IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

MIKE A PICCIRILLI Claimant **CASEY'S MARKETING COMPANY** Employer	**APPEAL 17A-UI-04704-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 12/11/16** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the April 25, 2017, (reference 03) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on June 14, 2017. Claimant participated. Attorney Jesse Render participated on claimant's behalf. Employer participated through store manager Sabrina Christiansen. Area supervisor Stacie Hansen attended the hearing on behalf of the employer, but she did not testify. Employer Exhibit 1 was admitted into evidence with no objection. Claimant Exhibits A and B were admitted into evidence with no objection. Official notice was taken of the administrative record, including claimant's benefit payment history and wage history, 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 part-time as a store employee from July 1, 2016, and was separated from employment on April 13, 2017, when he discharged.

The final incident occurred on April 12, 2017. On April 12, 2017, a customer ordered chicken wings, but claimant failed to make the chicken wings. Employer Exhibit 1. On April 13, 2017, the customer contacted Ms. Christiansen on the phone and complained that claimant forgot to make their chicken wings on April 12, 2017. Ms. Christiansen reviewed the surveillance video and claimant did not have any wings coming out of the oven when the customer was in the store. Ms. Christiansen reviewed the order slip and it showed that the customer had ordered chicken wings. Claimant was the only employee in the kitchen when the customer came in for their order. Ms. Christiansen did not contact claimant about the incident. On April 13, 2017, Ms. Christiansen told claimant he was discharged. Employer Exhibit 1. Ms. Christiansen went over claimant's prior corrective actions with him, including that had been previously warned about incorrect preparation of food orders on December 8, 2016. Employer Exhibit 1. The employer also had other complaints regarding claimant's preparation of food orders prior to his

discharge. Employer Exhibit 1. On April 9, 2017, a customer had to wait thirty minutes longer for a pizza than claimant had originally told the customer. Employer Exhibit 1. On April 10, 2017, a customer complained that claimant did not have any food in the warmer. Employer Exhibit 1.

On December 29, 2016, the employer gave claimant a written warning for using a cellphone while he was on the clock. Employer Exhibit 1. The employer has a policy that prohibits employees from using a cellphone while on the clock. Claimant was warned that his job was in jeopardy. Employer Exhibit 1. On December 8, 2016, the employer gave claimant a written warning after the employer received three complaints from customers for late or incorrect pizzas and for not finishing the dishes or emptying the dishwater in the sink. Employer Exhibit 1. Claimant was warned that his job was in jeopardy. Employer Exhibit 1. On November 18, 2016, the employer gave claimant a written warning for being a no-call/no-show on November 14, 2016. Employer Exhibit 1. Claimant was warned that his job was in jeopardy. Claimant does not recall receiving any verbal warnings, but did receive suggestions on what he should do.

Ms. Christiansen testified that from November 2016 until claimant's discharge he did not have a sustained period of time where he performed his job duties to the employer's satisfaction; Ms. Christiansen did not come to the store until November 2016. The employer is a busy store and it is fast paced in the kitchen. Ms. Christiansen testified that she believes the store was too fast paced for claimant. Claimant testified he was performing his job to the best of his ability. Marcus Brogan and Robert Lowther, both former employees, provided written statements that there was too much work for the scheduled employees to complete. Claimant Exhibit A.

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 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.

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.

Iowa Admin. Code r. 871-24.32(5) provides:

> **Discharge for misconduct.**
>
> **(5)** *Trial period.* A dismissal, because of being physically unable to do the work, being not capable of doing the work assigned, not meeting the employer's standards, or having been hired on a trial period of employment and not being able to do the work shall not be issues of misconduct.

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).

Failure in job performance due to inability or incapacity is not considered misconduct because the actions were not volitional. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979). Where an individual is discharged due to a failure in job performance, proof of that individual's ability to do the job is required to justify disqualification, rather than accepting the employer's subjective view. To do so is to impermissibly shift the burden of proof to the claimant. *Kelly v. Iowa Dep't of Job Serv.*, 386 N.W.2d 552 (Iowa Ct. App. 1986). Although claimant had a prior warning, regarding his job performance, the employer did not present any evidence that claimant "demonstrated a wrongful intent on his part." *Kelly v. Iowa Dep't of Job Serv.*, 386 N.W.2d 552 (Iowa Ct. App. 1986). The parties agreed that the store claimant worked at was busy and the work was fast paced. Ms. Christiansen testified that from November 2016 until claimant's discharge he did not have a sustained period of time where he performed his job duties to the employer's satisfaction. Furthermore, Ms. Christiansen testified that she believes the store was too fast paced for claimant.

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.

Since the employer agreed that claimant had never had a sustained period of time during which he performed his job duties to employer's satisfaction and inasmuch as claimant testified he was performing the job to the best of his ability but was unable to meet the employer's expectations, no intentional misconduct has been established, as is the employer's burden of proof. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The employer has failed to meet its burden of proof in establishing disqualifying job misconduct. Benefits are allowed.

DECISION:

The April 25, 2017, (reference 03) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant 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/rvs