IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

SUSAN C PULSCHER Claimant	**APPEAL 15A-UI-09934-CL-T** **ADMINISTRATIVE LAW JUDGE DECISION**
HY-VEE INC Employer	
	OC: 08/09/15 **Claimant: Respondent (1)**

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

STATEMENT OF THE CASE:

The employer filed an appeal from the August 28, 2015, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on September 17, 2015. Claimant participated. Employer participated through store director JJ Hesnard and was represented by James Tranfaglia with Corporate Cost Control. Employer's Exhibits 1 and 2 were received. Claimant's Exhibit A was received.

ISSUE:

Was the claimant suspended 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 delicatessen clerk from July 16, 2012, and was separated from employment on June 4, 2015, when she was suspended.

On June 1, 2015, another employee made store director Hesnard aware of an article from a local newspaper stating that claimant had been arrested and charged with driving while suspended, not having required special insurance, second-offense operating a motor vehicle while intoxicated, possession of a controlled substance, and possession of drug paraphernalia.

On June 4, 2015, Hesnard asked claimant about the article. Claimant admitted she had been charged with the offenses. Claimant stated she would not discuss whether she committed the offenses on the advice of her attorney. Hesnard suspended claimant without pay. Hesnard informed claimant she could return to work if she was found innocent or if the charges were dismissed, and she would be terminated if she was found guilty of the charges.

The charges have not yet been resolved.

Employer has a Code of Conduct policy stating:

> Violation of any rule, policy or procedure, whether included here, in the store level handbooks or postings, or stated orally by management personnel, will result in disciplinary action up to and including termination. Where criminal laws are violated, termination and prosecution may occur.

Claimant received a copy of the policy along with her employee handbook.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was suspended 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(9) provides:

> (9) Suspension or disciplinary layoff. Whenever a claim is filed and the reason for the claimant's unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as discharged, and the issue of misconduct must be resolved. Alleged misconduct or dishonesty without corroboration is not sufficient to result in disqualification.

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." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). 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).

An employer may remove an employee for any number of reasons or no reason at all, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, employer incurs potential liability for unemployment insurance benefits related to the separation.

The criminal charges against claimant are not related to work. Employer does not have a policy governing off-duty criminal conduct. The Code of Conduct policy cited by employer only refers to violations of company policy that also violate criminal laws. Otherwise, the term "prosecution" would be superfluous as employer clearly has no authority to prosecute an employee for off-duty conduct that is not related to work.

Even if the policy did apply to off-duty criminal conduct, the criminal charges against claimant have not been resolved. Claimant is presumed to be innocent until she pleads or is proven to be guilty.

The employer's evidence as a whole failed to establish that claimant violated any known company rule or that she was otherwise guilty of misconduct within the meaning of unemployment law. As such, no disqualification is imposed.

DECISION:

The August 28, 2015, (reference 01) unemployment insurance decision is affirmed. Claimant was suspended from employment without establishment of misconduct. Benefits are allowed, provided she is otherwise eligible.

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Christine A. Louis
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Decision Dated and Mailed

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