IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

68-0157 (9-06) - 3091078 - EI

TIMOTHY T HALL
Claimant

HY-VEE INC
Employer

APPEAL NO: 18A-UI-11646-JC-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/21/18
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant, Timothy T. Hall, filed an appeal from the November 20, 2018, (reference 02) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on December 17, 2018. The claimant participated personally. The employer participated through Barbara Buss, hearing representative with Corporate Cost Control. Employer witnesses included Connie Heidmann, human resources manager, Cord West, assistant store director, Chad Airy, assistant director of delicatessen, and Marlys Siefken, assistant delicatessen manager.

The administrative law judge took official notice of the administrative records including the fact-finding documents. Employer Exhibits 1-7 were admitted 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 part-time as a deli clerk and was separated from employment on October 20, 2018, when he was discharged for tardiness and not listening to management (Employer Exhibit 1). The claimant had no other employment during while working at Hy-Vee, and has since begun part-time employment at Casey's in Cedar Rapids.

When the claimant was hired for the employer, he received training on employer rules and procedures, including the code of conduct, and attendance policies (Employer Exhibits 2, 3, 7). The employer stated it applies progressive discipline for attendance infractions. The claimant did not receive any warnings for his attendance infractions or tardies before discharge. The claimant did receive a written warning on September 24, 2018, for using his cell phone on the floor (Employer Exhibit 5) and for not paying for food items on September 30, 2018 (Employer Exhibit 6).

The claimant was tardy on September 22, October 1, 13, 14, and 17, 2018. His tardies ranged from 7 to 19 minutes. The claimant stated he had brought a doctor's note to Ms. Siefken in September 2018 which identified he was on new medication. One of the side effects involved stomach issues, and when the claimant told Ms. Siefken about the medication, she stated he was trying to avoid her and avoid work. The employer prepared "pink slips" in conjunction with the claimant's tardies for documentation purposes, but never presented him any discipline or told him he would be fired if he was late again.

On October 20, 2018, the claimant was 22 minutes late to his shift. He did not notify the employer he was running late due to stomach issues and did not take Ms. Siefken's phone call 15 minutes after his shift, because he was driving. Upon arrival, he was confronted by Ms. Siefken and he said he had been sick with a stomach bug the prior night and did not feel good. Later, he was confronted again by Cord West, who reported the claimant would not provide an answer for his tardy. He was subsequently discharged based upon his interactions with management about his late arrival and pattern of tardiness.

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.

Iowa law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id*.

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).

The employer has the burden of proof in establishing disqualifying job related 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). 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.*

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 evidence presented does not support the claimant's conduct to Mr. West or Ms. Siefken was insubordinate or rude when questioned about his tardiness, in light of him explaining to Ms. Siefken and not feeling well. Further, it cannot be ignored that previously when the claimant tried to explain his medical issues caused stomach issues to Ms. Siefken, her response was that he was trying to avoid her and avoid work. It is understandable why the claimant's interactions about illness thereafter would be brief with her. No specific evidence was presented that would support he was purposefully rude or disrespectful that day to either management member. Therefore, the administrative law judge concludes the claimant was not insubordinate or unprofessional that day.

In this case, the claimant had two unrelated warnings before discharge for use of his cell phone and not paying for food product (Employer Exhibits 5, 6). He had never been counseled for warnings before discharge about his attendance in light of having five prior tardies before October 20, 2018. Regardless of the reason, or failure to notify the employer or respond to Ms. Siefken's call, the administrative law judge is not persuaded the claimant could have reasonably known he may be fired on October 20, 2018, for being late because he had been late five other times previously without any discipline.

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. A warning for cell phone use or paying for sandwiches is not similar to tardiness and the employer's simple accrual of a certain number of warnings counting towards discharge does not

establish repeated negligence or deliberation and is not dispositive of the issue of misconduct for the purpose of determining eligibility for unemployment insurance benefits.

If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. The employer stated it applies a progressive discipline policy to attendance violations but in this case, did not for unknown reasons. The employer has not met its burden of proof to establish a current or final act of misconduct, and, without such, the history of other incidents need not be examined.

The question before the administrative law judge in this case is not whether the employer has the right to discharge this employee, but whether the claimant's discharge is disqualifying under the provisions of the Iowa Employment Security Law. While the decision to terminate the claimant may have been a sound decision from a management viewpoint, for the above stated reasons, the administrative law judge concludes that the employer has not sustained its burden of proof in establishing that the claimant's discharge was due to job related misconduct. Accordingly, benefits are allowed, provided the claimant is otherwise eligible.

The parties are reminded that under Iowa Code § 96.6-4, a finding of fact or law, judgment, conclusion, or final order made in an unemployment insurance proceeding is binding only on the parties in this proceeding and is not binding in any other agency or judicial proceeding. This provision makes clear that unemployment findings and conclusions are only binding on unemployment issues, and have no effect otherwise.

DECISION:

The November 20, 2018, (reference 02) decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. The benefits claimed and withheld shall be paid, provided he is otherwise eligible.

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Jennifer L. Beckman
Administrative Law Judge

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Decision Dated and Mailed

jlb/scn