IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

PATRICIA K ANDREWS Claimant **VAN DIEST SUPPLY CO** Employer	**APPEAL 16A-UI-10364-JCT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 08/28/16** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the September 15, 2016, (reference 01) unemployment insurance decision that denied benefits based upon separation. The parties were properly notified about the hearing. A telephone hearing was held on October 6, 2016. The claimant participated personally and represented by Mark E. Spellman, attorney at law. Melissa Smith also testified on behalf of the claimant. The employer participated through Espnola Cartmill, attorney at law. Employer witnesses included Carolyn Cross, (personnel manager), Kevin Spencer (plant operations director), and Lee Trask (company vice president). Employer exhibits one through nine were received into evidence. 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 full-time as a production operator and was separated from employment on August 25, 2016, when she was discharged for violating the employer's lock out procedures (Employer exhibit one).

At the time of hire, the claimant was issued the employer's personnel policies and procedures, which include reference that "all lock, tag and try procedures must be followed." (Employer exhibit eight). The claimant acknowledged receipt of these policies effective August 31, 2015 (Employer exhibit seven). The undisputed evidence is the claimant had no prior warnings for violating any employer policies, including safety violations.

The final incident occurred on August 19, 2016, when an employee working with the claimant, was injured on the job. Between August 18 and 19, 2016, the claimant twice was a party to a confined space entry permit, (Employer exhibits two and five) which was a document, coupled with instructions, that walked through safety procedures before employees entered a vessel for cleaning or maintenance. The claimant had received some training on being an attendant and

entrant for the confined space entry permit. The claimant learned after the final incident from the employer that she had not completed the necessary training regarding the confined space entry process and was not qualified to be an entrant or attendant, though she had performed the duties during her employment. No one advised the claimant that she was unqualified or needed more training. When the claimant went to help secure and clean the vessel in question, she utilized the procedures identified in the permit as Lockout Procedure # DF9-030 to go to the devices and lock out the appropriate parts (Employer exhibit three).

As part of the employer's process, the claimant should have then gone to the IPD (Industrial Protection Device) procedures, which were located in a separate binder, for instructions on locking out suppression cannons (Employer exhibit four). The employer asserted that a suppression cannon has 500 psi, or more than 14,000 pounds of pressure are applied to a six-inch area which discharged. As a result, the cannons are also to be locked out. The claimant asserted she was unaware that the suppression cannons need to also be locked out or that there was a separate binder containing the procedure for locking out the suppression cannons. Former employee, Melissa Smith also denied being trained on locking out suppression cannons and had worked with the claimant on the confined space entry permit on August 18, 2016.
Consequently, on August 19, 2016, the claimant was working with Maurice (Employer exhibit five) and followed the lock out procedures contained in procedure # DF9-030 (Employer exhibit three) but did not lock out the suppression cannons. Prior to entry, and during the course of the locking out, the claimant's supervisor, Ryan Tuvell, told her and Maurice that they were "good to go" even though the suppression cannons were not locked out. Shortly thereafter, Maurice entered the vessel for cleaning and while the claimant was outside of the vessel handing equipment to Maurice, a suppression cannon discharged causing injury to Maurice's legs, and requiring medical treatment. Following investigation, the claimant, Maurice, Mr. Tuvell and three other employees were discharged for violating the employer's lock out policies.

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:

> **Causes for disqualification.**
> 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. *Reigelsberger v. Emp't Appeal Bd.*, 500 N.W.2d 64, 66 (Iowa 1993); *accord Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000).

Misconduct "must be substantial" to justify the denial of unemployment benefits. *Lee*, 616 N.W.2d at 665 (citation omitted). "Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of benefits." *Id.* (citation omitted). …the definition of misconduct requires more than a "disregard" it requires a "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." Iowa Admin. Code r. 871–24.32(1)(a) (emphasis added). Whether an employee violated an employer's policies is a different issue from whether the employee is disqualified for misconduct for purposes of unemployment insurance benefits. *See Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000) ("Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of benefits." (Quoting *Reigelsberger*, 500 N.W.2d at 66.)).

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 witnesses 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 claimant was issued a copy of employer policies which reference the necessity of utilizing lock out/tag out procedures to retain employment (Employer exhibits seven and eight). The undisputed evidence is that lock out/tag out is an important safety procedure, as it prevents employees from harming themselves or others by turning off and locking the power source on any machine which they are servicing. Because the claimant and her co-workers on August 19, 2016, did not complete the proper lock out/tag out policies, a suppression cannon was discharged, causing injury to co-worker, Maurice.

When determining whether a claimant should be disqualified for benefits, the decision is not based on whether the employer made the right to separate the claimant from employment. Rather, misconduct must be substantial in nature to support a disqualification from unemployment benefits. *Gimbel v. Emp't Appeal Bd.,* 489 N.W.2d 36, 39 (Iowa Ct. App. 1992). The focus is on deliberate, intentional, or culpable acts by the employee. *Id.* The credible

evidence presented does not support that the claimant was aware of the lock out procedures for the suppression cannons, and therefore could not have willfully violated the employer's polices regarding them. The claimant credibly denied being aware that after following the lock out procedures identified as # DF9-030 (Employer exhibit three) that she was supposed to go to another binder find lock out procedures for the suppression cannons. By the employer's own admission, the claimant had not completed sufficient training to be qualified on confined space permits, (yet she was permitted to do so), and her supervisor, Ryan Tuvell, even commented to her (and Maurice) that they were "good to go" prior to the suppression cannon discharging. The administrative law judge concludes while the claimant may have violated the employer's policies, she was unaware they existed.

Therefore, based on the evidence presented, the administrative law judge concludes at most, the claimant's conduct was an isolated instance of poor communication between the employer and claimant regarding her access as a confined entry participant and need for additional training (including the lock out procedures for suppression cannons.) 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 the 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. 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. While the employer may have been justified in discharging the claimant, work-connected misconduct as defined by the unemployment insurance law has not been established in this case. Benefits are allowed.

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 to separation was misconduct under Iowa law.

DECISION:

The September 15, 2016, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible. The benefits withheld based upon this separation shall be paid to claimant.

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Jennifer L. Beckman
Administrative Law Judge

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Decision Dated and Mailed

jlb/rvs