IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

ERVIN L WEBB Claimant **ARCHER-DANIELS-MIDLAND CO** Employer	**APPEAL 17A-UI-10686-NM-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 09/17/17** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the October 16, 2017, (reference 01) unemployment insurance decision that denied benefits based on his discharge for violation of a known company rule. The parties were properly notified of the hearing. A telephone hearing was held on November 21, 2017. The claimant participated and was represented by attorney Marlon Mormann. The employer participated through attorney Jeremy Glenn and witnesses Bruce Albrechtsen and Erik McCann. Employer's Exhibits 1 through 6 and claimant's Exhibits A through F 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 February 24, 1997, until this employment ended on September 20, 2017, when he was discharged.

On September 14, 2017, claimant and three or four other employees were completing work on a large piece of equipment, a germ cooler. At some point in the course of their work the power to the equipment needed to be turned off and locked so guard rails could be put back on. Claimant, as well as the other employees working on the machine, had been trained on the proper lock-out/tag-out procedures, though there are no signs or manuals explaining the procedures in the immediate vicinity of the machines. (Exhibits 4 through 6). Claimant went and locked the blow line, but did not lockout the main system. Claimant testified he did not lockout the main system because the machine could not run with the blow line locked and no one had specifically instructed him to shut down the main system. McCann testified proper procedure would include locking out the main system, as different jobs pose different risks. McCann testified further that, while it is true that the machine should not run if the blow line is shut off, there is always a chance that the system preventing it from running under those circumstances could fail or be overridden, putting the employees working on the machine at

serious risk. According to claimant he had completed the lockout procedure for this machine in the same manner on prior occasions and was never told this procedure was unacceptable.

After the system is locked out, the next step in the employer's safety procedure is to try the system to ensure it is actually locked and powered down. Claimant testified he did check the computer system to confirm that the blow line did not have power, but did not perform the try step in the field, as that step was generally performed by workers in the field and he was in the computer room. It was later discovered, via the computer systems, that the main system had not, in fact, been locked out while the guards were being put back on. Claimant and one other employee were discharged based on this incident. Albrechsten testified the other employees involved were not discharged because only claimant and the other employee were responsible for and failed to complete the try step of the process. Claimant had no prior disciplinary history for this sort of violation and testified he believed he correctly followed all of the lock-out/tag-out steps according to the employer's policies and 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.
>
> 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.

The conduct for which claimant was discharged was merely an isolated incident of poor judgment and an assumption that another employee in the field had completed a field test of the try step. Claimant provided credible testimony that he genuinely believed he was following proper lock-out/tag-out procedure, though this belief may have ultimately been incorrect. Claimant testified he had followed the same procedure in the past, without disciplinary or corrective action. To the extent that the circumstances surrounding this incident does not establish a pattern of misbehavior, the employer has only shown that claimant was negligent. "[M]ere negligence is not enough to constitute misconduct." *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 666 (Iowa 2000).

While the seriousness of this situation and signficiant potential risk are understandable, a claimant will not be disqualified if the employer shows only "inadvertencies or ordinary negligence in isolated instances." 871 IAC 24.32(1)(a). When looking at an alleged pattern of negligence, previous incidents are considered when deciding whether a "degree of recurrence" indicates culpability. 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). Ordinary negligence is all that is proven here.

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.

DECISION:

The October 16, 2017, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he 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

nm/rvs