IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

CONNIE M KIEFFER Claimant **SLB OF IOWA LC** Employer	**APPEAL 16A-UI-07017-DB-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 05/29/16** **Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant/appellant filed an appeal from the June 20, 2016, (reference 01) unemployment insurance decision that denied benefits based upon her discharge from employment for violation of a known company rule. The parties were properly notified of the hearing. A telephone hearing was held on July 13, 2016. The claimant, Connie M. Kieffer, participated personally and was represented by Attorney Amber Jannusch. The employer, SLB of Iowa LC, participated through Human Resources Manager Karen Beard and Bakery Market Manager Tom Lentz. Claimant's Exhibits A through C were admitted.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Did claimant voluntarily quit the employment with good cause attributable to employer?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as baker from January 19, 2005 until her employment ended on May 31, 2016. This company operates a bakery and restaurant. Claimant's job duties included preparing food and baking food. Claimant worked the night shift. Jake Bartels was claimant's immediate supervisor.

On May 14, 2016 claimant and another co-worker were involved in a verbal altercation. The other co-worker was Taylor Lee. Ms. Lee was a new employee and was still learning her job duties. Claimant was not formally Ms. Lee's supervisor but was told that she could instruct her on what needed to be done in the baking process. See Exhibit A.

On this date Ms. Lee came in to work and the day crew was still cleaning her work station. Ms. Lee proceeded to go out to the front area of the restaurant and sit and wait. The restaurant was closed at this time and there were no customers. Claimant approached Ms. Lee and told her that there were other tasks that she could be doing rather than sitting down. Ms. Lee became argumentative with claimant and yelled at her. Claimant yelled back.

Claimant tried to get the manager on duty involved to prompt Ms. Lee to start working. The manager on duty stated that she was not authorized to involve herself in disputes between bakers. Claimant then called Mr. Bartels and reported that Ms. Lee was refusing to work and not following instructions. Claimant asked Mr. Bartels to speak with Ms. Lee, which he did. The confrontation disseminated that the two went to work.

A few hours later the two were arguing again. Ms. Lee had not performed certain job tasks during the shift and claimant became upset about it. Claimant and Ms. Lee again yelled at each other. Claimant told Ms. Lee that she was not properly trained. Ms. Lee told claimant to stop freaking out on her. Claimant replied that she can freak out if she wants to. Claimant then made a comment to the effect of "don't forget there are knives in the store". Ms. Lee responded to claimant with the question of whether that was a threat. Claimant said no it was not a threat. Ms. Lee then stated that she was not going to threaten her job and claimant responded that Ms. Lee was threatening her own job by not working.

Claimant then called Mr. Lentz again about the situation. Mr. Lentz spoke to both claimant and Ms. Lee. Ms. Lee reported to Mr. Lentz that claimant had threatened her with the comment about there being knives in the store. Mr. Lentz instructed Ms. Lee to finish her shift at another store in order to diffuse the situation.

Mr. Lentz then took a statement from Ms. Lee the following day regarding the incident. Mr. Lentz did not take a statement from the claimant. The claimant called and spoke to Ms. Beard about the situation the following Monday morning (two days later). Claimant made a complaint against Ms. Lee. Claimant reported to Ms. Beard that Ms. Lee had stated that she was the slowest baker in the company and that no one wanted to work with her. Ms. Beard does not remember taking a statement from claimant during this telephone conversation.

Neither Mr. Lentz nor Ms. Beard informed the claimant that her actions on May 11, 2016 were being investigated and that she may be subject to discipline for the events that occurred on that night. Nothing further was said about the incident until May 31, 2016 when the claimant was discharged. Claimant continued to work between May 11, 2016 and May 31, 2016. On May 31, 2016 claimant was told that she was being discharged for her continued problems in failing to get along with co-workers and the threats that she made to Ms. Lee.

Claimant received a previous written warning in December of 2014 for use of profanity towards co-workers and creating a hostile working environment for co-workers. Claimant received a written warning in August of 2014 for creating a hostile working environment for co-workers and using confrontational language with co-workers. Claimant had not received any further discipline since 2014.

REASONING AND CONCLUSIONS OF LAW:

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

As a preliminary matter, I find that the Claimant did not quit. Claimant was discharged from employment.

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.

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).

871 IAC 24.32(4) provides:

> (4) Report required. The claimant's statement and the employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

871 IAC 24.32(8) provides:

> (8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

Further, 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." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* 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 Dep't of Job Serv.,* 391 N.W.2d 731 (Iowa Ct. App. 1986). Further, 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).

The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000). There is no evidence that the claimant's actions had any wrongful intent. The statement regarding there being knives in the store was made in the heat of the moment while the employees were arguing with each other. When Ms. Lee asked claimant if that was a threat and claimant responded that it was not.

The claimant was allowed to continue working for approximately two and one half weeks after the incident. Clearly the employer did not believe that claimant was a threat to co-workers if it allowed claimant to continue to work. While the claimant's action in making the comment to her co-worker is not condoned this was an isolated instance of poor judgment on behalf of the claimant. A good faith error in judgment is not misconduct. *See* IAC 24.32(1)(a); *Richers v. Iowa Dept. of Job Service*, 479 N.W.2d 308 (Iowa 1991; *Kelly v. Iowa Dep't of Job Serv.*, 386 N.W.2d 552, 555 (Iowa Ct. App. 1986).

Reoccurring acts of negligence by an employee would probably be described by most employers as in disregard of their interests. *Greenwell v Emp't Appeal Bd.*, No. 15-0154 (Iowa Ct. App. March 23, 2016). The misconduct legal standard requires more than reoccurring acts of negligence in disregard of the employer's interests. *Id*.

Further, a claimant's poor work performance does not disqualify her from receiving benefits. Failure in job performance due to inability or incapacity is not considered misconduct because the actions were not volitional. *Huntoon,* 275 N.W.2d at 448 (Iowa 1979). Where an individual is discharged due to a failure in job performance, proof of that individual's ability to do the job is required to justify disqualification, rather than accepting the employer's subjective view. To do so is to impermissibly shift the burden of proof to the claimant. *Kelly*, 386 N.W.2d 552 (Iowa Ct. App. 1986).

The employer failed to meet its burden of proof in establishing disqualifying job-related misconduct. As such, benefits are allowed.

DECISION:

The June 20, 2016, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. The benefits claimed and withheld shall be paid, provided she is otherwise eligible.

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Dawn Boucher
Administrative Law Judge

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Decision Dated and Mailed

db/pjs