IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

CARI M O'BRIEN Claimant **TARGET CORPORATION** Employer	**APPEAL 15A-UI-11835-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 10/04/15** **Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the October 20, 2015, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on November 5, 2015. Claimant participated. Employer participated through human resource business partner for the distribution center, Andrea Nelson. Employer Exhibit One was admitted into evidence with no objection.

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 packing team member from November 4, 2014, and was separated from employment on October 4, 2015, when she was discharged.

The employer has a negligent conduct policy that requires team members to use care in the performance of their duties. The policy lists riding on a pallet jack as a prohibited act because it can create an unsafe work environment. Riding on a pallet jack normally results in a final warning. The employer also has a disciplinary policy where each type of corrective action builds upon itself. If an employee receives three corrective actions within a rolling year, they then receive a final warning for multiple violations, which means that any further corrective action results in termination. The employer also has a no-call/no-show policy where an employee is required to call or show up for work within two hours after their scheduled start time. If an employee has three no-call/no-shows within one year, they are discharged. Claimant was aware of the policies. Employer Exhibit One.

On October 3, 2014, claimant was observed riding on a pallet jack. Claimant had been observed by team members and her group leader. The group leader followed-up with claimant to see why she did that. Claimant told her group leader that she was just bored and that is why she was riding the pallet jack. Riding on a pallet jack is considered negligent conduct. Normally negligent conduct results in a final warning, but because claimant already was on a final

warning, she was discharged. Riding on a pallet jack creates a serious safety issue/risk for claimant and other employees.

On September 20, 2015, claimant received two final warnings, one for a no-call/no-show on September 19, 2015, and the other for multiple violations. Employer Exhibit One. Claimant signed for both warnings. Employer Exhibit One. The final warning alerted claimant that her job was in jeopardy if she received another corrective action within the next year. Employer Exhibit One.

On August 1, 2015, claimant received a corrective action (counseling) for unsatisfactory work performance. Employer Exhibit One. Claimant signed for the warning. Employer Exhibit One. On March 30, 2015, claimant got a corrective action (counseling) for a no-call/no-show on March 23, 2015. Employer Exhibit One. Claimant did not call in or show up for work on March 23, 2015. Employer Exhibit One. Claimant signed for the warning. Employer Exhibit One. Claimant did not bring in her cell phone records regarding this no-call/no-show to the employer. Claimant did not report to human resources her concerns that she should not have received the counseling.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct. Benefits are denied.

It is the duty of an administrative law judge and the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge, as the finder of fact, may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other evidence you believe; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. This administrative law judge reviewed the exhibit submitted. This administrative law judge finds the employer's version of events to be more credible than claimant's recollection of those events.

Iowa Code § 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.

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).

Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). 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). 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). 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 employer is entitled to establish reasonable work rules and expect employees to abide by them. The employer has a negligent conduct policy that requires team members to use care in the performance of their duties. Claimant's argument that she was not aware that riding on a pallet jack was prohibited is not persuasive. Claimant testified she did not read her entire employee handbook, yet on November 4, 2014, she signed off as having read and understood the employer's policies. Employer Exhibit One. The policy specifically lists riding on a pallet jack as a prohibited act because it can create an unsafe work environment. It is clear that riding on pallet jacks is prohibited. This is also evident by the employer's policy that when an employee is caught riding on a pallet jack, they are normally given a final warning. This shows the serious safety risk that riding on pallet jacks poses to an employee. Claimant would have received a final warning, but she had already received two final warnings on September 20, 2015, therefore, the employer discharged claimant under its policies. Employer Exhibit One. Claimant's argument that the first no-call/no-show from March 2015 should not have been given is also unpersuasive. Even if claimant is now able to show she did call in to the employer in March 2015 to report her absence because of illness, she did not get the counseling removed from her record by October 4, 2015 and thus she knew her job was in jeopardy having already received two final warnings. Employer Exhibit One. On September 20, 2015, claimant received two final warnings, one being for multiple violations. Employer Exhibit One. The multiple

violation final warning clearly stated that claimant would be discharged if she received another corrective action. Employer Exhibit One. As discussed above, riding a pallet jack would result not only in a corrective action, but a final corrective action at a minimum. Therefore, on October 4, 2015, claimant received a final corrective action within one year of her final warning after knowing any further violation would result in discharge.

The employer is charged with protecting the safety of its employees by ensuring employees follow its safety rules while working. The employer has presented substantial and credible evidence that claimant was acting against the best interests of the employer and the safety of claimant and its employees by riding on a pallet jack. The employer has presented substantial and credible evidence that claimant violated the negligent conduct policy by riding around on a pallet jack in direct violation of the employer's policy and having been warned that any violation would result in discharge. This is disqualifying misconduct.

DECISION:

The October 20, 2015, (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

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Jeremy Peterson
Administrative Law Judge

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Decision Dated and Mailed

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