IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

JAMES P MUHAMMAD Claimant **APPLE CORPS L P** Employer	**APPEAL 15A-UI-11675-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 09/27/15** **Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the October 13, 2015, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on November 3, 2015. Claimant participated. Employer participated through general manager, Shawna Hayes. Employer Exhibit One was admitted into the record over claimant's objection. Claimant objected because he did receive some of the write-ups while employed.

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 part time as a prep/dishwasher from May 20, 2014, and was separated from employment on September 17, 2015, when he was discharged.

On September 16, 2015, claimant was responsible for closing the dishwasher. To close the dishwasher, claimant had to clean all the dishes, put the dishes away, and clean the dishwasher. When claimant was finished, he had to check out with the manager on duty before he left. The manager would check the work and then if done correctly, claimant would be released. On September 16, 2015, claimant cleaned the dishes and dishwasher, but did not put all of the dishes away. Claimant checked out with the manager and was told he could leave. Claimant had left dishes to be put away by the morning shift on almost every night he worked. Claimant had an agreement with the kitchen manager that the kitchen manager would put the dishes away in the morning. On September 17, 2015, Ms. Hayes arrived and there were multiple dishes not put away. On September 17, 2015, Ms. Hayes called claimant and told him he was discharged.

The employer presented a counseling record for September 14, 2015, but never provided it to claimant. Employer Exhibit One. The counseling record did not indicate whether it was a first, second, or third offense. Employer Exhibit One. The counseling record also did not indicate whether it was a verbal or written warning, or termination. Employer Exhibit One. Claimant did finish his prep work on September 14, 2015. The assistant manager was upset that he did not want to do the night prep work. Claimant did not want to do the night prep work because that was not on his list of duties for that shift.

Claimant received a written warning, first offense, on August 5, 2014, for not finishing his prep work accurately and missing some labels. Employer Exhibit One. Claimant also received a counseling statement on May 20, 2015, the day he was rehired, regarding harassment. Employer Exhibit One.

The employer has a progressive disciplinary policy; there is a first, second, third offense, and then termination.

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.

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 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 reviewed the exhibit submitted. This administrative law judge finds claimant's version of events to be more credible than the employer's recollection of those events.

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.
>
> 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). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. 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, 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 by the employer because of his quality of work and insubordination. Employer Exhibit One. The employer's argument is not persuasive. Both parties agree on September 16, 2015, claimant did not put his dishes away before he left work. Ms. Hayes testified that claimant was not checked out by a manager before he left, yet the manager on duty on September 16, 2015 did not testify. Claimant provided direct, first-hand testimony that he did check out with the manager on duty and was told it was ok to leave by the manager on duty. The employer also argued that claimant had received a disciplinary warning for September 14, 2015. This argument is also not persuasive. Claimant did not sign for the disciplinary warning and there was no testimony that claimant was ever told by the employer that he was getting a disciplinary warning for any misconduct on September 14, 2015. Employer Exhibit One. The only other warning claimant received occurred on August 6, 2014. Employer Exhibit One. Claimant did receive a counseling on the day he was rehired, May 20, 2015. Employer Exhibit One. Therefore, claimant only received one warning regarding his job performance, which occurred over one year prior to his discharge. Employer Exhibit One. That warning was considered a first warning. Employer Exhibit One. According to the employer's disciplinary policy, claimant would have reasonably expected at a minimum two more warnings prior to discharge, yet claimant did not receive any more warnings after August 6, 2014.

Furthermore, claimant testified that he consistently left dishes to be put away when he left work pursuant to an agreement with the kitchen manager and he was never disciplined for this conduct. The conduct for which claimant was discharged was merely an isolated incident of poor judgment and inasmuch as employer had not previously warned claimant in the past year about the issue 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. Training or general notice to staff about a policy is not considered a disciplinary warning. The employer failed to satisfy its burden of proof to establish job disqualifying misconduct. Benefits are allowed.

DECISION:

The October 13, 2015, (reference 01) unemployment insurance decision is affirmed. 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.

_____
Jeremy Peterson
Administrative Law Judge

_____
Decision Dated and Mailed

jp/css