IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

EUGENE VAN BERKUM
Claimant

A & W ELECTRICAL CONTRACTORS
Employer

APPEAL NO. 09A-UI-04138-LT

ADMINISTRATIVE LAW JUDGE DECISION

Original Claim: 02/15/09
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the March 9, 2009, reference 01, decision that denied benefits. After due notice was issued, a telephone conference hearing was held on April 9, 2009. Claimant participated. Employer participated through Jeff Van Houten, owner; Bruno Andreini, former owner; Kevin Eaton, project manager; and Jeanette Bracket, office manager. Employer's Exhibit 1 was received.

ISSUE:

The issue is whether claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant most recently worked full-time as a commercial electrician and was employed from June 1993 until February 13, 2009 when he was discharged. When Andreini hired claimant, he gave claimant permission to work with claimant's father's and brother's appliance business but not private work in competition with his commercial business. Van Houten bought the business from Andreini in April 2007 and had told claimant in May 2007 that he was not happy with his position in the company because he had not expressed any respect to Van Houten in the previous years when Van Houten was an estimator and supervisor for some jobs but claimant primarliy worked for Andreini directly. Another conversation on Friday afternoon before the Independence Day holiday, claimant had an argument with Eaton on the emergency job. Van Houten set up a meeting for Monday about the dispute. After resolving that issue, claimant brought up the issue of a raise, because he had to work on the side to make ends meet. Van Houten said he would think about it but did not advise claimant he could not moonlight. Claimant continued to do side work but nothing commercial or in competition with the employer. He primarily worked on small residential projects (hooking up outlets) on weekends or nights for family, friends, and neighbors. Employer does not do business in Pella where claimant lives. On about January 29, a coworker showed Van Houten claimant's business card (Employer's Exhibit 1, Attachment E) with a company cell phone number; but since claimant was overseeing a critical commercial job and had specific information employer

would need to finish the project, employer took no action. On February 11, employer saw residential electrical materials in the company van and again did not confront claimant. On February 13 employer fired claimant without questioning him about the business card, the cell phone number, or the electrical materials. Had employer questioned claimant about his concerns, he would have found that when the card was printed in 2001 or 2002 claimant was paying the cell phone bill. Employer began paying the bill in 2005 or later and claimant was asked to merge phones on a family plan so employer could avoid a higher cost business cell phone plan. The cell phone representative told claimant he would be able to take his phone and number with him. Claimant did not attempt to hide his business card from coworkers or supervisors. The residential materials were for his personal garage project.

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 § 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.

871 IAC 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.

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." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Employment Appeal Board*, 423 N.W.2d 211 (Iowa App. 1988).

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, employer incurs potential liability for unemployment insurance benefits related to that separation. Given the history of communication, or lack thereof, claimant reasonably believed he was permitted to work on small, non-competing residential jobs on the side, including his own. Inasmuch as employer had not previously warned claimant about any of the issues leading to the separation, it 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. Benefits are allowed.

DECISION:

The March 9, 2009, reference 01, decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. The benefits withheld effective the week ending February 21, 2009 shall be paid to claimant forthwith.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

dml/kjw