IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

JESSICA J BRIGGS Claimant **STEENA CO LLC** Employer	**APPEAL 17A-UI-05778-NM-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 04/30/17** **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 based upon her discharge for violation of a known company rule. The parties were properly notified of the hearing. A telephone hearing was held on June 20, 2017. The claimant participated and testified. The employer participated through owner Cara VanSteenis and Store Manager Patty Payne. Employer's Exhibits 1 and 2 were received into evidence.

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 shift manager from October 28, 2016, until this employment ended on April 26, 2017, when she was discharged.

The employer is in the business of operating a fast food restaurant. On April 26, 2017, claimant closed one of the two drive-thru lanes early. The employer's policies prohibit closing a drive thru lane without permission from a supervisor. (Exhibit 1). Claimant received a copy of this policy upon her hire. On March 9, 2017, claimant received a written reprimand for closing the restaurant lobby 30 minutes early when she was short-staffed. (Exhibit 2). At the time she was issued the reprimand claimant was warned if she closed the lobby early again she might be terminated. Claimant testified she did not realize this applied to other parts of the restaurant. During the discussion about the reprimand on March 9 Payne told claimant she was of the understanding that, in a situation like this, the owner preferred to have one of the drive-thru lanes shut down rather than closing the lobby. Claimant testified, based on this statement, she believed, when a similar situation occurred on April 26, it would be proper to close one of the drive-thru lanes. According to claimant she even called Payne and got permission to shut one of the drive-thru lanes down, though Payne denies this was the case. When VanSteenis learned claimant had closed the drive-thru lane, her employment was terminated.

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). 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.

The conduct for which claimant was discharged was an isolated incident of poor judgment. While claimant was previously warned about closing the lobby early, that warning specifically pertained to the lobby and did not mention any other part of the restaurant. At the time claimant was given that warning she was also told by Payne that the owner preferred she shut down one of the drive-thru lanes in that type of situation. There is some dispute as to whether claimant received permission to do this by her supervisor, but even if she did not, the comments made to her by Payne on March 9 could reasonably lead one to believe the appropriate thing to do in a similar situation would be to close a drive-thru lane.

To the extent that the circumstances surrounding each accident were not similar enough to establish a pattern of misbehavior, the employer has only shown that claimant was, at best, negligent. "[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). Ordinary negligence is all that is proven here.

Furthermore, 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 specific issue leading to the separation, it has not met the burden of proof to establish claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. Because the employer has failed to establish disqualifying misconduct, benefits are allowed, provided claimant is otherwise eligible.

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 she is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

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Nicole Merrill
Administrative Law Judge

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Decision Dated and Mailed

nm/rvs