**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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| **AMANDA J COADY**<br>Claimant<br><br>**WELCOME WAY INC**<br>Employer | **APPEAL 17A-UI-09752-JP-T**<br><br>**ADMINISTRATIVE LAW JUDGE DECISION**<br><br>**OC: 08/20/17**<br>**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 September 15, 2017, (reference 02) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on October 10, 2017. Claimant participated. Employer participated through hearing representative Christopher Hunter, general manager Danny Edwards, area supervisor Jason Berrie, and claims specialist Jessica Rakowski. Employer Exhibit 1 was admitted into evidence with no objection. 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 department manager from August 18, 2011, and was separated from employment on August 21, 2017, when she was discharged. Mr. Edwards testified that claimant was discharged for a repeated pattern of unacceptable behavior (poor job performance and making bad decisions).

The employer has a written policy requiring its employees follow instructions and perform their job in an effective manner. Employer Exhibit 1. Claimant was aware of the employer's policies. Employer Exhibit 1.

On August 3, 2017, the employer (Mr. Edwards and Mr. Berrie) gave claimant her yearly performance review. Claimant testified it was a good review, but she did not receive a raise. During the review, the employer summarized what claimant was doing well and what she needed to improve. The employer advised claimant needed to step-up her daily cleaning and organization. At the end of the review, claimant became upset because she did not get a raise. Mr. Edwards and Mr. Berrie again went over the areas that claimant needed to improve.

On August 4, 2017, claimant came to the employer and told another manager she was not getting a raise because the store was doing poorly. Claimant told the other manager she was looking for another job. Claimant also told this manager that the manager may not get a raise.

On August 9, 2017, Mr. Edwards and Mr. Berrie met with claimant regarding the incident on August 4, 2017. Claimant told them she cannot live off of what the employer is paying. Mr. Edwards and Mr. Berrie explained to claimant that her comments created a negative environment at the store. Mr. Edwards and Mr. Berrie told claimant she needs to focus on her job performance. Mr. Berrie explained that claimant's performance needed to change. The employer summarized and documented what was discussed during the meeting. The summarized document did not state that claimant was warned her job was in jeopardy. Claimant testified she did not sign the summarized document. Claimant testified the employer did not warn her that her job was in jeopardy.

On August 10, 2017, Mr. Edwards testified he assigned claimant the task of creating a training schedule for the newly hired employees and gave her specific guidelines for the schedule. Claimant denied that Mr. Edwards assigned her the creation of the training schedule. Claimant testified that Mr. Edwards assigned Anna (another manager) the task of creating the training schedule for the newly hired employees. Claimant denied assigning the creation of the training schedule to Anna.

On August 11, 2017, Mr. Edwards saw the training schedule that was created and it was not accurate. Mr. Edwards contacted claimant and she said she misunderstood his message; claimant did not know Mr. Edwards had assigned the task to her. Claimant asked Mr. Edwards if he wanted to have it redone, and he said no. Claimant was not given a formal disciplinary warning for this incident.

On August 13, 2017, Mr. Edwards testified that claimant was the manager in charge. Claimant denied that she was the manager in charged on August 13, 2017, and testified she was assigned to perform payroll. During her shift, claimant contacted Mr. Edwards and request to leave early because she was not feeling well. Mr. Edwards told claimant as long as she had all of her tasks completed she could leave early. One of the tasks claimant had to complete was creating a floor sheet for August 15, 2017. Prior to leaving early, claimant created a floor sheet for August 15, 2017, but she mistakenly scheduled an employee to work in two different areas. Claimant also had another employee prepare the breakfast stock before she left.

On August 14, 2017, Mr. Edwards discovered that the breakfast stock had not properly been prepared. Mr. Edwards then sent claimant text messages regarding running out of food. Claimant was not given a formal disciplinary warning for this incident. Mr. Edwards also sent claimant a text message telling her to setup an orientation for new employees and to schedule it on August 17, 2017. Claimant responded ok.

On August 15, 2017, Mr. Edwards discovered that claimant did not accurately complete the floor sheet before she left early on August 13, 2017. Mr. Edwards had to fix the floor sheet before claimant came in so the employees would know what stations to work. On August 15, 2017,

claimant was scheduled to work from 7:45 a.m. to 3:45 p.m. Mr. Edwards also sent claimant a text message that inventory and the truck order needed to be completed. Claimant testified that when she started her shift, there were only two managers (including herself) working, but there are usually three managers working. The third manager did not arrive until approximately noon. Later that day claimant sent a text message to Mr. Edwards that she did not know how she was going to get the training schedule and inventory done. Mr. Edwards responded get the inventory done first, print the training schedule, and then spend some time making a good plan for the training schedule. Claimant had to pick her daughter up by 4:30 p.m. on August 15, 2017, so she assigned Brittney (another manager) to call the new employees and set them up for orientation on August 17, 2017. However, when Brittney called the new employees, Brittney setup the orientation for August 16, 2017 instead of August 17, 2017.

On August 16, 2017, Mr. Edwards discovered that claimant had another manager setup the orientation and that manager had set the orientation up for August 16, 2017 instead of August 17, 2017. Mr. Edwards had to adjust his schedule for August 16, 2017, because the manager working on August 16, 2017 had to handle the orientation of the new employee. Mr. Edwards contacted claimant and asked her about the orientation schedule. Mr. Edwards told claimant he felt like he gave her clear instructions. Claimant responded that she had instructed Brittney to setup the orientation on August 17, 2017. Claimant denied saying to Mr. Edwards, "What the hell do you want me to do?" during their conversation. Claimant admitted to saying, "damn Danny, I can do nothing right." Mr. Edwards told claimant there is no need to use profanity. Mr. Edwards then had a conversation with Mr. Berrie regarding what had been going on with claimant. Mr. Edwards and Mr. Berrie decided to discharge claimant.

On August 21, 2017, Mr. Edwards and Mr. Berrie met with claimant. The employer started to discuss the things that had happened between their last one-on-one meeting and this meeting. Claimant interrupted and asked if she was being discharged. The employer responded yes. Claimant then gave the employer her keys and left. Claimant testified she performed her job to the best of her ability and she thought she was successful at her job.

On March 10, 2017, the employer gave claimant a written warning and one week suspension. Employer Exhibit 1. Claimant had left the store during a health inspection to go to the bank.

**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.
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> (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(4) provides:

> (4) Report required. The claimant's statement and 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.

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). 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).

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 testified she performed her job to the best of her abilities and she thought she was successful at her job. Claimant's testimony was corroborated by the lack of formal (written) discipline regarding her job performance. On August 3, 2017, the employer went over claimant's annual performance review. Although claimant did not get a raise and the employer went over areas she needed to improve on, she was not given a disciplinary warning regarding her job performance. The employer's argument that on August 9, 2017, claimant was verbally warned her job was in jeopardy if she did not improve her job performance, is not persuasive. Claimant provided credible testimony that the employer did not warn her on August 9, 2017 that her job was in jeopardy. Claimant further credibly testified that she did not sign any document memorializing the meeting on August 9, 2017. Claimant's testimony was corroborated by Mr. Edwards's testimony that the document summarizing the meeting did not state claimant was warned her job was in jeopardy. Claimant also credibly testified that on August 15, 2017, she was busy during her shift and was unable to complete the orientation schedule so she delegated the task to another manager. Claimant credibly testified she instructed the manager as to the correct date and time for the orientation schedule, but it was the other manager that did not follow the instructions and setup it on the wrong day.

Although claimant had a prior written warning, including a suspension, on March 10, 2017, the employer did not present any evidence that claimant demonstrated "an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer." Iowa Admin. Code r. 871-24.32(1)a. 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 September 15, 2017, (reference 02) 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