IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

JACOB B MEZA-WHITLATCH Claimant **BOURBON STREET BAR & GRILL INC** Employer	**APPEAL 18A-UI-07753-NM-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 07/01/18** **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 July 18, 2018, (reference 03) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on August 9, 2018. Claimant participated and testified. Employer participated through Brand Manager Steven Hambleton.

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 began working for employer on June 1, 2018, though he had been working for its predecessor businesses for approximately four years prior. Claimant last worked as a part-time line cook. Claimant was separated from employment on July 1, 2018, when he was discharged.

On Friday, June 29, 2018, claimant started to feel very sick while he was at work. Claimant had been working in the kitchen on the fryer all day long. He felt so ill he was unable to drive himself home and had to call to get a ride. The assistant manager had to help him to the car once his ride arrived. Once claimant was home he began to feel better. Claimant did some internet research on his symptoms and thought it was possible he may have had carbon monoxide poisoning.

The next day, Saturday, June 30, claimant went back in to work to retrieve his car. While he was there, he went inside to thank the assistant manager who helped him the night before. While talking to the assistant manager claimant mentioned his symptoms were consistent with

carbon monoxide poisoning and suggested they might want to get the hood vents examined. Claimant also mentioned he did not want to work in front of the fryers for eight or nine hour days any longer. Claimant testified he only mentioned this because his next shift he was scheduled to work the grill during the lunch hour only and wanted to make sure he didn't get reassigned to a longer shift in front of the fryer. Claimant explained he wanted to work other stations because the fryers were the furthest station away from the air conditioner. As such, it was the hottest place to work in the kitchen and that he was already drinking a lot of water.

Following his conversation with the assistant manager, the employer called claimant to tell him to take the week off until they could get the hood vents examined. Claimant, realizing how much income he would be missing, called back and asked if there was other work he could do. The employer told claimant to come in and do prep work, which he did. Approximately half an hour in to his prep work shift claimant was called in to the office. During this meeting Hambleton explained to claimant he was needed on the fryers and he would not be able to dictate where he worked or what his hours would be. Hambleton also suggested it was not carbon monoxide poisoning, but perhaps heat exhaustion that made claimant sick. Hambleton testified they were having problems with the air condition in the kitchen and two other employees, one of whom also worked exclusively on the fryers, had experienced similar symptoms as claimant, which were attributable to heat exhaustion. The other employee working on the fryer was able to resolve her issues by drinking more water. Hambleton testified the fryers were not the hottest area in the kitchen, as the flattops and grills were heated to a higher temperature and that rotating claimant would not have resolved the issue. Hambleton also expressed concern with claimant's proficiency in the other areas of the kitchen, though he could not provide specifics. Claimant testified he was well trained and practiced in all areas of the kitchen.

Claimant explained he was not trying to dictate his work, but was concerned with how ill he became the night before. Claimant renewed his request to work shorter shifts or to rotate stations to prevent becoming ill again. Hambleton eventually expressed to claimant that he did not think the two were going to be able to come to an agreement and separated him from employment. Claimant testified, had he been told he was required to work the fryers or be discharged he would have continued to work the fryers.

The claimant filed a new claim for unemployment insurance benefits with an effective date of July 1, 2018. The claimant filed for and received a total of $420.00 in unemployment insurance benefits for the weeks between July 1 and August 4, 2018. Both the employer and the claimant participated in a fact finding interview regarding the separation on July 17, 2018. 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 § 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:

> 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.

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." 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). 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).

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 assess points or impose discipline up to or including discharge for the incident under its policy. 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, employer incurs potential liability for unemployment insurance benefits related to that separation.

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, claimant requested either that his hours be reduced or he be allowed to rotate to other positions in the kitchen after becoming severely ill while at work. Claimant's belief that the symptoms he was experiencing was in good faith and reasonable given the circumstances. Claimant became ill after a long day behind the fryers and the one other employee working the same position reported a similar experience. Furthermore, claimant provided credible testimony that he was not necessarily refusing to do the work as assigned, but asking if other options were available. The employer never specifically told claimant that he would be discharged if he refused to work his scheduled hours behind the fryer and he provided credible testimony that had he been told as much, he would have worked as assigned. Even if claimant did refuse to do the assigned work, he has shown a reasonable, good faith reason for requesting a change in to do the assigned work. As such, the employer has not met the burden of proof to establish that claimant engaged in misconduct. Benefits are allowed, provided claimant is otherwise eligible. As benefits are allowed, the issues of overpayment and participation are moot.

DECISION:

The July 18, 2018, (reference 03) 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 shall be paid to claimant. 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