IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

PAMELA I LANKEN Claimant **MARSDEN BLDG MAINTENANCE LLC** Employer	**APPEAL 15A-UI-09839-DL-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 08/02/15** **Claimant: Respondent (1)**

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

STATEMENT OF THE CASE:

The employer filed an appeal from the August 20, 2015, (reference 01) unemployment insurance decision that allowed benefits based upon a discharge from employment. The parties were properly notified about the hearing. A telephone hearing was held on September 16, 2015. Claimant participated. Employer participated through human resources business partner Margarita Bernadino, supervisor assistant Eva Aviles, assistant area manager Wendell Morney. Claimant's Exhibit A was received. Employer's Exhibits 1 through 4 were received.

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 an evening floater cleaner from March 10, 2011, and was separated from employment on August 6, 2015, when she was discharged. Her last day of work was July 30, 2015, when she was suspended pending investigation. On July 23 claimant arrived at the Marsden building at 5:30 p.m. as instructed to receive her work assignment for the evening. After operations manager Rudy Castellanos instructed her to work with Aviles in the client Financial Center, she was allowed to clock in at 6:05 p.m. While en route, Morney called her for the keys to the Ottumwa client building, which she had cleaned for him the day before. She had to drive back to the Marsden building parking lot to retrieve them from her car and arrived at the Financial Center at 6:40 p.m. when she called Aviles to let her in the building. Morney called her at 7:00 p.m. when he arrived so she retrieved the keys from the work van, gave them to Morney and returned to work. At 7:47 p.m. she called Avila for more work. When she was done with that assignment, claimant called Avila at 9:33 p.m. who told her she was done at that building. (Claimant's Exhibit A) Claimant then left the Financial Center and drove to the next client building about a mile away. On the way she pulled over for a few minutes to look for the keys and took a 15-minute break when she arrived, clocking out and in with her cell phone. The employer accused her of time theft and discharged her. She had not been warned about inaccuracy in time reporting or taking too much time to travel between buildings. Castellanos did not participate.

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 § 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 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.

Iowa Admin. Code r. 871-24.32(9) provides:

> (9) Suspension or disciplinary layoff. Whenever a claim is filed and the reason for the claimant's unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as discharged, and the issue of misconduct must be resolved. Alleged misconduct or dishonesty without corroboration is not sufficient to result in disqualification.

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 not established that the claimant's timing that day was anything more than a combination of forgotten keys, work-related communication time with other employees, and a misunderstanding of allowable break time. Furthermore, it had not previously warned claimant about time reporting discrepancies or travel time so 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. 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. A warning for reporting in uniform on time and timely reporting of an injury is not similar to inaccurate time reporting or excessive travel time between assignments and the employer's simple accrual of a certain number of warnings counting towards discharge does not establish repeated negligence or deliberation and is not dispositive of the issue of misconduct for the purpose of determining eligibility for unemployment insurance benefits.

DECISION:

The August 20, 2015, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

dml/css