IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

EMILY J MCKITTRICK-CLINGMAN Claimant **COPART OF CONNECTICUT INC** Employer	**APPEAL 19A-UI-06938-SC-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 07/28/19** **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:

On August 29, 2019, Copart of Connecticut, Inc. (employer) filed an appeal from the August 19, 2019, reference 01, unemployment insurance decision that allowed benefits based upon the determination Emily J. McKittrick-Clingman (claimant) was not discharged for willful or deliberate misconduct. The parties were properly notified about the hearing. A telephone hearing was held on September 25, 2019. The claimant participated personally. The employer participated through Office Manager Maria Martinez-Azua and was represented by RoxAnne Rose. The Employer's Exhibits 1 through 3 were admitted into the record without objection.

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: The claimant was employed full-time as a Title Procurement Clerk beginning on October 8, 2018, and was separated from employment on July 31, 2019, when she was discharged. The employer has a general policy that giving away its products for no charge or at a discount is grounds for discipline up to and including termination.

In January 2019, the employer announced that employees could sign up for tickets for the Family Fun Day which it was hosting later that year at Six Flags Great America in Illinois. The employer would provide one parking pass, general admission tickets, and tickets for a hosted picnic lunch for the employee, one additional adult, and any dependent which was defined as someone in their care. The claimant asked Office Manager Maria Martinez-Azua if she would be able to get tickets for her nieces for whom she had just taken custody. At that time, Martinez-Azua told her she would not be allowed to get tickets for them as she could not yet claim them on her taxes as dependents.

The third-party vendor that had arranged the Family Fun Day was the one responsible for verifying that employees had requested an appropriate number of tickets. The employer just delivered the tickets requested in mid-July.

Over the year, the claimant had spoken to other managers in the building who told her that it would have been acceptable to get tickets for her nieces. Once the tickets were delivered, the claimant observed other employees give away tickets they had been given. As a result, the claimant started asking people if they had extra tickets she could have. Adriana, the claimant's co-worker, had a change in plans and no longer needed her tickets. Additionally, Adriana's boyfriend had also purchased a fast pass in preparation for the day. Adriana gave the claimant her general admission tickets and the claimant purchased the fast pass from her for $140.

On July 26, Martinez-Azua sent an email to her employees stating that any additional tickets needed to be returned to the employer. That afternoon, the employer started an investigation into information they had received that employees were abusing the Family Fun Day tickets. Adriana stated the claimant bought the tickets from her for $100 to $140. The claimant denied buying the tickets provided by the employer but did admit buying the fast pass. The employer determined that the claimant had violated their core value of integrity because her statement was different than Adriana's statement.

On July 31, the employer discharged all employees who had been involved in the investigation and were accused of abusing the Family Fun Day tickets. The claimant had not received any prior warnings. She also did not know her job was in jeopardy or she could lose her job for accepting Adriana's extra tickets.

The administrative record reflects that the claimant has received unemployment benefits in the amount of $2,727.00, since filing a claim with an effective date of July 28, 2019, for the six weeks ending September 7, 2019. The administrative record also establishes that the employer did participate in the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

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

Iowa Code section 96.5(2)a provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 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 disqualification shall continue 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 provides, in relevant part:

> 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).

The decision in this case rests, at least in part, upon the credibility of the parties. The employer did not present a witness with direct knowledge of the entirety of the situation. No request to continue the hearing was made and no written statements of the individuals involved were offered. As the claimant presented direct, first-hand testimony while the employer relied upon second-hand reports, the administrative law judge concludes that the claimant's recollection of the events is more credible than that of the employer.

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 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 the 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." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

At most, the conduct for which the claimant was discharged was an isolated incident of poor judgment. As the employer had not previously warned the claimant about the issue leading to the separation or given her a policy with regard to the Family Fun Day tickets, it has not met the burden of proof to establish that she 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. According, benefits are allowed.

As benefits are allowed, the issue of overpayment is moot and charges to the employer's account cannot be waived.

DECISION:

The August 19, 2019, reference 01, unemployment insurance decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. As benefits are allowed, the issue of overpayment is moot and charges to the employer's account cannot be waived.

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Stephanie R. Callahan
Administrative Law Judge

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Decision Dated and Mailed

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