IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

CODY FICKEN Claimant **GATR OF CEDAR RAPIDS, INC.** Employer	**APPEAL 21A-UI-09829-WG-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 04/05/20** **Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant/appellant filed an appeal from the March 29, 2021 (reference 02) unemployment insurance decision that disallowed benefits based upon claimant's discharge from employment. The parties were properly notified of the hearing. A telephone hearing was held on June 17, 2021. The claimant, Cody Ficken, participated personally. The employer, Gatr of Cedar Rapids, Inc., participated through its Human Resources Director, Sarah Eisenrich. No exhibits were offered.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Did claimant voluntarily quit the employment with good cause attributable to employer?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant, Cody Ficken, worked full-time as an apprentice technician performing diesel mechanic work for the employer from September 21, 2020 through February 11, 2021. On February 11, 2021, claimant's supervisor, Jeremy Brubaker, called claimant into a conference room and advised him that his employment was "not working out due to core values" of the company. Claimant was discharged on February 11, 2021. Claimant testified that no further explanation was provided to him for his discharge and the employer did not call any witnesses that were present at the discharge meeting on February 11, 2021.

At hearing, the employer offered two reasons for claimant's discharge. First, the employer asserted that claimant did not get along with others in the shop. Claimant denied this assertion, contending that he was friends with and got along with all of the other employees. The employer's witness was candid and forthright in acknowledging that she was not present on site and could not provide first-hand information about the environment or occurrences at the Waterloo plant where claimant worked. I find claimant's testimony to be more convincing than any hearsay statements relied upon by the employer and its witness as to this basis for discharge. I find that the employer did not prove misconduct relating to claimant's interaction with co-workers.

Second, the employer asserted that claimant violated its core values and specifically his attitude. The employer referenced some Facebook posts from claimant that use vulgar language, appear to make threatening remarks, and other inflammatory language and comments. Claimant concedes he made the posts referenced by the employer. However, he contends these were mere "venting" outside of work and that he deals with mental health issues and his supervisor knew this and was accepting of this difficulty. The language and assertions made in the Facebook posts are inflammatory and vulgar. Yet, those posts were not directed at a specific person or as a threat to a specific individual per the interpretation of the employer's witness. The employer testified to about six social media posts it considered to be in violation of its core values over a couple of day period.

Claimant had never been warned or otherwise disciplined for poor attitude, for posting Facebook messages contrary to the employer's core values, or otherwise made aware that his behavior was unsatisfactory to the employer and required modification to avoid discharge. The employer concedes claimant has no prior disciplinary action against him.

Claimant also asserts that many others, if not all others, in the employer's shop used vulgar language and violated the "core values" expressed by the employer. Again, the employer's representative is unable to verify or refute the allegations and contentions made by claimant in this respect. While claimant's conduct may be troubling, the employer has not proven that claimant's conduct rose to the level of 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. At most, the employer has proven claimant was guilty of isolated instances of poor judgment. Ultimately, I find that the employer failed to prove misconduct.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged for no disqualifying reason. Benefits are allowed.

As a preliminary matter, I find that the Claimant did not quit. Rather, all parties agree and I find that claimant was discharged from employment.

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:
>
> 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.
>
> 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).

Iowa Admin. Code r. 871-24.32(4) provides:

> (4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

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.

Further, 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). The focus of the administrative code definition of misconduct is on deliberate, intentional or culpable acts by the employee. *Id.* 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). Further, 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). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000).

The employer offered hearsay statements and conclusions about claimant's attitude and ability to interact and get along with co-workers. Claimant denied these statements and I found that the employer failed to prove any misconduct related to claimant's interaction with co-workers.

Inasmuch as employer had not previously warned claimant about his attitude and violation of the company's core values related to attitude, 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. Although the employer's representative talked about the company's core values and the fact that the company reiterates those core values to employees, training or general notice to staff about a policy is not considered a disciplinary warning. The employer did not notify claimant that it considered his behavior to violate its core values or that they would subject him to disciplinary action, including discharge.

In this case, claimant's actions related to interaction with co-workers or his Facebook postings were not misconduct. At most, they were isolated incidents of poor judgment and claimant is guilty of no more than "good faith errors in judgment." 871 IAC 24.32(1)(a). Instances of poor judgment are not misconduct. *Richers v. Iowa Dept. of Job Services*, 479 N.W.2d 308 (Iowa 1991); *Kelly v. IDJS*, 386 N.W.2d 552, 555 (Iowa App. 1986). His actions were not an intentional and substantial disregard of the employer's interest which rises to the level of willful misconduct.

Nothing in this decision should be interpreted as a condemnation of the employer's right to terminate the claimant for violating its policies and core values. The employer had a right to enforce its core values. 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 to separation was disqualifying misconduct under Iowa law. Since the employer has not met its burden of proof, benefits are allowed.

DECISION:

The March 29, 2021 (reference 02) 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.

William H. Grell
Administrative Law Judge

June 30, 2021
Decision Dated and Mailed

whg/mh