IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

SHERRI A LOKHORST Claimant **A'VIANDS LLC** Employer	**APPEAL 19A-UI-07953-CL-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 07/14/19** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

On October 13, 2019, the claimant filed an appeal from the October 8, 2019, (reference 04) unemployment insurance decision that denied benefits based on a separation from employment. The parties were properly notified about the hearing. A telephone hearing was held on October 31, 2019. Claimant participated personally and through witness Nick Deradd. Employer participated through district manager Jonathan Barnes and was represented by John Soete.

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 began working for employer on July 22, 2014. Claimant last worked as a full-time food service director. Claimant was separated from employment on August 29, 2019, when she was terminated.

Employer is a food service management company. Employer provides food services to schools serving kindergarten through 12th grade.

Employer has a policy on protecting company information. It prohibits employees from disclosing private information of employees or employer and states that doing so could result in termination. The policy is contained in the handbook. Claimant either knew or should have known of the policy.

Claimant was the food service director at the Boyden, Iowa location. As a food service director, claimant had electronic access to wage information.

On July 13, 2019, claimant was either demoted or stepped down to the position of full-time cook. Employer hired Kayla Oldenkamp to replace her. New electronic accounts were set up

for Oldenkamp. District manager Jonathan Barnes forgot to send a request to terminate claimant's authorization for access to employer's electronic information.

Claimant lives in a small town. Claimant's mother-in-law heard through the town "grapevine" the amount employer was paying Oldenkamp per hour. Claimant's mother-in-law shared this information with her.

On August 26, 2019, claimant remarked to her co-worker, Lori, that she heard how much employer was paying Oldenkamp per hour. Claimant gave the amount and remarked that it was more than the employer ever paid her when she held the position of food service director. Lori reported this conversation to Barnes. Barnes believed claimant learned the information from accessing employer's wage information that was stored electronically.

On August 29, 2019, Barnes met with claimant. They talked about several issues. Ultimately, Barnes notified claimant he was terminating her employment because she shared Oldenkamp's private information. Claimant stated that she told only one person. Claimant was upset and the parties did not discuss how claimant learned the information.

Employer had never previously disciplined claimant for similar conduct.

REASONING AND CONCLUSIONS OF LAW:

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

It is my duty, as the administrative law judge and 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, as the finder of fact, 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. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). 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 evidence you believe; 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. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

The administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own experience living in a small town similar to claimant's for many years. As demonstrated in the findings of fact above, the administrative law judge finds claimant's testimony that she learned Oldenkamp's rate of pay through town gossip to be credible. Claimant denies accessing electronic wage information after she was no longer food service director. In this day and age, it would not have been very difficult for employer to obtain evidence showing whether claimant used her password to view Oldenkamp's wage information. Employer did not present any evidence that she did.

So the question is, does claimant's repeating town gossip about her new boss amount to misconduct?

Iowa Code § 96.5(2)a provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 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.

The employer has the burden to prove the claimant was discharged for job-related misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer made the correct decision in ending claimant's employment, 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). Misconduct justifying termination of an employee and misconduct warranting denial of unemployment insurance benefits are two different things. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988).

Misconduct must be "substantial" to warrant a denial of job insurance benefits. *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 is not 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).

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 assess points or impose discipline up to or including discharge for the incident under its policy.

The conduct for which claimant was discharged was merely an isolated incident of poor judgment. 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.

Employer failed to establish claimant was terminated for misconduct.

DECISION:

The October 8, 2019, (reference 04) unemployment insurance decision is reversed. Claimant was separated for no disqualifying reason. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements.

_____

Christine A. Louis
Administrative Law Judge
Unemployment Insurance Appeals Bureau
1000 East Grand Avenue
Des Moines, Iowa 50319-0209
Fax (515)478-3528

_____

Decision Dated and Mailed

cal/scn