08648-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 07/03/16** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the July 27, 2016, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on August 25, 2016. Claimant participated; however, during the employer's rebuttal evidence, claimant disconnected from the hearing. The administrative law judge attempted to contact claimant twice after she disconnected, but she did not answer when contacted at the number provided. Claimant did not rejoin the hearing after she disconnected. Kyle Polson testified on claimant's behalf. Rosemary Williamson registered on behalf of claimant, but did not answer when contacted at the number provided. Claimant registered Dina Corbett, but when Ms. Corbett was contacted, she did not want to participate. Employer participated through store manager Larry Roper.

The employer referenced documents during the hearing, but did not provide the documents to the Appeals Bureau prior to the hearing. The hearing notice that was sent to the parties states: "You should immediately send any documents you want to submit as evidence to the Appeals Bureau and the other party. Documents used in the fact-finding interview will not be considered unless you send them to the Appeals Bureau and opposing party." The documents referenced were not admitted into evidence because they were not provided.

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 part-time as a cashier from September 18, 2015, and was separated from employment on June 16, 2016, when she was discharged.

Claimant was discharged for behavior/conduct and job performance. Mr. Roper testified he has not seen a written disciplinary policy for the employer.

The final incident occurred on June 2, 2016. On June 2, 2016, claimant was working her scheduled shift and was the cashier for a customer, Jerry. Jerry wrote a check for $20.00 over the amount of purchase. When claimant processed Jerry's transaction, she did not look at the check very closely. Claimant did not provide the $20.00 to Jerry. Jerry told claimant that he wrote the check for $20.00 over the amount, but claimant responded no. Jerry again advised claimant that he wrote the check for $20.00 over the amount. Claimant testified that this interaction occurred in a joking manner. After claimant was advised more than once by Jerry, she opened up the drawer, looked at the check, and provided him the $20.00. Jerry told the employer claimant did not apologize; claimant does not recall if she apologized. Claimant did not believe that Jerry was upset about the incident.

On June 3, 2016, Jerry reported the incident to the employer. On June 13, 2016, Mr. Roper spoke to Jerry. Jerry told the employer he felt like claimant was calling him a liar and felt he was treated rudely. Jerry provided a written statement to the employer. After Mr. Roper spoke to Jerry, he investigated the incident, but there were no other witnesses. The employer did not have any video of the incident.

On June 16, 2016, Mr. Roper spoke to claimant about the incident. Claimant stated that Jerry was not upset about their interaction. Mr. Roper testified he felt that claimant's behavior would harm the employer's reputation. Claimant was then discharged on June 16, 2016.

Claimant received a written warning on May 20, 2016, for insubordination and attitude. The employer gave claimant this written warning for rude behavior towards other employees, including Mr. Roper. The employer needed extra cashiers to work on a Sunday. The employer asked claimant to work on the Sunday, but she refused to work. Mr. Polson did not believe the interaction between claimant and the employer was rude, he thought it was more frustration. Claimant was not warned that her job was in jeopardy. Claimant also received a written warning on May 13, 2016, for refusing to keep busy after having been requested by a supervisor. Claimant was warned for her conduct, insubordination, and refusing to keep busy. Claimant refused to sign the written warnings for May 20 and 13, 2016. Claimant did not sign the warning on May 20, 2016 because she did not agree with it. Claimant testified she did not receive the May 13, 2016 warning. On April 21, 2016, the employer documented that claimant was not following proper cash register procedures. Mr. Roper testified that the employer had given claimant other verbal warnings. Claimant was never warned that her job was in jeopardy. Claimant did not have prior warnings regarding her customer service.

REASONING AND CONCLUSIONS OF LAW:

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

When the record is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. *Schmitz v. Iowa Dep't Human Servs.*, 461 N.W.2d 603, 607 (Iowa Ct. App. 1990). Both the quality and the quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See, Iowa Code § 17A.14 (1). In making the evaluation, the fact-finder should conduct a common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be fulfilled. *Schmitz*, 461 N.W.2d at 608.

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 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(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 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). 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). 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 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.

The employer has failed to meet its burden of establishing disqualifying job misconduct. The administrative law judge does find that claimant was given two prior written warnings on May 13 and 20, 2016 and other verbal warnings; however, the employer never warned claimant that her job was in jeopardy. The employer's argument that on June 2, 2016, a customer (Jerry) was treated rudely by claimant, harmed the employer's reputation, and was disqualifying job misconduct, is not persuasive. Although Jerry gave the employer a written statement and Mr. Roper testified about Jerry's complaint, Jerry did not testify and submit himself to cross-examination and the employer did not present a witness with first-hand knowledge about the incident. However, claimant presented direct, first-hand testimony that on June 2, 2016, her interaction with Jerry was in a joking manner, she was not rude to Jerry, and Jerry was not upset about the interaction.

The employer has not met its burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. Although the employer gave claimant prior warnings, it did not warn her that her job was in jeopardy because of her conduct. 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. Benefits are allowed.

DECISION:

The July 27, 2016, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

_____
Jeremy Peterson
Administrative Law Judge

_____
Decision Dated and Mailed

jp/pjs