IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

68-0157 (9-06) - 3091078 - EI

ZACHARY D LORING
Claimant

RUTHVEN COMMUNITY CARE CENTER INC
Employer

APPEAL NO: 18A-UI-04670-JC

ADMINISTRATIVE LAW JUDGE DECISION

OC: 03/25/18
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant/appellant, Zachary D. Loring, filed an appeal from the April 13, 2018, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. After due notice was provided, a hearing was held in Spencer, Iowa on May 18, 2018. The claimant participated personally and was represented by Susan R. Loring, mother of the claimant. The employer participated through Diana Wishman, maintenance supervisor. Tami Eaton, business office manager, and Sandra Ferguson, administrator, also testified. Claimant Exhibit A was admitted into the hearing record. The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

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: The claimant was employed part-time as a maintenance worker/driver and was separated from employment on March 27, 2018, when he was discharged.

The claimant in his capacity was on-call as a driver and maintenance person. As part of his job description, he was expected to come on weekends, holidays and when snow removal was needed. The undisputed evidence is the claimant had no prior warnings related to failure to come in for shifts, regular or on-call. Prior to discharge, the claimant had been issued a verbal coaching on March 23, 2018, related to accessing the business office, but it was not considered a disciplinary warning. The claimant was unaware his job was in jeopardy.

On March 23, 2018, Ms. Wishman informed the claimant that due to a pending snowstorm, he would be expected to come in over the weekend and help shovel snow. Due to the employer being a community care facility for dependent adults, it was imperative to keep driveways accessible for any emergency or ambulance, even in snowy conditions. The employer's premises is located in Ruthven, Iowa and the claimant's mailing address is Spencer, Iowa, though the parties agree he resides rurally. The employer reported that Mr. Loring had

previously failed to come in to scoop snow as expected on December 17-18, 30, 31, 2017, January 28, and February 24 and 25, 2018. He was never confronted by Ms. Wishman about it nor was he issued any disciplinary action for his failure to come in to scoop snow.

On March 24, 2018, the claimant did not come in and remove snow due to being "snowed in." Approximately 5.5 inches of snow fell between Friday night to Saturday morning. Ms. Wishman sent a text message in the morning alerting the claimant that morning that snow removal was needed and she had dug out. She followed up in the afternoon when she was finished, and drove by the claimant's home around 5:30 p.m. at night. She observed what appeared to be tire tracks that had gone to/from the highway to the driveway. The claimant stated that afternoon his father had finally dug out and had left the house related to some chickens that had been killed by dogs the previous day. The claimant stated he alone was responsible for scooping and digging out his family as his mother had an injury and his father had a heart condition. He was unable to leave the house to scoop snow but did not update Ms. Wishman of his status because he had previously been snowed in and she would have known that. That evening, Ms. Wishman did not question where the claimant had been during the day but texted the claimant that he was expected to come in the next morning to continue snow removal. He responded "ok, sounds good." He later sent a text message that evening that he remained snowed in. Ms. Wishman responded by offering to come get the claimant and drive him in. Neither party followed up about whether a ride would be needed in the morning.

On March 25, 2018, the claimant did not show up and did not request a ride. He sent a text message to Ms. Wishman that his car wasn't moving around 9:20 a.m. She did not respond. At no time on March 23, 24 or 25, did Ms. Wishman tell the claimant possible consequences of not showing up for the weekend snow removal. Ms. Wishman also did not follow up with the claimant on March 25, 2018, when he did not show or the next day when he did return to work on March 26, 2018. The employer presented no written rule or policy which would place the claimant on notice that he could be discharged for not showing up for weekend snow removal. He was subsequently discharged on March 27, 2018, for his failure to come in the prior weekend.

REASONING AND CONCLUSIONS OF LAW:

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

Iowa Code section 96.5(2)a provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
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> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
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> a. The disqualification shall continue 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).

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 Department of Job Service*, 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. IDJS*, 364 N.W.2d 262 (Iowa 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. IDJS*, 425 N.W.2d 679 (Iowa 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 Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

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*. Assessing the credibility of the claimant and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

The question of whether the refusal to perform a specific task constitutes misconduct must be determined by evaluating both the reasonableness of the employer's request in light of all circumstances and the employee's reason for noncompliance. *Endicott v. Iowa Dep't of Job Serv.*, 367 N.W.2d 300 (Iowa Ct. App. 1985). In this case, the employer reasonably expected the claimant who worked in an on-call position to help remove snow when requested. The employer was also aware that the claimant did not live near the premises. The claimant in this case had previously missed snow removal weekends in the past and had not been disciplined.

Such was the case for the final incident when the claimant was snowed in for two days and could not go to the facility. In this case, the employer did offer the claimant a ride. The claimant acknowledged he received the message but never confirmed a ride was needed. The administrative law judge is sympathetic to the reasonable positions of each party because of the failure to communicate promptly and clearly with each other, however, the employer carries the burden of proof in a discharge from employment.

Based on the evidence presented, the administrative law judge concludes the conduct for which the claimant was discharged was an isolated incident of poor judgment and inasmuch as the employer had not previously warned the 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. 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. An employee might even infer employer acquiescence after multiple unreported absences without warning or counseling. Training or general notice to staff about a policy is not considered a disciplinary warning. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. In this case, the claimant was discharged for not coming in for snow removal on March 24 and 25, 2018. He could not have reasonably anticipated he would be fired based on his prior history of not coming in due to being snowed in during snow removal weekends. The employer has not met its burden of proof to establish a current or final act of misconduct, and, without such, the history of other incidents need not be examined.

Nothing in this decision should be interpreted as a condemnation of the employer's right to terminate the claimant for violating its policies and procedures. The employer had a right to follow its policies and procedures. The analysis of unemployment insurance eligibility, however, does not end there. This ruling simply holds that the employer did not meet its burden of proof to establish the claimant's conduct leading separation was misconduct under Iowa law.

DECISION:

The April 13, 2018, (reference 01) decision is reversed. Benefits are allowed, provided he is otherwise eligible. Any benefits claimed and withheld shall be paid, provided he is otherwise eligible.

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Jennifer L. Beckman
Administrative Law Judge

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Decision Dated and Mailed

jlb/scn