IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

PAMELA I LANKEN Claimant **FBG SERVICE CORPORATION** Employer	**APPEAL 16A-UI-10245-DB-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 08/21/16** **Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant/appellant filed an appeal from the September 13, 2016 (reference 01) unemployment insurance decision that denied benefits based upon her separation from employment. The parties were properly notified of the hearing. A telephone hearing was held on October 4, 2016. The claimant, Pamela I. Lanken, participated personally. The employer, FBG Service Corporation, was represented by Frankie Patterson and participated through witnesses Linda Simms and Jennifer Lappe. Claimant's Exhibit A was admitted. The administrative law judge took administrative notice of the claimant's unemployment insurance record including the fact finding documents.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Did claimant voluntarily quit the employment with good cause attributable to employer?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a cleaning specialist from March 25, 2016 until her employment ended on August 24, 2016. Claimant's job duties included cleaning, vacuuming, dusting and moping. Louis Valenciano was claimant's immediate supervisor.

The final incident which led to claimant's discharge occurred on August 24, 2016. Claimant was called into work for a meeting to discuss her switching to a different location in Woodward-Granger. Claimant came into the office for this meeting at 9:00 a.m. Claimant was tired from working the night before. Claimant met with Linda Simms and Mike Livermore. Mr. Livermore was her current supervisor and Ms. Simms was going to be her new supervisor. The three discussed the fact that claimant had recently moved her availability to after 3:00 p.m. and that this new position started at 11:30 a.m. Claimant agreed that she would be able to take the new position. Ms. Simms asked if claimant was upset because the tone of voice she was using was argumentative. Claimant replied that she was just tired and she had changed her availability to after 3:00 p.m. because she does not get to bed until after 2:00 a.m.

Mr. Livermore then told the claimant that she would not be able to be on her personal cell phone while she was working the new position at Woodward-Granger. Mr. Livermore was referring to a previous incident when he witnessed claimant attempting to contact her boyfriend on her personal cell phone. Claimant was never disciplined for this incident. Claimant was using her personal cell phone to try to contact her boyfriend because she believed that she was being harassed by the security guard at work. Claimant was upset and crying during this previous incident. Mr. Livermore told the claimant that he knew the security guard was out to get her and to just walk away from him.

When Mr. Livermore brought up this incident regarding the personal cell phone use at the meeting claimant became upset. She again stressed to Mr. Livermore that she was only using the cell phone in an effort to calm herself down and to keep herself from quitting due to the harassment by the security guard. She became argumentative with Mr. Livermore about the reason she was using the cell phone on the previous occasion. She did not yell or use profane language during this meeting. She did not say any threatening remarks or use any threatening gestures during this meeting.

Mr. Livermore told claimant that he was going to reschedule the meeting since she was tired. Claimant asked why the meeting needed to be rescheduled because she was there now and they could go over any instructions with her at that time. Mr. Livermore then told claimant "we can either reschedule this or you know what, never mind, I am going to let you go, you are done." Claimant was discharged for insubordination during the meeting. Claimant then left the office after being discharged.

The employer does have a written policy which states that an employee can be subject to discharge for insubordination. Claimant did receive a copy of this written policy. The fact finding documents show that the employer previously stated that the claimant was discharged for being observed on camera failing to perform her job duties.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged for no disqualifying reason. Benefits are allowed.

As a preliminary matter, I find that the Claimant did not quit. Claimant was discharged from employment.

The decision in this case rests, at least in part, upon the credibility of the parties. It is the duty of the administrative law judge as 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 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. *Id.* 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 believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id*. Given the employer's inconsistent representations regarding the reason claimant was discharged, the administrative law judge concludes that the claimant's testimony is more credible than that of the employer.

Iowa Code section 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.

871 IAC 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 Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

871 IAC 24.32(4) provides:

> (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.

871 IAC 24.32(8) provides:

> (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.

Further, 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). Further, 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 law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000). Reoccurring acts of negligence by an employee would probably be described by most employers as in disregard of their interests. *Greenwell v Emp't Appeal Bd.*, No. 15-0154 (Iowa Ct. App. March 23, 2016). The misconduct legal standard requires more than reoccurring acts of negligence in disregard of the employer's interests. *Id*.

Insubordination can be misconduct. An employer has the right to expect an employee to follow reasonable directions. *Myers v. Iowa Dep't of Job Serv.*, 373 N.W.2d 507 (Iowa Ct. App. 1985). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990); however, "Balky and argumentative" conduct is not necessarily disqualifying. *City of Des Moines v. Picray*, (Iowa Ct. App. 1986).

In this case the claimant did not refuse to follow any instructions of her supervisors. She never stated that she would not meet at a different date and time. There was no profane language or threats of violence used. The employer failed to meet its burden of proof in establishing a current act of disqualifying job-related misconduct. As such, benefits are allowed.

DECISION:

The September 13, 2016 (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. The benefits claimed and withheld shall be paid, provided she is otherwise eligible.

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Dawn Boucher
Administrative Law Judge

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Decision Dated and Mailed

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