IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

MICHAEL G SIMPSON Claimant **CASEY'S MARKETING COMPANY** Employer	**APPEAL 17A-UI-05652-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 05/07/17** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the May 25, 2017, (reference 01) 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. Employer participated through area supervisor Julie McKee. Store manager Charli Syndergaard attended the hearing on behalf of the employer, but did not testify. Employer Exhibit 1 was admitted into the record 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 full-time as a store employee from June 25, 2015, and was separated from employment on April 16, 2017, when he was discharged.

Claimant was discharged for violating the employer's employment of relatives/non-fraternization, honesty and integrity, and employee conduct policies. Employer Exhibit 1. The employer's employment of relatives/non-fraternization policy has a specific section for violations. Employer Exhibit 1. The violation section states: "Supervisors violating the non-fraternization policy or who fail to immediately report involvement in a personal relationship with a subordinate employee will receive corrective action, up to and including termination of employment." Employer Exhibit 1. Claimant was aware of the employer's policies. Employer Exhibit 1.

On April 3, 2017, during claimant's scheduled shift, claimant and an assistant manager engaged in inappropriate conduct in the manager's office while they were both working; they kissed, hugged, and touched (arms around each other, touching each other on the face in a romantic way) each other. On April 13, 2017, Ms. McKee was in the store doing a store report and noticed that a lot of the overnight cleaning had not been done and she randomly selected April 3, 2017 to review surveillance video. Ms. McKee observed on the surveillance claimant and the assistant manager kiss one time, cuddle/hug two or three times, and inappropriately

touch during a ten minute time period on the video. Employees know that the employer has cameras in all work areas, including the manager's office.

On April 16, 2017, Ms. McKee interviewed the assistant manager and claimant. Ms. McKee first interviewed the assistant manager and the assistant manager initially denied any inappropriate conduct. Ms. McKee told the assistant manager it was on video and the assistant manager responded ok. Next, Ms. McKee interviewed claimant. Ms. McKee asked if claimant was aware of any inappropriate conduct in the store. Claimant responded yes, that he and the assistant manager had built a relationship and were involved. Claimant told Ms. McKee they were in a relationship. Claimant admitted they had kissed at work. Ms. McKee is only aware of this happening one time. The employer discharged the assistant manager and claimant.

Claimant did not have any prior disciplinary warnings. Claimant did not have any supervisory/authority over the assistant manager. The assistant manager had supervisory/authority over claimant.

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).

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). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990); however, "Balky and argumentative" conduct is not necessarily disqualifying. *City of Des Moines v. Picray*, (No. __-__, Iowa Ct. App. filed __, 1986).

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.

It is clear that on April 3, 2017, claimant kissed an assistant manager at the employer while they were both working. Claimant was a subordinate to the assistant manager. The employer's policy clearly put the assistant manager on notice that she was subject to a "corrective action, up to and including termination of employment" for "violating the non-fraternization policy[;]" however, the policy did not put claimant on notice of what, if any, discipline he could expect for violating the policy as a subordinate. Furthermore, claimant had no disciplinary warnings prior to his discharge.

The conduct for which claimant was discharged was merely an isolated incident of poor judgment and 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. Benefits are allowed.

DECISION:

The May 25, 2017, (reference 01) 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