IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

JILL D GUNTHER Claimant **NORDSTROM INC** Employer	**APPEAL 15A-UI-00776-LT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 12/14/14** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the January 6, 2015, (reference 01) unemployment insurance decision that denied benefits based upon a discharge from employment. The parties were properly notified about the hearing. A telephone hearing was held on February 11, 2015. Claimant participated and was represented by legal assistant, John Graupmann. Employer participated through human resource manager, Robin Popisil, inventory integrity manager, Ryan Stokes and inventory assistant manager, Jeremy Gardner. Jacqueline Jones of Equifax/Talx represented the employer. The claimant's medical diagnosis record proposed exhibit was not admitted as the employer had not received it; however the claimant offered testimony about the contents before it was offered.

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 an inventory integrity processor and was separated from employment on December 15, 2014. Claimant had told Gardner in a meeting on December 10, 2014, about having foot pain. He had called the meeting to confront her about an anonymous report she was on her cell phone making a "hair" appointment while on the work floor. Claimant told him she was using the phone while in the restroom about "her" [daughter's] doctor appointment. She assured him it would not happen again. There was a verbal discussion on April 20, 2011, more than three-and-a-half years earlier, with a supervisor in a different contact center job about her phone ringing in her purse. On December 13, 2014, claimant was limping while walking at work and told Stokes about her foot pain and that she suspected plantar fasciitis and would need to see a doctor. He told her it was a busy season and to get back to work.

On December 15 Stokes and Gardner called a meeting with claimant to issue a final written warning for "behavior," which Stokes later defined as cell phone use on the floor and tardiness. Claimant put a piece of chewed gum in a tissue before entering the room. She had not used the tissue to blow her nose or cry. At the meeting Stokes confronted claimant about her reduced

productivity during the last week and specifically the day before. Claimant responded that it was because she had been having foot pain and wanted to go to a doctor but had no time because of working a lot of overtime. She had pain in her right foot from heel to arch and suspected plantar fasciitis. Gardner said that was a personal problem. Claimant disagreed saying she believed it was a medical problem. There was no mention of cell phone use or tardiness in the meeting and the employer could not specify a recent date of a cell phone issue. Stokes said only, "Your productivity is low; do you have anything to say for yourself?" Claimant replied she did not have anything further to add. Stokes said, "Fine. This is your final warning. We're done here." She did not sign an electronic or paper document. Claimant took the tissue with the gum and attempted to place it in the garbage can positioned behind Stokes but he would not move to give her access so she attempted to toss it around him. She did not throw it at him. It landed on the floor. Stokes said, "Classy." Claimant left and closed the door more loudly than she had intended, in part due to the way the office walls are constructed. As she was walking back to her work area Stokes caught up with her and said, "That's it. Let's make it today. You're fired. We're done here." She told a few others in the area it had been nice working with them and clocked out at 3:30 p.m. She did not see anyone coming out of the interview room to see what was going on. Claimant had been more productive in 2014 than in 2013.

Claimant was tardy 16 minutes on April 1, 2014, due to traffic. She was one minute tardy on June 12 but was not otherwise tardy. She was on maternity leave from August 4 until November 1 and returned to work November 2, 2014. No documented warnings were issued and there were no documented incidents of tardiness thereafter.

On May 14, 2014, Stokes and Gardner accused her of using a disrespectful tone towards Gardner when she asked to give her a work duty closer to the work area because the tote was 60 pounds and she was 21 weeks pregnant and would have to carry the tote up a flight of stairs. Gardner told her to lift the tote, talk to human resources or get a doctor's excuse. Claimant took her break and called the doctor's office, which was closed. She returned from break to see Stokes who told her Gardner was upset, and she should watch her tone and not refuse work. She obtained a medical excuse the following day, which the employer accommodated. She had no written warnings her job was in jeopardy for this or any other reason. The employer presented no documentation to rebut any information the claimant provided.

REASONING AND CONCLUSIONS OF LAW:

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

Noting that the employer did not provide specific information about details of the alleged incidents or evidence of written or documented warnings, the administrative law judge concludes that the claimant's recollection of the events is more credible than that of the employer. The employer's recollection that claimant used the tissue to cry and blow her nose in the meeting when she merely used it to contain used gum, further bolsters claimant's credibility.

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.

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.

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 conduct for which claimant was discharged (throwing the tissue towards the garbage can and "slamming" the office door) was, at the very most, an isolated incident of poor judgment of attempting to dispose of the tissue in Stokes' office and close the door upon her exit. Inasmuch as employer had not previously warned claimant about the issues leading to the separation or any other related or similar reason, 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. Training or general notice to staff

about a policy is not considered a disciplinary warning. Even had there been documented warnings, a warning for attendance or cell phone use is not similar to alleged disrespectful treatment of a supervisor and the employer's simple accrual of a certain number of warnings counting towards discharge 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. Certainly if an employer expects respectful treatment from subordinate employees, managers and supervisors should demonstrate that type of conduct in dealing with those same subordinates.

DECISION:

The January 6, 2015, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. The benefits claimed and withheld shall be paid, provided she is otherwise eligible.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

dml/pjs