IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

DREW W SMITH Claimant **VERMEER MANUFACTURING COMPANY INC** Employer	**APPEAL 17A-UI-11873-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 10/22/17** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the November 8, 2017, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on December 19, 2017. Claimant participated. Attorney Ryan Mitchell participated on claimant's behalf. Employer participated through human resources business partner Kala Talsma, area manager Rod Showers, weld engineer Jeff Redding, safety engineer Stephen Kelly, and robotic welder Luis Sican. Employer Exhibit 1 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 welder from December 2, 2013, and was separated from employment on October 20, 2017, when he was discharged.

The employer has a written disciplinary policy. Employer Exhibit 1. The disciplinary policy provides employees will receive a written warning for "Deliberately skipping/omitting/removing a quality step in work processes[.]" Employer Exhibit 1. The disciplinary policy provides employees will receive a three-day suspension for failing "to promptly report a work injury or damage of materials[.]" Employer Exhibit 1. The disciplinary policy also provides that employees will receive a three-day suspension for "Careless/Reckless conduct (horseplay/negligence)[.]. Employer Exhibit 1. The disciplinary policy further provides that an employee will be terminated if the employee deliberately fails "to follow quality processes that leads to injury of another person or excessive damage to Company equipment ($1000/one thousand dollars)[.]" Employer Exhibit 1. Claimant was aware of the employer's policies. Employer Exhibit 1.

The employer discharged claimant for allegedly violating its policies on two separate occasions on October 18, 2017. The first alleged incident on October 18, 2017 that led to claimant's

discharge occurred when claimant failed to repair defects on a part as requested by the employer. The employer had instructed claimant to repair defects on parts that had been marked up by Mr. Redding. Claimant attempted to fix the defects, but he did not finish the repairs before the end of his shift. Claimant believed that the parts were passed onto the next shift. On October 19, 2017, when claimant returned to work the parts were still in his area. A third shift employee told claimant that he had fixed them. Later, Mr. Showers approached claimant and informed him that Mr. Redding was not happy with how the parts were fixed. Claimant told Mr. Showers that he did not have time to work on them very much, but that the third shift employee had fixed them.

The second alleged incident that led to claimant's discharge occurred on October 18, 2017 before claimant's shift ended. Claimant was working on a part when he heard a large part fall off a cart and land on the ground. Claimant was welding approximately 15 to 17 feet away when the part fell to the ground. Claimant looked up and saw his group leader and Mr. Sican around the part. After the part fell, claimant walked up to Mr. Sican and said something to the effect "how did you not see that coming". Claimant denied saying "hey, you didn't see nothing" to Mr. Sican. Claimant believed that this incident should be reported to the employer, but he thought the group leader or Mr. Sican would report the incident. Claimant had previously been informed he should report safety incidents to his group leader. Claimant did not report the incident to the employer. Mr. Sican did not immediately report the incident to the employer. When the part hit the concrete floor, it caused damage to the floor, but the employer is not aware of the cost of the damage. On October 19, 2017, an employee from the safety group interviewed claimant about the part that had fallen. Claimant did not deny that the part had fallen. Claimant did observe the damage to the concrete floor. Claimant did not blame the incident on Mr. Sican or the group leader. Claimant told the safety group employee he did not have the part on a hoist and that someone else brought it into the corner.

The employer reviewed the incidents that occurred on October 18, 2017 and the employer determined that they were negligent situations. The employer then decided to discharge claimant. On October 20, 2017, the employer informed claimant he was discharged. Claimant had no prior disciplinary warnings.

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.

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 that was admitted into evidence and noted the dates in the exhibits. The witnesses testified during the hearing and the employer's termination noticed indicated that the incidents that led to claimant's discharge occurred on October 18, 2017, but the employer's termination recommendation form indicated the final incidents occurred "On Wednesday, October 19, 2017[.]" Employer Exhibit 1. This administrative law judge finds claimant's version of events to be more credible than the employer's recollection of those events.

Iowa Code section 96.5(2)*a* provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 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 disqualification shall continue 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).

Iowa Admin. Code r. 871-24.32(4) provides:

> **(4)** *Report required.* The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

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). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *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). A warning weighs heavily toward a finding of intentional conduct.

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 employer discharged claimant for two separate incidents that occurred on October 18, 2017. The employer has failed to show that either incident alone or combined establish disqualifying job misconduct. Claimant credibly testified he did not have the opportunity to finishing repairing the defects on the parts before his shift ended on October 18, 2017. Claimant further credibly testified that the third shift employee told him that the defects were fixed. The employer has failed to "demonstrate[] a wrongful intent on his part" regarding claimant's job performance (failure to fix the defects). *Kelly v. Iowa Dep't of Job Serv.*, 386 N.W.2d 552 (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 also discharged claimant for failing to report a safety incident that occurred on October 18, 2017. Claimant credibly testified that his group leader and Mr. Sican were closer to the part that fell than he was and he assumed his group leader or Mr. Sican would report the incident. Claimant had been previously instructed to report safety incidents to his group leader. Claimant denied saying, "hey, you didn't see nothing" to Mr. Sican. Claimant also credibly testified he approached Mr. Sican and stated something to the effect that "how did you not see that coming." Although claimant should have reported the part falling because it caused damage to the concrete floor, no evidence was presented that it caused "injury of another person or excessive damage" that would result in automatic termination according to the employer's policy. Employer Exhibit 1. It is noted that claimant had no prior disciplinary warnings and the employer's policy indicates an employee will receive a three day suspension if an employee fails "to promptly report a work injury or damage of materials[.]" Employer Exhibit 1.

The incidents for which claimant was discharged were merely isolated incidents of poor judgment and inasmuch as employer had not previously warned claimant about the issues

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. 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 has failed to meet its burden of proof in establishing disqualifying job misconduct. Benefits are allowed.

DECISION:

The November 8, 2017, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

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Jeremy Peterson
Administrative Law Judge

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Decision Dated and Mailed

jp/rvs