IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

KRISTINA M MCBRIDE Claimant **ALLEN MEMORIAL HOSPITAL** Employer	**APPEAL 16A-UI-09975-JP** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 08/21/16** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the September 9, 2016, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. An in-person hearing was held on October 19, 2016 at 3420 University Avenue, Suite A in Waterloo, Iowa. Claimant participated. Attorney Annie Galbraith participated on claimant's behalf. Hattie Holmes attended the hearing as an observer. Employer participated through vice-president of human resources Steve Seesterhann. Employer exhibits 1 through 9 were admitted into evidence with no objection.

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 full-time as a patient access from September 11, 2014, and was separated from employment on August 23, 2016, when she was discharged.

The employer has an Information Security Agreement and Information Systems Access policy. Employer Exhibits 3 and 4. Employees are only allowed to use UserIDS that are assigned to them. Employer Exhibit 4. The employer also has a progressive disciplinary policy. Employer Exhibit 1. The policy provides for written warnings for the first two levels, the third level is a suspension, and the fourth level results in discharge. Employer Exhibit 1. The policy lists "Improper use of hospital information system user IDs" as an example of a first level written warning. Employer Exhibit 1. The policy also lists "Misuse of Hospital Information System user ID: intentionally giving user ID to another associate or intentionally using another associate's user ID without supervisory approval" as an example of a second level written warning. Employer Exhibit 1. Claimant was aware of the employer's policies.

The final incident that led to discharge occurred on August 12, 2016. On August 12, 2016, claimant's hours had been switched to accommodate another employee's schedule and she was closing. As claimant was closing out the windows on the front desk computer, there was a

document from another employee's (Courtney Wilson) e-mail that was open. Claimant initially thought the document was hers and she read the document. Claimant discovered that the document was not hers, but was an attachment to Ms. Wilson's e-mail. After claimant realized it was not her document, but was Ms. Wilson's, she paused and debated what to do. Claimant and Ms. Wilson have had issues in the past, which created a stressful work environment for claimant. The document was addressed to Brandon, another employee in the same department as claimant. Claimant believes that Ms. Wilson was gossiping and violating the Health Insurance Portability and Accountability Act of 1996 (HIPAA). Claimant believes that Ms. Wilson was starting drama. Claimant decided to copy and pasted the document's contents into another word document and saved the word document. Claimant then logged into her e-mail account and pasted the information into an e-mail. Claimant then sent the e-mail from her account to her e-mail address. Claimant's actions accomplished the same result as if she would have just forwarded Ms. Wilson's e-mail to herself. Claimant did not report anything she read or did on August 12, 2016 to her supervisor because it was a Friday night. Claimant did not want to report what was in Ms. Wilson's document without the e-mail because she wanted proof of what was actually written.

Claimant attempted to report the incident to her supervisor, Katie Hesse, on Monday, August 15, 2016, but Ms. Hesse left early and when claimant approached her, she told claimant to report it tomorrow. On August 16, 2016, claimant's team lead was back at work. Claimant reported what happened on August 12, 2016 to her team lead. Claimant told her team lead that she and Ms. Wilson have had issues. Claimant showed the e-mail to her team lead. The team lead then left and claimant went to break.

On August 17, 2016, the employer made an announcement that no employees could leave their computer without logging out or locking the computer. Nothing else happened until August 23, 2016 when she met with the employer. Claimant met with the employer twice on August 23, 2016. During the first meeting, claimant did not deny copying the e-mail. Mr. Sesterhenn told claimant that she had violated the policy by copying and pasting the document. The employer told claimant it was going to continue to investigate the incident. Later on August 23, 2016, claimant met again with the employer and was discharged. Mr. Seesterhann testified that claimant was not discharged because of the final incident, but because it was her fourth step (level) in the progressive disciplinary policy. When claimant was discharged she wrote in the employee's remarks, "The email I read was left up and not logged out by the owner of the email for anyone to read or see. The copy was made only to have my sup aware of the situation [and] hopefully correct it." Employer Exhibit 2.

Prior to August 12, 2016, claimant had three prior disciplinary warnings within the past year. Employer Exhibits 7, 8, and 9. The employer issued claimant a "1st Level Written Warning" on February 3, 2016 for failing to follow protocol and procedure (claimant did not verify information). Employer Exhibit 9. Claimant was warned that "[a]dditional infractions of this type or any other policy will probably result in: Additional disciplinary action." Employer Exhibit 9. On February 12, 2016, the employer issued claimant a "2nd Level Written Warning" for failing to follow proper protocol and procedure for not verifying information. Employer Exhibit 8. Claimant was warned that "[a]dditional infractions of this type or any other policy will probably result in: Additional disciplinary action." Employer Exhibit 8. On February 12, 2016, the employer also issued claimant a "3rd Level – One Day Unpaid Suspension" for attendance infractions. Employer Exhibit 7. Claimant was warned that "[a]dditional infractions of this type or any other policy will probably result in: Termination." Employer Exhibit 7. Claimant did not have any other prior warnings. Mr. Seesterhann testified that claimant would not have been discharged for the August 16, 2016 incident if she did not have the three prior warnings.

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 appearance, 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 exhibit that was admitted.

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.
>
> 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(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.

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.

Claimant provided credible testimony that on August 12, 2016, she copied the information so she would have proof of what Ms. Wilson wrote when claimant reported the incident. Claimant's testimony was corroborated by her attempt to report the incident to her supervisor (Ms. Hesse) the next work day (August 15, 2016) and her reporting of the incident to her team lead on August 16, 2016. Employer Exhibit 5. It is clear claimant was not trying to hide her conduct on August 12, 2016.

Even though claimant's conduct on August 12, 2016 may have violated the employer's Information Systems Access policy and the Information Security Agreement and was therefore subject to the employer's disciplinary process, she had no prior warnings for violating the policy or the agreement. The employer's disciplinary policy states that "Improper use of hospital information system user IDs" is an example of a first level written warning and "Misuse of Hospital Information System user ID: intentionally giving user ID to another associate or intentionally using another associate's user ID without supervisory approval" is an example of a second level written warning. Employer Exhibit 1. Furthermore, Mr. Seesterhann testified that

claimant would not have been discharged for the August 16, 2016 incident if she did not have three prior warnings. It is noted that the prior warnings were not similar in nature to the August 12, 2016 incident.

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. A warning for failure to verify information or absenteeism is not similar to violating the Information Systems Access policy or the Information Security Agreement and the employer's simple accrual of a certain number of warnings counting towards discharge does not establish repeated negligence or deliberation and is not dispositive of the issue of misconduct for the purpose of determining eligibility for unemployment insurance benefits. Benefits are allowed.

DECISION:

The September 9, 2016, (reference 01) unemployment insurance decision is reversed. 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.

_____
Jeremy Peterson
Administrative Law Judge

_____
Decision Dated and Mailed

jp/rvs

NOTE TO EMPLOYER:
If you wish to change the address of record, please access your account at: https://www.myiowaui.org/UITIPTaxWeb/.
Helpful information about using this site may be found at:
http://www.iowaworkforce.org/ui/uiemployers.htm and
http://www.youtube.com/watch?v=_mpCM8FGQoY