IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

RAYMONE C RUSH Claimant **IA DEPT OF HUMAN SVCS/GLENWOOD** Employer	**APPEAL 17A-UI-07470-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 05/21/17** **Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.6(2) – Timeliness of Appeal

STATEMENT OF THE CASE:

The claimant filed an appeal from the June 8, 2017, (reference 01) unemployment insurance decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call on August 10, 2017. Claimant participated. Employer participated through hearing representative Kenneth Kjer, human resources supervisor Natalie McEwen, and treatment program administrator Kathy King. Official notice was taken of the administrative record with no objection.

ISSUE:

Is the appeal timely?

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: An ineligibility unemployment insurance decision was mailed to claimant's last known address of record on June 8, 2017. The decision contained a warning that an appeal must be postmarked or received by the Appeals Bureau by June 18, 2017. The appeal was not filed until July 24, 2017, which is after the date noticed on the unemployment insurance decision.

Claimant did not get the decision denying benefits until after the appeal deadline. Claimant contacted Iowa Workforce Development (IWD) around Friday, July 21, 2017, once he received the decision. The IWD employee told claimant his benefits were denied because he had been discharged for sleeping. The IWD employee told claimant he had to go through the process to file an appeal. Claimant filed the appeal the next working day (Monday, July 24, 2017) after he received the decision.

Claimant had previously worked for the employer, but he voluntarily left. Claimant was re-employed full-time as a resident treatment worker from March 6, 2017, and was separated from employment on May 11, 2017, when he was discharged. When claimant was rehired, he was

placed on a six month probationary period. If an employee successfully completes their six month probationary period, they then become a permanent employee. Permanent employees are disciplined according to a progressive disciplinary policy. Probationary employees may be separated from employment for any reason or no reason at all. Probationary employees are not disciplined according to the progressive disciplinary policy.

On April 1, 2017, a supervisor, Dylan, alleged claimant was sleeping in a client's room and this client required one-on-one supervision. Claimant denied sleeping in the client's room when he was supposed to be providing one-on-one supervision. Claimant also denied sitting in a chair with his head laid back and his eyes closed. Prior to Dylan entering the room, claimant heard Dylan knock on the door. Claimant then laid his head back. Claimant testified his eyes were half open. Claimant was able to observe the client while his head was laying back. Dylan called claimant's name once and claimant responded "what's up man?" Claimant denied that Dylan placed his hand on claimant's shoulder and lightly shook claimant. Dylan told claimant that he cannot be sleeping while supervising a client. The supervisor asked for the client's accountability report. Claimant testified the accountability report was complete except for the 2:00 p.m. period. The time was approximately 2:13 p.m. when Dylan requested the accountability report and claimant's shift was supposed to end at 2:00 p.m. Dylan told claimant to go to the supervisor's office. Claimant waited for Dylan at the office, but the investigator arrived and told him to go home. Claimant understood that there would be an investigation and that he would not be able to work with this client until it was over. Claimant then went home.

On April 3, 2017, the investigator interviewed claimant as a part of the employer's investigation. The investigator asked claimant about what happened on April 1, 2017 with the client. Claimant told the investigator he did not recall the supervisor coming into the room or calling his name. Claimant admitted he was not fully awake at the time the incident happened. Claimant had worked overtime the previous three days and he was supposed to be off work on April 1, 2017, but he was called into work. Claimant stated his head was tilted back but he could see the client. Claimant stated that Dylan did not shake him.

On April 5, 2017, the employer interviewed claimant again. The investigator questioned claimant about the client and whether the client was to get a supplement drink if he did not finish his entire meal. Claimant told the investigator he was not aware that the client was to get the supplement drink. Claimant testified the client had eaten his entire meal, but claimant had not yet charted that the client ate the entire meal. Claimant told the investigator that he had gone to the supervisor's office before he could complete the activity program chart.

On April 7, 2017, the employer interviewed claimant. The investigator continued asking claimant about the client's supplemental drink. This client was not claimant's normal client. Claimant told the employer his statements were accurate.

Claimant was allowed to work his regular scheduled shifts and overtime until April 11, 2017. On April 11, 2017, claimant was suspended with pay due to another investigation regarding an allegation of inappropriate interactions with a different client. After an investigation, the employer determined claimant was not to at fault for this incident.

On April 13, 2017, the employer completed its investigation and it found claimant to have been inattentive to his job duties. On May 5, 2017, the employer met with claimant and he was informed he was discharged for failing to successfully complete his probationary period because of the incident on April 1, 2017. If claimant had been a permanent employee, he would have been disciplined according to the employer's progressive discipline policy. Claimant testified

that other permanent employees have been found to be inattentive or sleeping and they were not discharged.

REASONING AND CONCLUSIONS OF LAW:

The first issue to be considered in this appeal is whether the appellant's appeal is timely. The administrative law judge determines it is.

Iowa Code section 96.6(2) provides:

> 2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of section 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to section 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving section 96.5, subsections 10 and 11, and has the burden of proving that a voluntary quit pursuant to section 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 1, paragraphs “a” through “h”. Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The appellant did not have an opportunity to appeal the unemployment insurance decision because the decision was not received in a timely fashion. Without timely notice of a disqualification, no meaningful opportunity for appeal exists. See *Smith v. Iowa Emp't Sec. Comm'n*, 212 N.W.2d 471, 472 (Iowa 1973). The appellant did not receive the decision until after the appeal deadline. The appellant contacted IWD once he received the decision and filed his appeal the next business day. Therefore, the appeal shall be accepted as timely.

The next issue is whether claimant was discharged for disqualifying job-related misconduct. 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 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:
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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 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.
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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.

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.

Iowa Admin. Code r. 871-24.32(5) provides:

> Discharge for misconduct.
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> (5) Trial period. A dismissal, because of being physically unable to do the work, being not capable of doing the work assigned, not meeting the employer's standards, or having been hired on a trial period of employment and not being able to do the work shall not be issues of misconduct.

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). 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). Failure in job performance due to inability or incapacity is not considered misconduct because the actions were not volitional. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

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.

If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. *Crosser v. Iowa Department of Public Safety*, 240 N.W.2d 682 (Iowa 1976). The employer discharged claimant for being inattentive on April 1, 2017. However, claimant provided direct, first-hand testimony that although he was not fully awake on April 1, 2017, he was not sleeping and he was still watching the client. Claimant credibly testified he heard Dylan knock on the door and when Dylan said his name once, he responded. Claimant further credibly testified that

Dylan did not touch his shoulder at any time. The employer had the power to present Dylan to provide direct, first-testimony, but instead relied on statements he made regarding the incident. Dylan's statements for the employer's investigation do not carry as much weight as live testimony because the testimony is under oath and the witness can be questioned. The employer did not provide first-hand testimony at the hearing and, therefore, did not provide sufficient eye witness evidence of job-related misconduct to rebut claimant's denial of said conduct. The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

In the alternative, even if it is found that claimant was inattentive, the conduct for which claimant was discharged was merely an isolated incident of poor judgment and 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. The employer's argument that claimant was not a permanent employee and is not subject to discipline under the employer's progressive disciplinary policy is not persuasive. Although claimant was a probationary employee, discharge within a probationary period, without more, is not disqualifying. 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. Since claimant's consequence (discharge) was more severe than other employees (e.g., permanent employees) received for similar conduct, the disparate application of the policy cannot support a disqualification from benefits. Benefits are allowed.

DECISION:

The June 8, 2017, (reference 01) unemployment insurance decision is reversed. Claimant's appeal is considered timely. 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