IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

WILLIAM E ROBERTSON Claimant **LISLE CORPORATION** Employer	**APPEAL 18A-UI-11944-NM-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 11/18/18** **Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(1)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 December 7, 2018, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on January 2, 2019. Claimant participated and testified. Employer participated through Human Resource Manager Tracy Roush. Employer's Exhibits 1 through 14 were received into evidence.

ISSUES:

Was the claimant discharged for disqualifying misconduct?
Has the claimant been overpaid benefits?
Should benefits be repaid by claimant due to the employer's participation in the fact finding?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for employer on June 26, 2017. Claimant last worked as a full-time janitor. Claimant was separated from employment on November 16, 2018, when he was discharged.

On November 9, 2018, claimant was observed standing by the time clock waiting for the bell to ring so he could clock out and leave. Claimant testified all his required job duties had been completed and he was standing at the clock for approximately 20 seconds before the bell rang because he was in a hurry to get to his second job. Roush testified claimant's supervisor, Roger Poore, told her claimant was standing at the clock, not working, for approximately four to five minutes. Roush was not sure where Poore got this information, but believed it was from another employee. Roush also alleged that claimant had not completed all his job duties, though could not say specifically what work was left to be done. Poore had spoken to claimant on several prior occasions about getting all of his work completed. (Exhibits 5, 6, and 10). Claimant testified he believed he had improved and was getting all his work done. The last

documented conversation occurred on February 19, 2018. (Exhibit 5). Claimant testified he was never warned of termination and was unaware his job was in jeopardy at the time of his separation. Claimant had never been spoken to about waiting by the time clock waiting for the bell to ring.

The claimant filed a new claim for unemployment insurance benefits with an effective date of November 18, 2018. The claimant filed for and received a total of $2,154.00 in unemployment insurance benefits for the weeks between November 18 and December 29, 2018. Both the employer and the claimant participated in a fact finding interview regarding the separation on December 6, 2018. The fact finder determined claimant qualified for benefit

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.
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> 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.

The decision in this case rests, at least in part, on the credibility of the witnesses. It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.*. In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id*.

After assessing the credibility of the witnesses who testified during the hearing, reviewing the exhibits submitted by the parties, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the claimant's version of events to be more credible than the employer's recollection of those events. Claimant provided direct, first-hand testimony from November 9, 2018. The employer, on the other hand, relied on assumptions and information Roush received third-hand.

After he had completed all of his work for the day claimant stood by the time clock, for less than 30 seconds, waiting for the bell to ring so he could clock out. The conduct for which claimant was discharged was, at worst, an isolated incident of poor judgment. 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. Claimant had been warned about making sure he completed all of his job duties. Claimant had made improvements in this area and there were no documented warnings after February 2018. Claimant completed all of his work on November 9. Claimant had never been warned about standing near the time clock in the seconds leading up to the bell ringing and was not aware this conduct put his job in jeopardy. 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. As benefits are allowed, the issues of overpayment and participation are moot.

DECISION:

The December 7, 2018, (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.

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Nicole Merrill
Administrative Law Judge

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Decision Dated and Mailed

nm/rvs