IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

MARK W FISHER Claimant **ALLIED SERVICES LLC** Employer	**APPEAL 17A-UI-03128-SC-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 02/19/17** **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:

Allied Services, LLC (employer) filed an appeal from the March 8, 2017, reference 01, unemployment insurance decision that allowed benefits based upon the determination Mark W. Fisher (claimant) was not discharged for willful or deliberate misconduct. The parties were properly notified about the hearing. A telephone hearing was held on April 13, 2017. The claimant participated. The employer participated through Operations Manager Jerome Meyer and Human Resources Manager Audra Adams. Official notice was taken of the administrative record, specifically the fact-finding documents for purposes of participation.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid unemployment insurance benefits?
Can the repayment of those benefits to the agency be waived?
Can 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: The claimant was employed full-time as a Residential Driver beginning on June 6, 2016, and was separated from employment on February 21, 2017, when he was discharged. The claimant was responsible for driving a garbage truck in residential areas. The garbage truck can be driven using either the right or left side consoles. The employer has a Focus Six safety policy, which outlines six behaviors related to backing and operating the truck, which, if violated, can result in discharge. One such violation would be driving the truck in reverse using the right side console as opposed to the left side console. The employer covers this policy with employees in orientation and at safety meetings.

On February 16, 2017, the claimant was involved in an accident in which he hit a light pole with the front left corner of his truck. He was driving the truck in reverse as he could not get around the corner due to residents parked on the street. The claimant was operating the truck from the

left side console. The employer sent the Area Safety Manager and the claimant's supervisor, Amanda Shaffer, to investigate the accident. The claimant denied driving in reverse from the right side console. He did tell the Area Safety Manager he had done that once when he first started.

The Area Safety Manager reported to Operations Manager Jerome Meyer and Human Resources Manager Audra Adams that the claimant said he frequently drove in reverse using the right side console and described his findings from the investigation. Meyer and Adams determined the claimant violated the employer's Focus Six policy based on the placement of the damage and the claimant's alleged admission to the Area Safety Manager that he had frequently driven in reverse using the right side console. The employer made the decision to discharge the claimant after the one incident. The claimant had not received any prior warnings.

The administrative record reflects that claimant has received unemployment benefits in the amount of $3,129.00, since filing a claim with an effective date of February 19, 2017, for the seven weeks ending April 8, 2017. The administrative record also establishes that the employer did not participate in the fact-finding interview, make a first-hand witness available for rebuttal, or provide written documentation that, without rebuttal, would have resulted in disqualification.

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.

Iowa law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id*. Iowa regulations define misconduct, stating:

> "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.

Iowa Admin. Code r. 871-24.32(1)a. 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).

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 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." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). Allegations of misconduct without additional evidence are insufficient to result in a disqualification for unemployment insurance benefits. Iowa Admin. Code r. 871-24.32(4). 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 employer claims the claimant violated its Focus Six safety policy which resulted in damage to its property. Meyer testified the Area Safety Manager told him about a conversation he had with the claimant regarding the accident and previous incidents of driving in reverse using the right side console. However, the Area Safety Manager did not testify at the hearing and no documents created by the Area Safety Manager during the course of the investigation were provided for the hearing. The claimant denies he was driving in reverse using the right side console on the day of the accident or that he told the Area Safety Manager that he frequently drove in reverse using the right side console.

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. 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).

The decision in this case rests, at least in part, upon the credibility of the parties and witnesses. The employer did not present a witness with direct knowledge of the situation. No request to continue the hearing was made and no written statement of the individual was offered. Mindful of the ruling in *Crosser*, *id.,* and noting that the claimant presented direct, first-hand testimony while the employer relied upon second-hand reports, the administrative law judge concludes that the claimant's recollection of the events is more credible than that of the employer.

The employer has not established that the claimant was driving in reverse using the right side console, a violation of its safety policy, which resulted in damage to its property. It also has not established that the claimant frequently drove in reverse using the right side console. The

employer has established that the claimant was involved in an accident with its vehicle while he was driving in reverse.

The employer has not met the burden of proof to establish that the claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. The 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). 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. Accordingly, benefits are allowed.

As benefits are allowed, the issues of overpayment and repayment are moot and charges to the employer's account cannot be waived.

DECISION:

The March 8, 2017, reference 01, unemployment insurance decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. The issues of overpayment and repayment are moot and charges to the employer's account cannot be waived.

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Stephanie R. Callahan
Administrative Law Judge

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Decision Dated and Mailed

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