

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

DUSTIN SVOBODA
Claimant

RCM SUBS INC
Employer

APPEAL 17A-UI-11390-NM-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 10/15/17
Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the November 3, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified of the hearing. A telephone hearing was held on November 28, 2017. The claimant participated and testified. The employer participated through Operations Manager Patrick Miller and General Manager Lisa Place. Employer's Exhibit 1 was received into evidence.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can any charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a store manager. Claimant was first hired on January 7, 2016 and was promoted to manager on September 6, 2016. Claimant worked in this position until this employment ended on October 11, 2017, when he was discharged.

On October 11, 2017, a meeting was held with claimant to discuss several ongoing issues with his performance. During this meeting Place addressed several concerns including order errors, claimant not following proper safe deposit procedures, and food safety issues, such as regularly checking and recording the temperature of food in accordance with health code regulations. (Exhibit 1). Claimant was discharged as a result of these issues. Place had provided informal coaching to claimant on several prior occasions, but no formal disciplinary action was issued and claimant was never advised that his job was in jeopardy.

At the time of the hearing, Place testified the decision to terminate claimant's employment ultimately came down to several incidents occurring between September 25 and October 1, 2017. According to Place, on September 25 claimant had allowed outdated apples to remain on the shelf for customers and had not replaced these apples by September 28. Place testified it was clear the apples were outdated because they were brown. On October 1, 2017, Place discovered claimant was serving stale crackers, which he had previously indicated he would replace. Place also noted the ongoing issues involving the food temperature logs, but did not provide a final date in which claimant failed to adequately log.

Claimant testified he believed, based on his training, that the apples were still okay to serve and that he just forgot to replace the crackers. Claimant further testified that these issues were not mentioned in his termination meeting, rather the focus of that meeting was Place's opinion that he over ordered product. Claimant admitted Place did mention the temperature logs as well. Claimant admitted he had missed a few days of temperature logs but that this was common among employees and not something he realized he could be discharged for.

The claimant filed a new claim for unemployment insurance benefits with an effective date of October 15, 2017. The claimant filed for and received a total of \$1,430.00 in unemployment insurance benefits for the weeks between October 15 and November 18, 2017. Both the employer and the claimant participated in a fact finding interview regarding the separation on November 2, 2017. The fact finder determined claimant qualified for benefits.

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.

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.

A lapse of 11 days from the final act until discharge when claimant was notified on the fourth day that his conduct was grounds for dismissal did not make the final act a "past act." Where an employer gives seven days' notice to the employee that it will consider discharging him, the date of that notice is used to measure whether the act complained of is current. *Greene v. Emp't Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct. App. 1988). An unpublished decision held informally that two calendar weeks or up to ten work days from the final incident to the discharge may be considered a current act. *Milligan v. Emp't Appeal Bd.*, No. 10-2098 (Iowa Ct. App. filed June 15, 2011). In reviewing past acts as influencing a current act of misconduct, the ALJ should look at the course of conduct in general, not whether each such past act would constitute disqualifying job misconduct in and of itself. *Attwood v. Iowa Dep't of Job Serv.*, No. ___, (Iowa Ct. App. filed ___, 1986).

Claimant's lack of concern and understanding regarding basic food safety issues is troubling, however, the only specific incident identified by the employer that could be considered a current act involved claimant's failure to replace stale crackers on October 1, 2017. "[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).

Place had spoken to claimant about the issues surrounding his performance informally on several occasions, but never issued formal disciplinary action or advised him that his job was in jeopardy. 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. Benefits are allowed, provided claimant is otherwise eligible. As benefits are allowed, the issues of overpayment and participation are moot.

DECISION:

The November 3, 2017, (reference 01) unemployment insurance decision is affirmed. 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. The issues of overpayment and participation are moot.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

nm/rvs