IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

MARIA J BARROSO Claimant **ABM INDUSTRY GROUPS LLC** Employer	**APPEAL 18A-UI-03284-NM-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 02/11/18** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the March 8, 2018, (reference 02) unemployment insurance decision that denied benefits based on her discharge for insubordination. The parties were properly notified of the hearing. A telephone hearing was held on April 5, 2018. The claimant participated and was represented by attorney William Nicholson. The employer participated through Hearing Representative Sandra Linsin and witnesses Bobby Lisbon, David Heijl, and Monique Blakeney. Employer's Exhibit A and claimant's Exhibit 1 and 2 were 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 was employed full time as a lead general cleaner from April 14, 2017, until this employment ended on January 25, 2018, when she was discharged.

On January 19, 2018, Lisbon and Blakeney met with claimant to discuss ongoing issues she was having with the day crew in the building where she was assigned to supervise the night crew. In order to resolve the issue Lisbon informed claimant he was moving her to the building across the street. Claimant's hours, job duties, and pay were to remain the same. Claimant indicated to Lisbon that she would not go unless her crew went with her. Lisbon explained that was not feasible, at which point claimant asked about her work restrictions. Claimant testified she brought up her restrictions at this point because, while it was not common, she sometimes had to have her crew members assist her with tasks outside her restrictions. Claimant testified she had previously worked with the crew members in the new building and was concerned they would not provide assistance as requested, leaving her with the occasional task outside her restrictions. Claimant further testified these restrictions were provided to her then-supervisor, Dave Vasquez, in August 2017. Lisbon had only been claimant's supervisor for a few months and this was the first he heard of any work restrictions. Lisbon then contacted human

resources, who told him to place claimant on leave and instruct her to bring in a copy of her most recent work restrictions by the following Monday, January 22. Claimant brought in her restrictions as requested.

On January 23, 2018, claimant received a call from Lisbon stating she could not return to work without full medical clearance to return without restriction. (Exhibits 1 and 2). On January 25, 2018, Lisbon was directed by human resources to discharge claimant from employment for conduct detrimental to the employer's interest. Heijl testified this directive was given because claimant refused to go to the new work site, but could not recall why he did not direct Lisbon to discharge her for insubordination or refusing an assignment, both of which were options on the termination form. (Exhibit A, page 1). Lisbon then terminated claimant's employment. Claimant was never advised that she would be terminated if she did not go to work at the new building. Claimant testified, had she been given that directive, she would have gone to the new building, but she was not given the opportunity to do so.

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.

It is not entirely clear why claimant was discharged, but it appears to be related to her alleged insubordination by refusing to move to another building. Insubordination does not equal misconduct if it is reasonable under the circumstances. The question of whether the refusal to perform a specific task constitutes misconduct must be determined by evaluating both the reasonableness of the employer's request in light of all circumstances and the employee's reason for noncompliance. *Endicott v. Iowa Dep't of Job Serv.*, 367 N.W.2d 300 (Iowa App. 1985). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. (Refusal to pick up mail at a place where racial harassment occurred.) *Woods v. Iowa Dep't of Job Serv.,* 327 N.W.2d 768, 771 (Iowa 1982). The Iowa Court of Appeals has previously found an employee's refusal to push a cart he, in good faith, believed was too heavy, just days after suffering a back injury at work, was found not to have engaged in misconduct. *Woodbury Cnty. v. Emp't Appeal Bd.*, No. 03-1198 (Iowa Ct. App. filed April 14, 2004).

In this case, it does not even appear as though claimant definitively refused to perform the work assigned. Rather, claimant indicated she did not want to move locations without taking her crew with her based on concerns she had with work restrictions. Once work restrictions were brought up, the conversation about switching buildings was side-tracked, as this was the first her supervisor was hearing about restrictions. Claimant was instructed to provide her current restrictions, which she did. Claimant was then advised that she could not return to work until all restrictions were lifted, but then was discharged two days later. There was nothing unreasonable in claimant bringing up concerns that a new crew would not assist her in working within her restrictions. Claimant was never told she would be discharged if she refused the assignment to the new building and testified, had she been given the ultimatum, she would have agreed to the transfer.

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 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. Benefits are allowed, provided claimant is otherwise eligible.

DECISION:

The March 8, 2018, (reference 02) 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