IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

WESLEY PETERSON Claimant **IOWA FINANCE AUTHORITY** Employer	**APPEAL 18A-UI-10982-NM** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 10/07/18** **Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge Misconduct
Iowa Admin. Code r. 871-24.32(1)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from the October 29, 2018, (reference 01) unemployment insurance decision that denied benefits based upon his discharge for violation of a known company rule. The parties were properly notified about the hearing. A hearing was held in-person in Des Moines, Iowa on January 4, 2019. Claimant participated and was represented by attorney Patrick White. Employer participated through Hearing Representative Paul Jahnke and witnesses Carolanne Jensen and Brooke Parziale. Employer's Exhibits 1 through 12 and Claimant's Exhibits A through J were admitted into evidence.

ISSUE:

Was the claimant discharged for disqualifying misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for employer on May 27, 2011. Claimant last worked full-time at the Director of Government Relations. Claimant was separated from employment on September 27, 2018, when he was discharged.

On March 24, 2018, claimant learned that the then-director of the employer agency, Mr. Jamison, had been discharged amid allegations of sexual harassment. The allegations came from individuals known as witness 1 and witness 2. Claimant had a close, long-standing friendship with witness 2. The two would regularly socialize outside of work and call or text outside work hours. Claimant had no supervisory authority over witness 2. Upon learning of the director's discharge, claimant called witness 2. (Exhibit 1). The purpose of claimant's call was to try to figure out what was going on with Mr. Jamison's discharge. Claimant testified he was calling as one friend to another. When claimant spoke to witness 2 his voice was raised. He asked her if she was one of the accusers, which she denied. Claimant then indicated if he was asked about a situation involving her, he would say he did not remember. After the conversation ended, claimant immediately felt badly for how he had spoken to witness 2. He

attempted to call her back to apologize, but she did not answer. Claimant then sent a text message apologizing and stating he was just hoping he was not "collateral damage" in the situation. Witness 2 accepted the apology and the friendship went on as it had been before.

Following Jamison's dismissal, an independent investigation into the harassment allegations was conducted. The investigation findings were detailed in a document known to the parties as the Weinhardt Report. The Weinhardt Report was given to the Interim Director Carolanne Jensen on September 20, 2018. This report was the first Jensen had heard of the March 24 conversation between claimant and witness 2. Upon receiving the report, Jensen consulted with the Director of the Department of Administrative Services (DAS), Janet Phipps. Jensen and Phipps agreed DAS should complete its own internal investigation. The investigation was concluded on September 27, 2018 and it was determined claimant had engaged in retaliatory behavior when he called witness 2 on March 24. Neither claimant nor witness 2 were interviewed as part of the investigation. At no point, either during the DAS investigation or Weinhardt investigation did witness 2 categorize claimant's conduct on March 24 as threatening, intimidating, or retaliatory. Nevertheless, Jensen determined claimant's conduct was severe enough that he must be discharged in order to protect victims and encourage others to come forward in the future. Claimant was discharged for violating the employer's policies regarding retaliation on September 27, 2018. (Exhibit 3).

Claimant testified he had received the employer's policies and procedures, located in the employee handbook. (Exhibits, C, D, 11 and 12). He also received sexual harassment training in February 2018. (Exhibit 4). According to claimant he did not understand his conduct on March 24, 2018 could be considered retaliation and he did not intend for it to be anything aside from a conversation between friends. Claimant testified, had he known his conduct could be considered retaliation, he would not have made the call. He had no prior warnings or disciplinary action.

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.
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> 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.

Claimant was discharged for allegedly retaliating against witness 2 after she made a sexual harassment complaint. The conduct for which claimant was discharged was merely an isolated incident of extremely poor judgment. The claimant was not in a position of authority over witness 2, nor is there any evidence that he threatened or even insinuated any negative action would be taken against her. At the time of the conversation, claimant did not even know witness 2 was one of the complaining employees. Claimant provided credible testimony that he called witness 2 on March 24 as a friend to talk to try to figure out what was happening with their employer. While the employer contends discharging claimant was necessary to protect victims and prevent a chilling effect on reporting harassment, no evidence was presented that would indicate witness 2 felt retaliated against by claimant or needed to be protected from him, or that any other employee was even aware of the situation. To the contrary, all of the evidence shows, once claimant apologized, the two resumed their friendship. Furthermore, the fact that claimant made no attempts to contact or identify witness 1 or to discuss the situation about Mr. Jamison with any employee after March 24, 2018, supports his claim that he was simply talking to a friend about a stressful situation at work. Claimant's testimony that he did not understand his actions could be considered retaliation is credible.

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. The employer had not previously warned claimant about the issue leading to the separation. 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. As such, benefits are allowed, provided claimant is otherwise eligible.

DECISION:

The October 29, 2018, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he 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/scn