IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

JACKIE K MEANS Claimant **LUTHERAN SERVICES IN IOWA INC** Employer	**APPEAL 17A-UI-07153-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 06/25/17** **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 July 14, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on July 31, 2017. Claimant participated. Employer participated through statewide manager of daily supported community living services Amber Suckow. Employer Exhibit 1 was admitted into evidence with no objection. Employer Exhibit 2 was offered into evidence. Claimant testified she did not receive Employer Exhibit 2 and objected to its admission. Claimant's objection was sustained and Employer Exhibit 2 was not admitted into evidence. Official notice was taken of the administrative record, including claimant's benefit payment history, with no objection.

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 program supervisor from July 2010, and was separated from employment on June 26, 2017, when she was discharged.

Some of the services the employer provides to its clients are paid through Medicaid. If the employer is audited and its documentation is not properly filled out/reported, Medicaid may make the employer refund payments it has received. Employees are responsible for accurately and thoroughly documenting the services they provide within 72 hours after their shift ended. Claimant was responsible for ensuring the employees she supervised accurately and thoroughly

document the services they provided. Claimant was also responsible for meeting with the employees she supervised to discuss any corrections that needed to be made to their documentation. Claimant was responsible for disciplining any employees that were not documenting accurately and thoroughly. The employer has a documentation technician that sends out a weekly report that lists of all notes (documentation) that are not locked, completed, or if corrections are needed. The documentation technician also provides a monthly report that details the percentage of competed and not completed notes. The documentation technician also sends out a quarterly report that summarizes the weekly and monthly reports.

On April 14, 2017, the employer placed claimant on a performance improvement plan (hereinafter "PIP"). Employer Exhibit 1. The PIP outlined seven areas that claimant needed to improve on. Employer Exhibit 1. Claimant was warned that her job was in jeopardy. Employer Exhibit 1. The PIP outlined claimant's "specific performance improvement expectations (including timelines)[.]" Employer Exhibit 1. The PIP specifically addressed the staff's documentation. The PIP stated claimant "will improve note return rates from 90% to 50% by [July 31, 2017]." Employer Exhibit 1. The return rate is the percentage of notes that the documentation technician finds insufficient for billing. As of April 14, 2017, 90% of the notes were not done properly. The overall agency goal is to have 90% of notes done properly, but the PIP only had a goal of 50% done properly. Employer Exhibit 1. The PIP also provided that claimant's supervisor "will follow up weekly with each of the expectations listed above during weekly, in-person supervisions." Employer Exhibit 1.

After claimant's PIP, she met with her supervisor on seven occasions (April 19, 28, 2017; May 5, 12, and 19, 2017; and June 9 and 16, 2017), either in-person or over the phone. During these meetings, claimant and her supervisor discussed different areas from the PIP. Claimant and her supervisor discussed claimant's staff's documentation and the weekly reports (return rate reports). Claimant would e-mail her staff and their supervisors any corrections that needed to be made on their documentation. During these meetings, claimant's supervisor never told her that the documentation percentage was too low or not improving fast enough. On June 16, 2017, during claimant's last meeting with her supervisor, her supervisor told her that everything was going great and things were improving. Claimant did not have any disciplinary warnings after April 14, 2017.

On June 22, 2017, the human resources director, the director, claimant's supervisor, and Ms. Suckow discussed claimant's PIP progress. The employer decided that it did not see enough improvement in claimant's staff's documentation and it decided to discharge her. Ms. Suckow testified that the employer has a 90% accuracy rate for billable documentation. In May 2017, claimant's staff's documentation rate was 8% billable/completed. In June 2017, the documentation rate was at 16% billable/completed. Claimant was making progress since the PIP, but the employer did not believe it would reach 90% billable/completed by July 31, 2017. On June 26, 2017, the employer discharged claimant due to poor job performance. Claimant testified she was performing her job duties to the best of her abilities.

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 exhibit admitted into evidence. 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(5) provides:

Discharge for misconduct.

(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). Where an individual is discharged due to a failure in job performance, proof of that individual's ability to do the job is required to justify disqualification, rather than accepting the employer's subjective view. To do so is to impermissibly shift the burden of proof to the claimant. *Kelly v. Iowa Dep't of Job Serv.*, 386 N.W.2d 552 (Iowa Ct. App. 1986).

Claimant credibly testified that she was performing the job to the best of her abilities. Although claimant was placed on a PIP on April 14, 2017 regarding her job performance, the employer did not present any evidence that after April 14, 2017, she "demonstrated a wrongful intent" with her job performance. *Kelly v. Iowa Dep't of Job Serv.*, 386 N.W.2d 552 (Iowa Ct. App. 1986). Claimant credibly testified that the documentation rate was improving. Furthermore, claimant met with her supervisor on seven different occasions after the PIP and her supervisor never told her that the documentation rates were not improving fast enough. Finally, it is noted that in claimant's PIP, the employer gave her until July 31, 2017 to get her documentation rate to 50%; however, the employer discharged her over a month before the deadline it gave her, despite the documentation rate improving.

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 failed to meet its burden of proof in establishing disqualifying job misconduct. Benefits are allowed.

As benefits are allowed, the issues of overpayment, repayment, and the chargeability of the employer's account are moot.

DECISION:

The July 14, 2017, (reference 01) unemployment insurance decision is affirmed. 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