IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

JOHN M PARTHEMORE Claimant **AUTO SYSTEMS EXPERTS INC** Employer	**APPEAL 15A-UI-08085-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 06/21/15** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the July 8, 2015, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on August 7, 2015. Claimant participated. Employer participated through Director of Operations Jim Andersen.

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 store manager from February 7, 2011, and was separated from employment on June 19, 2015, when he was discharged.

Claimant was responsible for running the day-to-day operations of the store. Claimant was responsible for disciplining employees and handling 50/50 charge accounts. The employer allows customers to enter into 50/50 charge accounts, where customer pays 50 percent of the bill once the service is done and then provide the employer with a check for the other 50 percent that the employer will not cash until a certain number of days later. This is the procedure claimant was required to follow to allow customers to utilize 50/50 charge accounts. On occasion the check would not clear and then claimant would have to pay for the delinquent amount out of his monthly bonus check. Claimant would also on occasion not secure the check from the customer and if the customer did not come back in to pay, he would be responsible for the delinquent amount.

On April 14, 2015, claimant received a written warning. Mr. Andersen issued the written warning to claimant for not following the employer's charging policy and claimant had also offered personal time off to new employees without receiving authorization. Claimant signed the warning; however, claimant did not agree with the warning. On the written warning it states claimant's position will be reevaluated if the behavior continues. Mr. Andersen did not verbally

tell claimant his job was in jeopardy. Claimant testified he had received prior approval to offer the new employees personal time off. Claimant said he would not have made that offer without prior approval.

Claimant was discharged on June 19, 2015. Mr. Andersen discovered that claimant had purchased three cars from customers. Mr. Andersen testified there is a company policy that prohibits employees from purchasing cars from customers. Mr. Andersen testified this policy is in the operational manual, but that he did not go over this with claimant. Mr. Andresen testified that he had verbally warned claimant about this, but it was not documented. Claimant testified that almost all the managers that he knows, purchase cars from customers. Claimant testified that his understanding was that the employer frowned upon it, but that it was widely done. Mr. Andersen also testified that he discovered claimant was having employees work on claimant's car while clocked in. Mr. Andersen testified this was also a violation of company policy. Claimant testified he understood this was allowed, especially if business is slow. Mr. Andersen also discovered that claimant had allowed claimant's friend to utilize claimant's employee discount. Mr. Andersen said this was in violation of company policy. Claimant testified that it was not against company policy and other managers give their friends discounts. Claimant testified he did not know about this policy. Claimant was told that as long as it benefits the employer, it was ok. Claimant testified his friend brought the employer a lot of business and referrals. Claimant does not believe the other managers were disciplined.

Claimant understood the employer's discipline policy to be progressive in nature, wherein the first violation is a written warning, the second violation is a suspension without pay, the third violation is a suspension without pay and review of employment, and the fourth violation is discharge. Claimant further testified that the last sentence on the written warnings state that further violations will result in the employee's employment will be reviewed. Claimant testified that this is on every single written violation that he had issued employees. Claimant testified that the term, employment will be reviewed, refers to the progression of the discipline. Mr. Andersen testified that this information, including the disciplinary progression, was on the forms claimant would use to discipline his employees; however, the written warnings given to managers were different and did not contain this information. Claimant testified he was never told his job was in jeopardy.

REASONING AND CONCLUSIONS OF LAW:

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

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:
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> 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.
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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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

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

> (4) Report required. The claimant's statement and the 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.

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). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. 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 Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.,* 391 N.W.2d 731 (Iowa Ct. App. 1986).

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.

It is the duty of an administrative law judge and the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of*

LeClaire, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge, as the finder of fact, may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other evidence you believe; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. This administrative law judge finds claimant's version of events to be more credible than the employer's recollection of those events.

Inasmuch as employer had warned claimant on April 14, 2015, about not following the employer's charging procedure policy and giving new employees personal time off without authorization, it has not met the burden of proof to establish that claimant acted deliberately or negligently after the most recent warning. The conduct for which claimant was discharged (purchasing customer vehicles, having employees work on his vehicles, and allowing his friend to utilize his employee discount) was merely common practice with the other managers. Furthermore, even though the claimant may have violated the employer's policy by purchasing customer vehicles, having employees work on his vehicles, and allowing his friend to utilize his employee discount, since the consequence was more severe than other employees received for similar conduct, the disparate application of the policy cannot support a disqualification from benefits. According to claimant's testimony, other managers involved in the same or similar incidents were not disciplined, thus the claimant seems to have been the subject of the disparate application of the policy, which cannot support a disqualification from benefits.

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. Claimant was never given a written warning for purchasing customer cars, having employees work on his vehicles on company time, or allowing his friend to use his employee discount. Training or general notice to staff about a policy is not considered a disciplinary warning. A warning for not following charging procedure and approving personal time off is not similar to the reasons for discharge and does not establish repeated negligence or deliberation and is not dispositive of the issue of misconduct for the purpose of determining eligibility for unemployment insurance benefits. Benefits are allowed.

DECISION:

The July 8, 2015, (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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Jeremy Peterson
Administrative Law Judge

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Decision Dated and Mailed

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