IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

BRENDA J WOMACK Claimant **MOWEN CLEANING SERVICE LLC** **SERVICEMASTER OF FORT MADISON** Employer	**APPEAL 17A-UI-10242-DL-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 10/23/16** **Claimant: Respondent (1)**

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

STATEMENT OF THE CASE:

The employer filed an appeal from the September 27, 2017, (reference 03) unemployment insurance decision that allowed benefits based upon a discharge from employment. The parties were properly notified about the hearing. A telephone hearing was held on October 23, 2017. Claimant participated with daughter Abby Womack and friend Patricia Pulis. Employer participated through janitorial general manager Mattie Nance. Employer's Exhibits 1 through 3 were received. Exhibit 1 is not considered in making this decision as it pertains to an allegation made after the separation.

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 part-time cleaner August 11, 2017, through September 8, 2017. Mattie Nance interviewed and hired claimant to work weekdays and gave her a note with her hours during the week, specifying no work on Saturdays or Sundays. Pulis saw the note. On September 6 Mattie's spouse Voyd Nance asked claimant to work that Saturday, September 9, 2017. Claimant declined because she would be attending her grandson's first birthday party that had already been rescheduled once. Voyd was on phone with Mattie at the time and claimant heard her say she would work it out. Claimant did not raise her voice or swear at either Nance and the communication took place off the client company property because Voyd wanted to smoke a cigarette. On September 7 Voyd told claimant that Mattie instructed him to write her up. Claimant asked the reason but Voyd did not know. Claimant did not see or receive a copy of the document. (Employer's Exhibit 3) On September 8 at about 8 a.m., Mattie called claimant, who was with her daughter Abby and put the phone on speaker because she was feeding her grandson. Mattie opened the communication by asking, "what is your problem?" claimant thought she was joking for a moment and then said she did not have one. Mattie raised her voice and swore at claimant stating, "You won't even fucking work Saturdays. You were told when you were hired you would fucking work whenever I want you too." Mattie abruptly fired her. There was no mention of a verbal warning that day or the day prior.

Claimant did not swear at or raise her voice with Mattie. Nor did she have a chance to tell Mattie she was on speaker or explain why she could not work that Saturday.

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:

> **Causes for disqualification.**
>
> 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.

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 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).

Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). 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.)).

Claimant did not refuse to work Saturday with two days' notice but merely explained the reason why she could not. That is not considered insubordination. Pulis' and claimant's testimony regarding the note specifiying no Saturday or Sunday work is credible, as is testimony from claimant and her daughter that Mattie was the person swearing and raising her voice. The record reflects that claimant had not been given a warning her job was in jeopardy for any reason. Thus, 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.

DECISION:

The September 27, 2017, (reference 03) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

dml/rvs