IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

NICHOLAS A BROCK Claimant **TRANSFER MASTER PRODUCTS INC** Employer	**APPEAL 14A-UI-06797-L** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 06/08/14** **Claimant: Respondent (1)**

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

STATEMENT OF THE CASE:

The employer filed an appeal from the June 27, 2014 (reference 02) unemployment insurance decision that allowed benefits because of a discharge from employment. After due notice was issued, a hearing was held on February 25, 2015 in Decorah, Iowa. Claimant participated and was represented by Erik Fern, Attorney at Law. Employer participated through company president Aaron Goldsmith and accounting/human resource manager Amanda Moore. Employer's Exhibits One through Ten were received. Claimant's Exhibits A through F were received.

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 as a full-time salaried sales/customer service from June 2012 through June 6, 2014 when he was discharged (Employer's Exhibit Four and Six). The employer told claimant he was discharged because of diminished sales performance, absenteeism and tardiness, and not following through on company policy (Employer's Exhibit Four). Sales and reports between March and May 2014 were a large factor in the decision to discharge. Claimant was never told his sales would be compared to coworker Eric's sales. Claimant was on vacation in Naples, Florida from March 17 through 21, at a trade show in New Orleans from March 26 through 29, and at a trade show in Las Vegas the week of March 10, 2014. Claimant also had chronic sinus infections with medical treatment and notes to excuse him from work, many of which he did not take (Claimant's Exhibit A). Claimant exceeded Eric's sales in January and February 2014, and the employer's figures do not consider the claimant's final sale on June 6, 2014 (Employer's Exhibit One and Seven). Because employer's advisory board member Chaim Abrahms, who had authority, assigned claimant to work in production and fork lift operation during May to help replace two separated employees, his sales were reduced in comparison to Eric (Employer's Exhibit One). Claimant also had other duties that were not assigned to Eric, such as warehouse work, fork-truck driving, service calls, and trade show preparation and follow-up (Claimant's Exhibit B). The employer gave claimant a compliment about being the leading sales person on January 27, 2014 (Employer's Exhibit Three).

During the interview and hiring process claimant told the employer he was primarily responsible for his children's care at certain times, they had soccer or swim practices and was simply instructed to let Goldsmith know when that required him to be away from work. Eric received analogous privileges with flexible hours for similar reasons. The claimant was a salaried employee and his first supervisor Lowell Kuck, who was discharged prior to claimant (but on July 2, 2014, signed a document about time sheet policy recollection after claimant's separation, Employer's Exhibit Five) instructed him that the timesheets reflected his presence at work on a particular day rather than specific in and out times. The arrangement was that he work from 8:30 a.m. to 5:00 p.m. or later. On January 27, 2014 the employer instructed claimant that he, in spite of being salaried, should reflect actual time present at work. Goldsmith also told claimant he could submit a log of after-hours work. Before that date claimant kept general time records with some variation (Employer's Exhibit Three). After that he kept more specific time records and did not often take a lunch break (Employer's Exhibit Eight). When he worked after 5:00 p.m. the phone rang over to him. When he started recording extra time for evening work the employer told him not to do that. Neither party kept independent time records manually or electronically to establish specific dates' arrival and departure times to contradict the records in Employer's Exhibit Eight.

Abrahms was assigned at some point around May 2014, to work with claimant and Eric to help with tracking sales. He assigned them to complete spreadsheets of daily sales activity. The first reference to sales logs was on May 30, 2014, in an e-mail from Abrahms to Goldsmith (Employer's Exhibit One). Abrahms complimented claimant on his spread sheets showing data on what he was doing during the day and about the increase in out-bound activity, which was better than Eric's. The employer did not provide specific information about which spreadsheets claimant had failed to submit to Abrahms and did not offer the spreadsheets as exhibits.

Because the employer considered claimant's employment at-will Goldsmith did not use progressive discipline or give any written warnings his job was in jeopardy for any reason. Claimant filed a wage and hour complaint regarding paid time off (PTO) and unauthorized payroll deductions on May 5, 2014 (Employer's Exhibit Two). The employer repaid the funds at issue after the separation date.

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:
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> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
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> 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, (4), and (8) provide:

> Discharge for misconduct.
>
> (1) Definition.
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> 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.
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> 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).
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> (4) Report required. The claimant's statement and the 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.
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> (8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

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 has failed to establish a final or current act of misconduct for which claimant was discharged. Even had the employer done so, inasmuch 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. 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. The employer has not met its burden of proof to establish a current or final act of misconduct, and, without such, the history of other incidents need not be examined.

DECISION:

The June 27, 2014 (reference 02) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

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