

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**JACOB A FISCHLEIN**  
Claimant

**SOFA MART LLC**  
Employer

**APPEAL 18A-UI-02855-NM-T**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 02/04/18**  
**Claimant: Respondent (1)**

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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 February 22, 2018, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified of the hearing. A telephone hearing was held on March 29, 2018. The claimant participated and testified. The employer participated through Hearing Representative Malia Maples and witness Andy Colson. Employer's Exhibits 1 through 4 were received into evidence. Official notice was taken of the fact finding documents.

**ISSUES:**

Was the claimant discharged for disqualifying job-related misconduct?

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

Can any 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 delivery driver from October 23, 2012, until this employment ended on January 23, 2018, when he was discharged.

The employer has a policy in place that requires employees to always use a spotter when backing up a delivery truck. Claimant signed a copy of this policy acknowledging he had reviewed and agreed with it on June 20, 2015, though he testified he did not actually read the policy. (Exhibit 2). Claimant further testified this policy was not always followed, as he was regularly sent to pick up delivery trucks, which had to be backed out of their parking spots, by himself.

On December 21, 2017, claimant backed into a customer's mailbox, while using a spotter, when he became momentarily distracted. Claimant was issued a written warning. (Exhibit 1). The warning advised, in the second paragraph, that if another similar incident occurred claimant may be discharged. Claimant testified he did not recall the second paragraph being written on the warning at the time he signed it and was not aware his job was in jeopardy following this incident. The employer's witness testified he was not there at the time the warning was signed and could not confirm what it said at the time it was signed.

On January 22, 2018, claimant was making a delivery and backed up without using a spotter. Claimant testified, following a delivery, he and the spotter were walking back to the truck to leave when they realized they needed one more signature. They were in a hurry so claimant proceeded to back up while his spotter ran back to get the signature. While backing up one of the tires went into the yard of the customer's neighbor, causing a rut in the ground. (Exhibit 4). The neighbor requested to be reimbursed by the employer for the rut. The claimant was subsequently discharged for failing to use a spotter.

The claimant filed a new claim for unemployment insurance benefits with an effective date of February 4, 2018. The claimant filed for and received a total of \$3,430.00 in unemployment insurance benefits for the weeks between February 4 and March 24, 2018. The employer elected not to participate via telephone in fact finding interview regarding the separation on February 20, 2018 and indicated they only wished to participate via a written statement contending the claimant voluntarily quit. The fact finder determined claimant qualified for benefits.

#### **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:

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.

871 IAC 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 Department of Job Service*, 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). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). 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 when he failed to use a spotter while backing up because he was in a hurry and caused damage to an individual's yard. The conduct for which claimant was discharged was merely an isolated incident of poor judgment. Claimant had previously been issued a written warning for an incident occurring on December 21, 2017, where he was using a spotter but was momentarily distracted and backed into a mailbox. To the extent that the circumstances surrounding each accident were not similar enough to establish a pattern of misbehavior, the employer has only shown that claimant was negligent. "[M]ere negligence is not enough to constitute misconduct." *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 666 (Iowa 2000). A claimant will not be disqualified if the employer shows only "inadvertencies or ordinary negligence in isolated instances." 871 IAC 24.32(1)(a). When looking at an alleged pattern of negligence, previous incidents are considered when deciding whether a "degree of recurrence" indicates culpability. Claimant was careless, but the carelessness does not indicate "such degree of recurrence as to manifest equal culpability, wrongful intent or evil design" such that it could accurately be called misconduct. Iowa Admin. Code r. 871-24.32(1)(a); *Greenwell v. Emp't Appeal Bd.*, No. 15-0154 (Iowa Ct. App. Mar. 23, 2016). Ordinary negligence is all that is proven here.

Furthermore, there is some dispute as to whether the claimant was put on notice that his job was in jeopardy. Claimant contends, following the December 21 incident, that he was not warned further incidents would lead to termination and that language in the warning advising of possible termination was added after he signed it. The employer could not rebut this testimony. 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. Inasmuch as employer has not established it previously warned claimant about the possibility of his 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. For all of the reasons identified above, benefits are allowed, provided claimant is otherwise eligible. The issues of overpayment and participation are moot.

**DECISION:**

The February 22, 2018, (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. The issues of overpayment and participation are moot.

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Nicole Merrill  
Administrative Law Judge

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Decision Dated and Mailed

nm/rvs