IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

GREGORY A JOHNSON Claimant **PILOT TRAVEL CENTERS LLC** Employer	**APPEAL 16A-UI-04579-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 03/27/16** **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 April 13, 2016 (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on May 3, 2016. Claimant participated. Employer participated through general manager Greg Holliday. Employer exhibit one was admitted into evidence with no objection. Official notice was taken of the administrative record of the fact-finding documents that were submitted by the employer.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid unemployment insurance benefits and, if so, can the repayment of those benefits to the Agency be waived?

Can charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a maintenance employee. When claimant started his employment on November 6, 2006, it was with a different employer that was then purchased by the employer, and on July 1, 2010 claimant transitioned to this employer and was separated from employment on March 23, 2016, when he was discharged.

The employer has a progressive disciplinary policy but it allows the employer to skip steps depending on the severity of the incident.

On March 21, 2016, claimant worked his scheduled shift. The incident occurred when claimant was taking his meal break. The employer allows employees 30 minutes for their meal break. Claimant had prior issues with the taking too long of breaks. Employer Exhibit One.

Claimant did not return from his meal break after thirty minutes. The manager, Holly, contacted claimant through the headset and requested he return from his break. Claimant was outside working on his personal vehicle. Claimant told the manager he had to put his tools away and then he would return to work. Claimant returned to work seven minutes after the manager requested him to return.

On March 23, 2016, Mr. Holliday told claimant he needed to have a conversation with him. Claimant stated it must be about the "bullshit" with Holly. Employer Exhibit One. Claimant was discharged for insubordination on March 23, 2016.

The employer had multiple conversations with claimant about the breaks he would take. The employer gave claimant a written coaching on August 25, 2015, for taking long breaks. Employer Exhibit One. There was boiler plate language on the written coaching that further incidents could result in discharge. Employer Exhibit One. The same boiler plate language warning claimant that further incidents could result in discharge was also on claimant's written termination notice. Employer Exhibit One. After August 25, 2015, the employer had multiple conversations with claimant about taking long breaks. The employer had a conversation with claimant the week prior to discharge about taking long breaks.

Other employees have been discharged for coming back from breaks late. The employees that were discharged went through the steps of the progressive disciplinary policy (verbal warning, written warning, written warning, and then discharge). The employer posts on a board what employees are late the week before so any employee can see who was late the week before. Every week there is multiple people on the board. Claimant had been on the board a few times.

The employer did use colorful language ("bullshit" and other profanity) with claimant at work. Claimant commonly used the word "bullshit". Claimant would use the word around Mr. Holliday. Claimant had no prior warning for profanity.

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:
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> 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.
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> 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).

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.

On March 21, 2016, claimant was late getting back from his meal break. This was not the first time claimant had been late returning from a break. Employer Exhibit One. Claimant was also not the only employee that has been late returning from breaks. It was a common occurrence that employees return late from breaks. Mr. Holliday testified that employees have been discharged for consistently returning from breaks late; however, the employer followed its progressive discipline (verbal warning, written warning, another written warning, and then discharge) in those instances. On March 23, 2016, Mr. Holliday confronted claimant about what happened on March 21, 2016. Claimant stated it must be about the "bullshit" with Holly. Employer Exhibit One. Claimant was then discharged by the employer. Claimant had one written warning for returning late from his breaks on August 25, 2015. Claimant had no prior warning for using profanity.

"The use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct, even in the case of isolated incidents or situations in which the target of abusive name-calling is not present when the vulgar statements are initially made." *Myers v. Emp't Appeal Bd.*, 462 N.W.2d 734 (Iowa Ct. App. 1990).

If management wishes to be treated with respect, it must enforce respectful treatment amongst coworkers and supervisors and apply those expectations consistently throughout the chain of command. Even though claimant used the term "bullshit" in a conversation with Mr. Holliday regarding the incident on March 21, 2016 with the manager Holly, the employer had engaged with similar colorful language with claimant on prior occasions with no discipline. The conduct for which claimant was discharged was merely an isolated incident of poor judgment and inasmuch as employer had not previously warned claimant 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. A warning for returning from breaks late is not similar to insubordination, which 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.

Furthermore, even though claimant may have returned late from his break on March 21, 2016, he only had one prior warning and 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. Benefits are allowed.

As benefits are allowed, the issues of overpayment, repayment, and the chargeability of the employer's account are moot.

DECISION:

The April 13, 2016 (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.

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Jeremy Peterson
Administrative Law Judge

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Decision Dated and Mailed

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