IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

EZECHIEL B. WARUZAMUKA Claimant **WHIRLPOOL CORPORATION** Employer	**APPEAL 21A-UI-10703-CS-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 02/21/21** **Claimant: Appellant (2)**

Iowa Code §96.5(2)a-Discharge/Misconduct
Iowa Code §96.5(1)- Voluntary Quit

STATEMENT OF THE CASE:

On April 15, 2021, the claimant/appellant filed an appeal from the April 5, 2021, (reference 02) unemployment insurance decision that denied benefits based on claimant being discharged for violation of a known company policy. The parties were properly notified about the hearing. A telephone hearing was held on July 2, 2021. Claimant participated at the hearing through an interpreter. The interpreter was Christine from CTS Language Link with an employee identification number 425007. Employer registered for the hearing but did not answer the call for the hearing. The administrative law judge attempted calling the employer three times. The hearing proceeded without the employer present.

ISSUE:

Was the claimant discharged for 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 August 29, 2013. Claimant last worked as a full-time inspector. Claimant was separated from employment on February 11, 2021, when he was discharged.

The company has a policy that employees need to wear ear plugs while working. This policy was not presented during the hearing and was not submitted by the employer prior to the hearing.

On Friday, February 6, 2021, claimant went to work. Normally when an employee enters the job site there are ear plugs located at the entrance. When claimant arrived at work there were no ear plugs available at the area where they were normally located. Claimant did not located alternate ear plugs. The claimant went to his work area and began working. Within five minutes of claimant beginning his work his supervisor saw he was not wearing ear plugs and told him to go find some and put them in. Claimant went and found some and put them in. When claimant returned to the work floor he was given a written warning for failing to wear ear plugs.

On Tuesday, February 11, 2021, claimant went to work and was notified by his supervisor he was being terminated for failing to wear ear plugs on February 6, 2021. Claimant had never received any prior warnings about failing to wear ear plugs at work.

REASONING AND CONCLUSIONS OF LAW:

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

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.

871 IAC 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 Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

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). 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). 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.

The claimant testified that when he arrived at work the ear plugs were gone. Claimant mistakenly forgot to located alternative ear plugs. "[M]ere negligence is not enough to constitute misconduct." *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 666 (Iowa 2000). A claimant will not be disqualified if the employer shows only "inadvertencies or ordinary negligence in isolated instances." 871 IAC 24.32(1)(a). When looking at an alleged pattern of negligence, previous incidents are considered when deciding whether a "degree of recurrence" indicates culpability. Claimant was careless, but the carelessness does not indicate "such degree of recurrence as to manifest equal culpability, wrongful intent or evil design" such that it could accurately be called misconduct. Iowa Admin. Code r. 871-24.32(1)(a); *Greenwell v. Emp't Appeal Bd.*, No. 15-0154 (Iowa Ct. App. Mar. 23, 2016).

The claimant testified he never had any prior disciplinary warnings regarding wearing ear plugs. 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. 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 to warrant a denial of unemployment benefits. As a result benefits are granted.

DECISION:

The April 5, 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.

Carly Smith
Administrative Law Judge
Unemployment Insurance Appeals Bureau

July 15, 2021
Decision Dated and Mailed

cs/mh