IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

JACQUELINE SVENSON Claimant **DOLGENCORP LLC** Employer	**APPEAL 15A-UI-12928-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 10/25/15** **Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the November 17, 2015, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on December 10, 2015. Claimant participated. Employer participated through district manager for district 288, Lisa Whitcomb. Employer Exhibit One was admitted into evidence with no objection. Claimant Exhibit A was admitted into evidence over the employer's objection. The employer objected because Ms. Whitcomb was told what to put in the review. The employer initiated the document. Claimant has no control over what is put into the document. The employer's objection was overruled.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a store manager from December 31, 2011, and was separated from employment on October 29, 2015, when she was discharged.

The employer has a written policy that sales associates cannot be left alone by themselves. Employer Exhibit One. Claimant was aware of the policy, but she was not aware she could not leave the building. Employer Exhibit One. The employer has a progressive disciplinary policy wherein the first step is a verbal warning, the next step is a written warning, then a final warning, and finally termination.

On October 15, 2015, claimant was working with another employee, Gloria. Gloria is a sales associate. Claimant was Gloria's supervisor. Claimant left the store for lunch at 12:55 p.m. and did not return until 2:02 p.m., which left Gloria alone in the store. Claimant left the property for approximately ten minutes, but then returned and ate her lunch in the parking lot. Gloria contacted Ms. Whitcomb and told Ms. Whitcomb that she was left alone by claimant. Gloria, as a sales associate, did not have the authority to void transactions or give refunds; claimant had that authority. Ms. Whitcomb reviewed store video and confirmed that claimant had left Gloria alone. Ms. Whitcomb spoke with claimant and told her she failed to protect company assets and left a sales associate alone and she was discharged.

Claimant had no prior disciplinary warnings. Claimant was not aware her job was in jeopardy.

The employer did participate in the fact-finding interview.

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 exhibits submitted by both parties. This administrative law judge finds claimant's version of events to be more credible than the employer's recollection of those events.

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.
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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).

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).

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.

On October 15, 2015, claimant and a sales associate, Gloria, were working together. According to the employer's policy, claimant was not to leave Gloria alone in the store; however, at 12:55 p.m. claimant left Gloria alone in the store and went to lunch. Claimant was discharged by Ms. Whitcomb for leaving Gloria alone in the store and not protecting company assets, yet claimant had no prior warnings for similar conduct. Claimant had no prior disciplinary warnings during her employment. The employer's argument that prior to October 15, 2015, Ms. Whitcomb had a conversation with claimant about not leaving a sales associate alone is not persuasive. Claimant denied such a conversation occurred. Furthermore, even if the conversation did occur, claimant received no discipline for this conduct. Claimant was not warned that her job was in jeopardy for leaving a sales associate alone.

Therefore, 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. 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 satisfy its burden of disqualifying job misconduct. Benefits are allowed.

Furthermore, claimant also testified that other key holders would leave sales associates alone in the store over break and they received no discipline. Even though claimant did leave a sales associate alone on October 15, 2015, others involved in the same or similar incidents were not disciplined, thus the claimant seems to have been the subject of the disparate application of the policy, which cannot support a disqualification from benefits. Benefits are allowed.

Because, for the reasons stated above, claimant is eligible for benefits, provided she is otherwise eligible, the issue of whether claimant was overpaid benefits is moot.

DECISION:

The November 17, 2015, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she 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/pjs