IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

GEORGINA D RODRIGUEZ Claimant **ALLSTEEL INC** Employer	**APPEAL 18A-UI-06949-NM-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 06/03/18** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the June 21, 2018, (reference 01) unemployment insurance decision that denied benefits based upon her discharge for violation of a known company rule. The parties were properly notified about the hearing. A telephone hearing was held on July 16, 2018. Claimant participated with the assistance of a Spanish language interpreter from CTS Language Link and was represented by attorney Lorraine Gaynor. Employer participated through Hearing Representative Kenneth Kjer and witness Danielle Harvey. Employer's Exhibit 1 was received into evidence.

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 began working for employer on June 23, 2014. Claimant last worked as a full-time distribution support operator. Claimant was separated from employment on June 6, 2018, when she was discharged.

On May 25, 2018, claimant was operating a fork lift while pulling pallets down from a rack. Claimant had pulled a pallet down for another team member to go through. While the team member was going through the pallet, claimant began to pull another pallet. In the process, she backed the fork lift up near where her team member was working. The employer contends claimant was not looking when she was backing up and this resulted in her team member's foot getting caught in a three-inch gap under the forklift. According to the employer, the team member's foot was pulled, resulting in a hyper-extended arch. The team member did not require medical treatment.

Following this incident the employer began an investigation. The team member told Harvey he yelled when he felt the forklift pulling on his foot and had claimant move forward a bit so he could remove his foot. (Exhibit 1, pg. 14). One witness to the incident told Harvey he heard

claimant say, “I bumped into him,” and other witness reported hearing her say, “Oh my God.” (Exhibit 1, pgs. 12 and 13). Neither witness reported hearing the comment overheard by the other. Harvey testified both witnesses reported claimant’s statements were made in English, though her primary language is in Spanish. Harvey also reviewed the security footage and testified claimant appeared to be looking forward when she was moving the forklift in reverse. This is in violation of proper forklift operating procedure, which states the operator should look in the direction of travel. Claimant had been trained on the forklift and was aware of this procedure.

As part of her investigation, Harvey also spoke with the claimant. Harvey testified the claimant was argumentative, uncooperative, and dishonest in the investigation. Harvey explained she came to this conclusion because claimant denied coming into contact with the other team member, making either of the statements alleged by the two witnesses, or failing to look back while she was moving the forklift in reverse. Claimant testified she said these things because that is what she believed the truth to be. Claimant further admitted she did become a bit agitated during the investigation, but explained this was because she was frustrated. Claimant explained Harvey kept asking her the same questions, leading her to believe her answers were not being properly communicated due to the language barrier, even after the employer got someone to assist with interpretation. Ultimately, the employer determined claimant should be discharged, in part due to her lack of accountability and cooperation in the investigation. (Exhibit 1, pgs. 4 – 7). Claimant had no prior warnings or disciplinary action.

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.
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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 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 following an incident where another team member was allegedly injured by the forklift claimant was operating. There is a dispute between the parties as to whether claimant ever even came into contact with the other team member. The decision in this case rests, at least in part, on the credibility of the witnesses. It is the duty of the administrative law judge as 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 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. *Id.*. 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 believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id*.

There are some credibility issues with the evidence presented by the employer, specifically the three witness statements. Two of the witness statements have the names of the alleged witnesses redacted, though no testimony was given to indicate the employer had any reason to believe the claimant would have the desire or opportunity to retaliate against those witnesses. Those two witness accounts each allege claimant made specific utterances at the time of the incident, but neither mentions the statements identified by the other. The witness account from the injured party does not mention either statement. Furthermore, it is very difficult to believe, under these circumstances, that a declarant who is a native Spanish speaker would utter the phrases alleged in English, rather than her native language. However, even if we put the issues

of credibility aside and assume the employer's version of events is correct, the conduct for which claimant was discharged was merely an isolated incident of poor judgment.

The employer has only shown that claimant was negligent as best. "[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. 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.

In regards to the employer's assertion that claimant was dishonest and uncooperative in its investigation, it has failed to meet its burden on these allegations as well. While the claimant may not have given the answers Harvey was looking for, she has provided credible testimony that she was answering with what she believed was the truth. Claimant provided further credible testimony that she was not trying to be argumentative, but was becoming frustrated after Harvey continued to ask her the same questions, as she believed it was a problem with the language barrier. The employer 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. As such, benefits are allowed, provided claimant is otherwise eligible.

DECISION:

The June 21, 2018, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

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Nicole Merrill
Administrative Law Judge

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Decision Dated and Mailed

nm/rvs