IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

BENEDICTE M MIANKINDILA Claimant **SWIFT PORK COMPANY** Employer	**APPEAL 18A-UI-02460-DL-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 01/21/18** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the February 20, 2018, (reference 01) unemployment insurance decision that denied benefits based upon a discharge from employment. The parties were properly notified about the hearing. A telephone hearing was held on March 19, 2018. Claimant participated through a CTS Language Link Lingala language interpreter. Employer participated through assistant human resource manager Emily Pottorff and human resource manager Nicholas Aguirre. The employer's proposed exhibits were not included as they were not delivered to claimant prior to the hearing. The employer was allowed to offer testimony about the contents.

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 as a full-time production worker through December 5, 2017. On November 27 the employer alleged that coworker Jose Verber Hurtado accused claimant of hitting him on the head while in the cafeteria in the presence of trainer Luciano Laguna and utility lead worker Rogelio Hernandez.[1] Claimant was a friend of Hurtado's sister, Violeta[2] so they sat together with him at break that day. They were laughing and joking while talking about the English classes they took together. As claimant got up to leave, she did not strike Hurtado on the head but touched his helmet once while telling his sister, "Don't believe him, he has stopped coming to English class." She did not raise her voice and was not angry. Hurtado stayed and finished eating. Hurtado had engaged in horseplay with claimant and Violeta in the past.

Claimant had been disciplined in November 2017, for not following instructions from management and in April 2017 for arguing with coworkers and leaving the line without permission. On that occasion while knowing she is pregnant, the supervisor made her wait to

[1] Hurtado, Laguna and Hernandez did not participate in the hearing and the employer did not offer sworn statements.
[2] The employer did not interview Hurtado's sister or provide a written witness statement from her.

use the restroom so she unintentionally began to wet herself. The employer has a zero-tolerance policy for horseplay.[3] The employer had not previously warned claimant her job was in jeopardy for any similar reasons.

REASONING AND CONCLUSIONS OF LAW:

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

When the record is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. *Schmitz v. Iowa Dep't Human Servs.*, 461 N.W.2d 603, 607 (Iowa Ct. App. 1990). Both the quality and the quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See, Iowa Code § 17A.14(1). In making the evaluation, the fact-finder should conduct a common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be fulfilled. *Schmitz*, 461 N.W.2d at 608.

The decision in this case rests, at least in part, upon the credibility of the parties. The employer did not present a witness with direct knowledge of the situation. No request to continue the hearing was made and no written statement of the individual was offered. Given the serious nature of the proceeding and the employer's allegations resulting in claimant's discharge from employment, the employer's nearly complete reliance on hearsay statements is unsettling. Nor did the employer bother to submit a copy of the policy at issue. Noting that the claimant presented direct, first-hand testimony while the employer relied upon second-hand reports, the administrative law judge concludes that the claimant's recollection of the events is more credible than that of the employer.

Iowa Code section 96.5(2)a provides:

> **Causes for disqualification.**
>
> 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

[3] The employer did not offer a copy of the policy.

> 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. *Reigelsberger v. Emp't Appeal Bd.*, 500 N.W.2d 64, 66 (Iowa 1993); *accord Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000).

Misconduct "must be substantial" to justify the denial of unemployment benefits. *Lee*, 616 N.W.2d at 665 (citation omitted). "Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of benefits." *Id.* (citation omitted). …the definition of misconduct requires more than a "disregard" it requires a "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." Iowa Admin. Code r. 871–24.32(1)(a) (emphasis added).

Whether an employee violated an employer's policies is a different issue from whether the employee is disqualified for misconduct for purposes of unemployment insurance benefits. *See Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000) ("Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of benefits." (Quoting *Reigelsberger*, 500 N.W.2d at 66.)).

Touching Hurtado's helmet once, in the circumstances the claimant credibly described, does not rise to the level of horseplay such that it would be disqualifying conduct. The employer 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. A warning for not following supervisory instructions, arguing with coworkers or leaving the line without permission are not similar to an allegation of horseplay 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.

DECISION:

The February 20, 2018, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

dml/rvs