IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

MELISSA R SMITH Claimant **VAN DIEST SUPPLY CO** Employer	**APPEAL 16A-UI-10326-NM-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 08/28/16** **Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(1)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from the September 16, 2016, (reference 01) unemployment insurance decision that denied benefits based upon her discharge for failure to follow instructions in the performance of her job. The parties were properly notified of the hearing. A telephone hearing was held on October 5, 2016. The claimant Melissa Smith participated and testified. The employer Van Diest Supply Co. was represented by attorney Espnola Cartmill. Witnesses Kevin Spencer and Carolyn Cross testified on behalf of the employer. Employer's Exhibits 1 through 7 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 production operator from March 16, 2015, until this employment ended on August 25, 2016, when she was discharged.

On August 18, 2016, claimant was part of a confined space entry into a blender vessel. Located within the vessel are cannons that need to be manually locked to prevent an explosion of the suppression system. When employees are doing a confined space entry into a vessel there is a lock-out/tag-out procedure they are expected to follow in order to ensure the safety of everyone involved. (Exhibit 4). The lock-out/tag-out procedure is located on each vessel. A more detailed description of what is to be done to ensure the cannons are properly locked is located within a different document that is housed in a binder in another area of the plant. (Exhibit 5). Claimant had been trained on confined space entry, but Spencer was not sure if she was trained on the specific procedures for this vessel. Claimant admitted she was trained on proper lock-out/tag-out procedures, but testified none of this training covered manually locking the cannons.

On the date in question claimant's supervisor, Scott Hamilton, was walking around with her while she was completing the lock-out/tag-out procedures and entered the confined space with her. Hamilton then left to complete another task. Hamilton, who also should have known the proper lock-out/tag-out procedures, said nothing to claimant about manually locking the cannons. Also with claimant that day was the permit supervisor. The permit supervisor is the individual who was in charge of training employees on proper lock-out/tag-out procedures. The permit supervisor said nothing to claimant about manually locking the cannons. After an investigation into the August 18 confined space entry was conducted, it was discovered none of the employees involved, including Hamilton and the permit supervisor, had been manually locking the cannons when doing confined space entries. It was also later discovered that claimant was not qualified to enter the confined space under the employer's policies, but neither claimant nor Spencer knew this at the time. Once the investigation was completed claimant was discharged for failure to follow the proper lock-out/tag-out procedures.

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. Whether an employee violated an employer's policies is a different issue from whether the employee is disqualified for misconduct for purposes of unemployment insurance benefits. *See Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000) ("Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of benefits." (Quoting *Reigelsberger*, 500 N.W.2d at 66.)).

The conduct for which claimant was discharged was merely an isolated incident of miscommunication from the employer about the proper lock-out/tag-out procedures and whether the claimant was authorized to proceed according to the training process. Additionally, claimant has provided credible and uncontroverted testimony that she was not trained on the specific part of the lock-out/tag-out procedures involving manually locking the cannons. This is evidenced by the fact that none of the other individuals involved seemed to be aware of this step in the process, including the permit supervisor, who was in charge of completing trainings on the proper procedures. At best, 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).

Furthermore, claimant had no previous warnings regarding this type of violation. 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.

DECISION:

The September 16, 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. 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

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