IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DESMEND J MENJARES
Claimant

BEST BUY STORES LP
Employer

APPEAL NO: 18A-UI-10884-JC-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/07/18
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the October 26, 2018, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on November 19, 2018. The claimant participated personally and was represented by Sarah L. Nelms, non-attorney representative and mother of the claimant. Ms. Nelms also testified for the claimant. The employer participated through Trenton Kilpatrick, hearing representative for Corporate Cost Control, represented the employer. Julie McDade, assistant manager of sales, testified for the employer.

The administrative law judge took official notice of the administrative records including the fact-finding documents. Employer Exhibit 1 was admitted into evidence. Based on the evidence, the arguments presented, 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 disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a sales consultant and was separated from employment on October 11, 2018, when he was discharged for alleged improper use of employee discount (Employer Exhibit 1).

When the claimant was hired, he signed an acknowledgement of employer rules and procedures but reported no handbooks were available at the time. Ms. McDade had no information about his training or orientation available. He did not receive the handbook/rules thereafter but could have accessed it online. He denied ever having training on the employee discount policy in 2016 when he was hired or when the employer updated its employee discount policy, effective April 10, 2017 (Employer Exhibit 1).

The 2017 version of the employer discount policy states that employees may not use their employee discount with friends or family (who would then repay the claimant) (Employer Exhibit 1). The policy only allows gifts to be bought with the employee discount if the employee pays for the entire purchase and is not reimbursed by anyone (Employer Exhibit 1). The policy also explicitly states "in order to ensure the Employee Discount is used appropriately, for in-store purchase, your name must appear on the payment form that is used to make the purchase (Employer Exhibit 1).

On September 22, 2018, the claimant purchased a phone at the employer store and used his employee discount. He retained ownership on the phone. He used the credit card of Sarah Nelms, his mother, to pay for the phone. Ms. Nelms stated she was in-town for a family wedding and tried to help the claimant secure his own phone and get off her phone plan. Due to family obligations, she did not give him cash to front the cost of the phone or go with him, but rather "flung" her credit card and asked him to take care of it. She asked him if he would get in trouble and he said no, because the phone was for himself, and not for her. The claimant stated he knew that he could not use his discount for others but in this case was using his discount for himself, and his mom simply fronted the cost until his next paycheck.

Upon review of monthly employee discount transactions, Ms. McDade discovered the claimant's transaction and the fact that the credit card used was for Ms. Nelms and not the claimant. She escalated the issue to human resources. She notified the claimant of the transaction who acknowledged he didn't know he could not use his mom's card since the phone was for him, and he apologized. Thereafter, the decision to discharge the claimant was made and "cascaded" to Ms. McDade. She did not make the decision to discharge. The evidence was disputed as to whether the claimant's prior disciplinary history related to inappropriate conduct and job performance was also considered in deciding to discharge him or if it was based on the single transaction on September 22, 2018. The claimant had no prior discipline related to abuse of discounts.

REASONING AND CONCLUSIONS OF LAW:

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

Iowa law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. Id.

Iowa Administrative Code rule 871-24.32(1)a provides:

> "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).

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. The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 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. IDJS*, 364 N.W.2d 262 (Iowa 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. IDJS*, 425 N.W.2d 679 (Iowa 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 Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). The focus is on deliberate, intentional, or culpable acts by the employee. See *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

Iowa Admin. Code r.871-24.32(8) provides:

> (8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

Iowa Admin. Code r. 871-24.32(4) provides:

> (4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

In this case, the claimant was discharged after he purchased a phone on September 22, 2018, utilizing his employee discount, but paying with his mother's credit card. At face value, in reviewing the transaction on paper, it could reasonably appear that the claimant bought a phone using his employee discount on September 22, 2018 for Sarah Nelms, because it was paid for by her credit card. However, that was not the case here. The claimant did not intend to abuse the discount or share his discount with Ms. Nelms, and did not allow anyone else to benefit from his employee discount. This is further supported by the fact he retained possession of the phone. Rather, the claimant simply couldn't afford the phone on that day and since his mom was in town, she helped pay for it and then he paid her back. She, in no way, profited or benefited from the transaction, except to remove her son from her phone plan.

All things considered, the claimant's conduct did violate the employer's policy because the claimant did not use a form of payment with his name on it during the transaction in question. However, when determining if a discharge is due to misconduct, it cannot be ignored that good

faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute. So the crux of the issue becomes whether the claimant purposefully or knowingly violated the employer's employee discount policy.

The witness in this case could not identify when the claimant was informed of the employer's discount policy including the new cell phone policy effective 2017. The claimant acknowledged signing receipt of policies during orientation but did not actually receive them. The employer presented no evidence that established through training, a meeting or anything else that the claimant was made aware of the details of the employee discount policy, including the language contained in the 2017 version regarding payment method. Ms. McDade also lacked information about whether the claimant was discharged for a single incident or based on a culmination of disciplinary history. In contrast, the claimant presented direct, first-hand testimony while the employer relied upon second-hand reports. The administrative law judge concludes therefore, that the claimant's recollection of the events is more credible than that of the employer.

Recognizing the claimant could have requested a copy of rules after the store was out at orientation, the administrative law judge is persuaded he knew the basic policy: don't let someone else use your discount and pay you back. In this case however, it was essentially the opposite: the claimant used his employee discount for his own benefit but was fronted the payment by his mother.

In light of credible proof of the payment name must match employee component of the employer policy, the administrative law judge cannot conclude that the claimant willfully and deliberately violated the employer policy on September 22, 2018 when he paid for his own phone with his mom's credit card.

Based on the evidence presented, the administrative law judge concludes the conduct for which the claimant was discharged was an isolated incident of poor judgment and inasmuch as the employer had not previously warned the claimant about the issue leading to the separation, it has not met the burden of proof to establish that the 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. Training or general notice to staff about a policy is not considered a disciplinary warning.

If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. The employer has not met its burden of proof to establish a current or final act of misconduct, and, without such, the history of other incidents need not be examined. The question before the administrative law judge in this case is not whether the employer has the right to discharge this employee, but whether the claimant's discharge is disqualifying under the provisions of the Iowa Employment Security Law.

While the decision to terminate the claimant may have been a sound decision from a management viewpoint, for the above stated reasons, the administrative law judge concludes that the employer has not sustained its burden of proof in establishing that the claimant's discharge was due to a final or current act of job related misconduct. Accordingly, benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The October 26, 2018, (reference 01) decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. The benefits claimed and withheld shall be paid, provided he is otherwise eligible.

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Jennifer L. Beckman
Administrative Law Judge

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Decision Dated and Mailed

jlb/scn