IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MARK S PITT
Claimant

ALL CLEAN OF IOWA INC
Employer

APPEAL NO: 15A-UI-00213-D

ADMINISTRATIVE LAW JUDGE DECISION

OC: 12/07/14
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

All Clean of Iowa, Inc. (employer) appealed a representative's December 31, 2014 (reference 02) decision that concluded Mark S. Pitt (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, an in-person hearing was held on February 10, 2015. The claimant participated in the hearing. Emmett Schnathorst appeared on the employer's behalf and presented testimony from one other witness, Jensen Krangel. During the hearing, Employer's Exhibits One and Two are entered into evidence. Based on the evidence, the arguments of the parties, 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 work-connected misconduct?

OUTCOME:

Affirmed. Benefits allowed.

FINDINGS OF FACT:

The claimant started working for the employer on August 20, 2012. He worked full time as a crew leader. Her last day of work was November 2, 2014. The employer discharged her on that date. The reason asserted for the discharge was not performing a job to the employer's expectations.

The claimant worked on cleaning a restaurant kitchen grill and vents in Waukee, Iowa beginning at about 10:00 p.m. on November 1 and ending at about 9:30 a.m. on November 2. When the business president, Schnathorst, arrived on the site at about 8:00 a.m., he was upset because the claimant had not started with or gotten to the fans on the roof. The job order did not specify in which order the work was to be done. When the claimant arrived with the crew on the site he determined that the roof was too damp from dew and that it should wait. He got the crew started on the kitchen grills and ventilation hoods. They were somewhat slowed down because

the three men on the crew were very inexperienced, with one just starting that day. Also, while there were two power washers on site, only one of them had a working heater unit; using only the one power washer delayed the progress on the job. The claimant had previously indicated that he believed he could get the heater unit fixed prior to going out on the job. However, the claimant had worked over 50 hours that week and ran out of time before needing to go out on the job on the night of November 2.

From February 9 through October 28, 2014 the employer had given the claimant 13 write-ups for performance issues, about two of which dealt with completion of the cleaning process; although none that were specifically for not starting with the roof fans. All of the warnings indicated that the claimant's job could be in jeopardy if the claimant's performance did not improve. The most recent warning on October 28 did not specify that it was a final warning.

Because the employer determined on November 2 that it could no longer accept the claimant's failure to complete the work to the employer's expectations, the employer discharged the claimant.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. Rule 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. Rule 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, 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. Rule 871 IAC 24.32(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

The reason cited by the employer for discharging the claimant is his failure to perform work to the employer's expectations. A failure in job performance is not misconduct unless it is intentional. *Huntoon*, supra; *Lee v. Employment Appeal Board*, 616 N.W.2d 661 (Iowa 2000). The mere fact that an employee might have multiple incidents of unsatisfactory job performance does not establish the necessary element of intent; misconduct connotes volition. The employer

has not established that the claimant intentionally failed to make his best efforts to adequately perform the job on the shift from November 1 to November 2. Even if the employer had a good business reason for discharging the claimant, it has not met its burden to show disqualifying misconduct. *Cosper*, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute and the claimant is not disqualified from benefits.

DECISION:

The representative's December 31, 2014 (reference 02) decision is affirmed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

_____
Lynette A. F. Donner
Administrative Law Judge

_____
Decision Dated and Mailed

ld/can