IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

MARCY B TAYLOR-FARRIS Claimant **HNK LLC** Employer	**APPEAL 17A-UI-05467-SC-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 04/23/17** **Claimant: Respondent (1)**

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

HNK, LLC (employer) filed an appeal from the May 15, 2017, reference 01, unemployment insurance decision that allowed benefits based upon the determination Marcy B. Taylor-Farris (claimant) was not discharged for engaging in willful or deliberate misconduct. The parties were properly notified about the hearing. A telephone hearing was held on June 9, 2017. The claimant did not respond to the hearing notice and did not participate. The employer participated through Owner Hammad Grewal. Employer's Exhibit 1 was received. Official notice was taken of the administrative record, specifically the fact-finding documents.

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: The claimant was employed part-time as a Sales Consultant beginning on March 29, 2017, and was separated from employment on April 26, 2017, when she was discharged. The employer has a policy that forbids employees manually keying in credit card numbers, but it does not state what will occur if an employee does not abide by that policy. It has another policy that states if the sales drawer is short an employee may be disciplined up to and including termination.

On April 26, 2017, the claimant manually keyed in two credit card sales after the magnetic bar on the credit card was not readable. Each sale processed was for $899.30 and the credit cards were later determined to be fraudulent. When asked why she keyed in the credit cards, she stated that was always done at her previous job at Burger King. The claimant was terminated for keying the credit cards sales manually. If the claimant had engaged in the same conduct,

but the loss was only $5.00, she would have been given a disciplinary warning and not discharged.

The administrative record reflects that the claimant has received unemployment benefits in the amount of $1,068.00, since filing a claim with an effective date of April 23, 2017, for the six weeks ending June 3, 2017. The administrative record also establishes that the employer provided a phone number for a first-hand witness available for rebuttal, but the fact-finder did not utilize that phone number during the 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.

Iowa law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id*. Iowa Administrative Code rule 871-24.32(1)a provides:

> "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).

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. 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." 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). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). 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). 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.

In this case, the claimant was careless, but the carelessness does not indicate "such degree of recurrence as to manifest equal culpability, wrongful intent or evil design" such that it could accurately be called misconduct. Iowa Admin. Code r. 871-24.32(1)(a); *Greenwell v. Emp't Appeal Bd.*, No. 15-0154 (Iowa Ct. App. Mar. 23, 2016). The employer had not previously warned the claimant about the issue leading to the separation. 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 not met the burden of proof to establish that the claimant acted deliberately against its best interest or with recurrent negligence in violation of company policy, procedure, or prior warning. Benefits are allowed.

As benefits are allowed, the issue of overpayment is moot. The claimant's current base period includes wages earned during the four quarters of 2016. The employer did not pay the claimant wages during her base period and its account is not currently being charged for her benefits. If the claimant files a new claim for benefits next year, the employer may be liable for benefits at that time.

DECISION:

The May 15, 2017, reference 01, unemployment insurance decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. The issue of overpayment is moot. The claimant's base period covers wages earned during the four quarters of 2016. The employer did not pay the claimant wages during her base period and its account is not currently being charged for her benefits. If the claimant files a new claim for benefits next year, the employer may be liable for benefits at that time.

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Stephanie R. Callahan
Administrative Law Judge

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Decision Dated and Mailed

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