

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

BALKISSOU ADJOUMA
Claimant

CAPTIVE PLASTICS LLC
Employer

APPEAL 16R-UI-11842-LJ-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 08/07/16
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 August 25, 2016, (reference 01) unemployment insurance decision that allowed benefits based upon a determination that claimant was discharged for no disqualifying reason. The parties were properly notified of the hearing. A telephone hearing was held on November 17, 2016. The claimant, Balkissou Adjouma, participated. English/Hausa interpreter Karima from CTS Language Link assisted with the hearing. The employer, Captive Plastics, L.L.C., participated through Minnie Winters, HR manager. Employer's Exhibits 1 through 14 were received and admitted into the record. Claimant's Exhibit A was received and admitted into the record over objection. Claimant's Exhibit A was given no evidentiary weight, as claimant testified this is a conversation between two people who did not testify in the hearing regarding a comment claimant allegedly made that is unrelated to the incident leading to the separation from employment.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can 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 was employed full time, most recently as a production packer, from June 20, 2014, until August 10, 2016, when she was discharged for work performance issues.

The final incident occurred when claimant placed a label onto a box upside-down. (Exhibits 7 and 8) Winters testified that claimant's initials appear on the label, indicating she was the employee who placed this label onto the box, though this is not clear from the evidence the

employer submitted. (Exhibit 7) Claimant admitted she placed the label onto the box and admitted her initials were on the label. The parties dispute the date on which the final incident of poor work performance occurred. While Winters testified this occurred on August 10, claimant testified this occurred somewhere between two weeks and six weeks earlier. During the meeting to discuss this final incident, per claimant's request, the employer brought in coworker Moussau, who speaks Hausa. Claimant became upset during the conversation and asked to leave the meeting. When the employer explained that the meeting was being held to discharge her and asked her to sign an employee performance record, claimant left.

Claimant had received several warnings related to her work performance in the past. Notably, claimant testified that she never went to school and can neither read nor write. On January 6, 2016, claimant received a second written warning for failing to follow the pack pattern. (Exhibit 3) Specifically, the employee disciplinary report states claimant placed bottles neck-down, when the spec called for the bottles to be placed neck-up. Claimant refused to sign this disciplinary action. Also on January 16, claimant received a third written warning and "last chance" for packing bottles with swung gates. (Exhibit 4) Claimant refused to sign this disciplinary action. Neither of these disciplinary actions indicates whether anyone who spoke Hausa was present for the conversation or explained the issue to claimant.

On April 5, 2016, claimant received a second written warning for failing to follow the pack pattern. (Exhibit 5) Specifically, the employee performance record states that on March 17, claimant failed to input a pallet for bottles, causing needless delay. The notes under the "team member" section state: "Balkissou says she did not do this. Claimant also testified that one of her disciplinary actions was issued related to her work on line 16, on an occasion when she pointed out an error to a coworker who went and told a supervisor. This coworker took credit for identifying the error and blamed claimant for creating it, though she denies it was her fault. Again, this disciplinary action does not indicate whether anyone who spoke Hausa was present for the conversation.

The employer provided several years' versions of the good manufacturing practices checklist. Claimant initialed each item on these documents. (Exhibits 11 and 12) The employer also provided a copy of a Mandatory Training Record on which claimant's name appears. (Exhibit 13) All of these documents are in English. It is unclear whether claimant was provided with a copy of the good manufacturing practices checklist in Hausa. Winters testified that each manufacturing line has a set of instructions that includes both words and pictures.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$2214.00, since filing a claim with an effective date of August 7, 2016, for the eight weeks ending October 1, 2016. Claimant received one payment in the gross amount of \$104.00 for the week ending August 13, 2016; and five payments in the gross weekly amount of \$422.00 each for the weeks ending August 20, August 27, September 3, September 10, and September 17, 2016. The administrative record also establishes that the employer did participate in the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

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

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.

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).

It is the duty of the administrative law judge as 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 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. *Id.* 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 believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds claimant provided more credible testimony than the employer. The administrative law judge does not believe claimant had any meaningful warnings prior to her date of discharge, as there is no indication that claimant was provided with a Hausa/English

interpreter or a Hausa translation of her performance records and disciplinary actions. While the employer may have provided instructions through both words and pictures in an effort to bridge the language barrier, this is not sufficient to put claimant on notice that her job was in jeopardy and she could lose her job for pack pattern issues. Therefore, the administrative law judge finds credible claimant's testimony that she was not aware her job was in jeopardy.

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 assess points or impose discipline up to or including discharge for the incident under its policy.

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.

As discussed in the credibility section above, the administrative law judge finds claimant had no meaningful prior warnings and therefore no opportunities to correct her performance in line with the employer's expectations. The conduct for which claimant was discharged was merely an isolated incident of poor judgment. As the 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. As claimant's separation qualifies her to receive unemployment insurance benefits, the issues of overpayment, repayment, and chargeability are moot.

DECISION:

The August 25, 2016, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. The issues of overpayment, repayment, and chargeability are moot.

Elizabeth A. Johnson
Administrative Law Judge

Decision Dated and Mailed

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