IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

ROBERT A NORTON Claimant **SCE PARTNERS LLC** Employer	**APPEAL 15A-UI-12281-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 10/04/15** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the October 26, 2015, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on November 20, 2015. Claimant participated. Employer participated through director of human resources, Kim Dellinger. Human resources manager, Sarah Andersen, appeared on behalf of the employer, but did not testify. Claimant Exhibit A was admitted into evidence over the employer's objection. The employer objected because of relevance of the pictures. Claimant Exhibit B was admitted into evidence with no objection.

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 a cook from December 30, 2014, and was separated from employment on October 2, 2015, when he was discharged.

On September 27, 2015, claimant was observed by two other employees washing his hair in a sink that is used for washing dishes. The employer determined that claimant's conduct was a violation of the state and county health code. The employer required claimant to abide by all state and county health codes. Claimant received training on the health code and food safety when he was hired. On September 30, 2015, Ms. Dellinger spoke with claimant. Claimant had to wash his hair in the sink to get the grease off of his head. The filter above where claimant was working had not been cleaned properly and there was grease dripping onto claimant's head. Claimant Exhibit A. The area claimant would normally go was all the way in the back but because they were so far behind on orders, he did not have time to go back there. Claimant told Ms. Dellinger that one of the chefs told him it was ok for him to wash his hair in the sink as long as he wiped out and sanitized the sink. Ms. Dellinger interviewed the other employees and

the chef that told claimant it was ok to wash his hair. The kitchen area on occasion would have grease on the floor. Claimant Exhibit A. On October 2, 2015, Ms. Dellinger spoke with claimant on the phone and told him he was discharged. Claimant had no prior warnings for health code violations.

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 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:
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> 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.
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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 Dep't of Job Serv.,* 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). 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." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.,* 391 N.W.2d 731 (Iowa Ct. App. 1986). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

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.

There is no dispute from the parties that on September 27, 2015, claimant washed his hair in a sink that is used to wash dishes. The employer found this was a violation of the state and county health code. The employer requires all employees to follow the state and county health code. Claimant had to wash his hair because the grease filter above his work station was not properly cleaned and grease was dripping onto his head. Claimant testified they were really busy at the time and he did not have time to go to the back to wash the grease out. Claimant testified that this grease had only dripped on his head in that amount on one prior occasion and had the filter been properly cleaned on September 27, 2015, he would not have needed to wash his hair to get the grease out. Furthermore, claimant was unaware washing his hair would be a violation of the health code. Claimant had been told by a chef it was ok for him to wash his hair there as long as he sanitized the sink afterwards. Claimant had no prior warnings for violating the health code.

The conduct for which claimant was discharged was merely an isolated incident of poor judgment and 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. 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. The employer failed to satisfy its 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.

DECISION:

The October 26, 2015, (reference 01) unemployment insurance decision is reversed. 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.

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Jeremy Peterson
Administrative Law Judge

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Decision Dated and Mailed

jp/pjs