IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

68-0157 (9-06) - 3091078 - EI

MARTIN VELASCO
Claimant

WELLS DAIRY INC
Employer

APPEAL NO: 08A-UI-01156-S2T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/06/08 R: 01
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Wells Dairy (employer) appealed a representative's January 25, 2008 decision (reference 01) that concluded Martin Velasco (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for February 18, 2008. The claimant participated personally through Ike Rocha, Interpreter. The employer was represented by Josh Burrows, Hearings Representative and Attorney, and participated by Wendy Lee, Organizational Cabability Generalist, and Nicholas Hamaker, Supervisor.

ISSUE:

The issue is whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on October 22, 2007, as a full-time category A helper in hallway. The claimant received the employer's handbook that had a progressive disciplinary policy. The employer was to issue a verbal warning, written warning and five-day suspension prior to termination. The employer could terminate an employee within his 90-day introductory probationary period without following those disciplinary steps. The employer issued the claimant verbal warnings on October 25 and December 17, 2007, when English speaking co-workers lied about the claimant's performance.

On December 20, 2007, the claimant arrived at work and began performing the work the previous workers had laid out for him. The employer wanted the claimant to check the rotation schedule in the computer but the claimant could not get into the computer without a code. Later on December 20, 2007, the claimant learned the pallets were not set out in the proper rotation. The plant shut down for the holidays after December 22, 2007. On January 2, 2008, the claimant returned to work. The employer terminated him for unsatisfactory job performance.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

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.

The employer has the burden of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Misconduct connotes volition. A failure in job performance which results from inability or incapacity is not volitional and therefore not misconduct. Huntoon v. Iowa Department of Job Services, 275 N.W.2d 445 (Iowa 1979). Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. Henry v. Iowa Department of Job Service, 391 N.W.2d 731 (Iowa App. 1986). Repeated unintentionally careless behavior of claimant towards subordinates and others, after repeated warnings, is misconduct. Greene v. Employment Appeal Board, 426 N.W.2d 659 (Iowa 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 Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

The employer terminated the claimant for a failure in job performance. The employer believes the failure was due to carelessness. For the employer to prove misconduct based on

carelessness it must prove that the carelessness was recurrent and deliberate. The employer did not provide sufficient evidence of repetition and intent at the hearing. The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

DECISION:

The representative's January 25, 2008 decision (reference 01) is affirmed. The employer has not met its proof to establish job-related misconduct. Benefits are allowed.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/pjs