IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

DANIEL J RAPACKI Claimant **ARAMARK CAMPUS LLC** Employer	**APPEAL 16A-UI-06182-NM-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 05/08/16** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the May 31, 2016, (reference 01) unemployment insurance decision that denied benefits based upon his discharge for failure to follow instructions in the performance of his job. The parties were properly notified of the hearing. A telephone hearing was held on June 20, 2016. The claimant, Daniel Rapacki, participated and testified. Witness Dustin Martin also testified on behalf of the claimant. The employer, Aramark Campus LLC, participated through hearing representative, Edward Wright, and food services director, Ron Ross. Employer's Exhibits 1 through 3 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 grill cook from October 6, 2014, until this employment ended on May 13, 2016, when he was discharged.

On May 12, 2016, at the end of his regularly scheduled shift, claimant approached Ross to talk to him about a special event he was working later that evening. Claimant was upset because he was under the understanding that everyone was required to work the event, but later found out that was not true. Claimant did not want to work the event. Claimant asked Ross what would happen if he did not show up for his shift and Ross told him he would be written up. The conversation ended with Ross telling claimant not to bother coming in that night. Ross testified his comment was not meant as permission and he still planned on writing claimant up if he did not come in to his shift. Claimant did not show up to work the special event that evening, but sent Ross a text message stating that if he were to get written up, it would be his third write-up.

When claimant did not show up, Ross determined that he would be written up. The employer has a policy in place that states employees are terminated after receiving three write-ups for any offense. Claimant had previously received two write-ups for policy violations unrelated to attendance. Claimant had never been disciplined for attendance. Claimant testified he did not

show up because he took Ross' comment to mean he should not come in. Martin, who also witnessed Ross' comment, testified he believed Ross was telling claimant not to come in. Claimant denied Ross ever warned him that failing to come in would result in termination. Claimant testified he only texted Ross because he only later remembered this would be his third write-up and was not sure if he was going to be written up.

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 § 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).

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.

Claimant was terminated after failing to show up for a scheduled shift. The conduct for which claimant was discharged was merely an isolated incident. Ross instructed claimant not to come in to work that night. While Ross may not have meant this statement to be taken literally and may have meant it as a warning, claimant's interpretation of the statement was not unreasonable. Even if claimant was under the impression that he would be written up for not coming to his shift, he had no previous disciplinary actions related to his attendance.

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. The employer's simple accrual of a certain number of warnings counting towards discharge does not establish repeated negligence or deliberation and is not dispositive of the issue of misconduct for the purpose of determining eligibility for unemployment insurance benefits. 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 May 31, 2016, (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.

_____
Nicole Merrill
Administrative Law Judge

_____
Decision Dated and Mailed

nm/pjs