IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

TARA J KAUZLARICH Claimant **VERMEER MANUFACTURING COMPANY INC** Employer	**APPEAL 18A-UI-03802-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 02/25/18** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the March 14, 2018, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on April 19, 2018. Claimant participated. Employer participated through human resources manager Jill Anderson and finance manager Lisa Van Gorp. Employer Exhibit 1 was 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 credit financial assistant from February 22, 2015, and was separated from employment on February 28, 2018, when she was discharged.

The employer is responsible for protecting the confidential information of its customers and dealers. The employer has a written policy that prohibits employees from disclosing "confidential information not otherwise available to persons or firms outside Vermeer[.]" Employer Exhibit 1. Claimant was aware of the policy.

On June 18, 2015, the employer received a credit application from a dealer and a dealer cover letter. Claimant processed the credit application for the dealer. On June 19, 2015, claimant participated in a text message exchange with a non-employee named Carter that consisted of over one hundred text messages.

In February 2016, a DCI (Department of Criminal Investigations) agent came to the employer and met with Ms. Van Gorp and the employer's Chief Financial Officer (CFO). The DCI agent explained that the agent had discovered a document (application coversheet) from Vermeer Credit Corporation that was dated June 18, 2015 during an outside investigation. The application coversheet indicated the name of the dealer, the location, and the dealer contact. The application coversheet contained information that only an employee in the Vermeer Credit

Corporation would have access to. The DCI agent instructed the employer to not discuss or investigate the incident with anyone due to an active DCI investigation. The DCI agent did not give any details about the investigation. The DCI agent did not inform the employer when they could discuss the information. The DCI agent did not disclose where the application coversheet was discovered; only that it was a result of their investigation. Ms. Van Gorp maintained contact with the DCI agent to determine when the employer could proceed with its investigation.

On November 7, 2017, Ms. Van Gorp received an e-mail from a DCI agent informing the employer they could start their investigation. On November 8, 2017, Ms. Van Gorp and the CFO met with claimant and showed her the application coversheet that was provided by the DCI agent. This was the first time that claimant was aware of any issue with the application coversheet that was processed on June 18, 2015. The employer asked claimant how the application coversheet would have been discovered by a DCI agent outside of the employer. Claimant stated she did not know how the application coversheet could have gotten outside of the employer. Claimant speculated that maybe it was stuck to something she took home. The employer asked claimant to let the employer know if she discovered any more information on how the application coversheet got out. The employer did not tell claimant she was under investigation. The employer did not tell claimant she could face discipline. The employer did not re-interview claimant after November 8, 2017. Claimant was not aware the employer was considering disciplining her. After the employer met with claimant, it held internal discussions about the situation.

In the middle of December 2017, some of the public records of claimant's testimony during a trial were released. Claimant had testified under oath that she participated in a text message exchange with a non-employee named Carter on June 19, 2015. The name on the application coversheet was a Carter and Carter dealer, but not the same Carter claimant had been texting. Claimant never testified that she provided the application coversheet to Carter. The employer continued to investigate the incident.

In February 2018, the employer made the decision to discharge claimant based on the amount of confidential processing she was doing and the likelihood that the application coversheet was released by her. On February 28, 2018, Ms. Anderson, Ms. Van Gorp, and Jill Blanco met with claimant and read her a termination letter. Employer Exhibit 1. Claimant was upset and shocked. Claimant was not aware the employer had been conducting an investigation. Claimant did not have any prior disciplinary warnings. From November 8, 2017 until her discharge, claimant continued to work for the employer as a credit financial assistant. From November 8, 2017 until her discharge, claimant processed confidential information for the employer.

Claimant denied providing the application coversheet to an individual named Carter. Claimant denied providing the application coversheet to anyone not affiliated with the employer. Claimant testified she did not knowingly disclose any confidential information.

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 Code section 96.5(2)*a* provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

> 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 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(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.

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).

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.

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.

In February 2016, the employer first became aware of the final incident (the release of an application coversheet) that led to claimant's discharge when a DCI agent spoke to the employer's CFO and Ms. Van Gorp; however, the DCI agent instructed the employer to not discuss or investigate the incident due to an ongoing investigation. On November 7, 2017, a DCI agent informed Ms. Van Gorp that the employer could discuss and investigate the incident. Therefore, as of November 7, 2017, the employer had the authority to discuss and investigate the final incident that led to claimant's discharge and this is the date that should be used to determine if claimant was discharged based on a current act. *See* Iowa Admin. Code r. 871-24.32(8)("The termination of employment must be based on a current act.").

Where an employer gives seven days' notice to the employee that it will consider discharging him, the date of that notice is used to measure whether the act complained of is current. *Greene v. Emp't Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct. App. 1988). An unpublished decision held informally that two calendar weeks or up to ten work days from the final incident to the discharge may be considered a current act. *Milligan v. Emp't Appeal Bd.*, No. 10-2098 (Iowa Ct. App. filed June 15, 2011). On November 8, 2017, the employer met with claimant for the first time regarding the final incident that led to her discharge. At the conclusion of this meeting, the employer did not inform claimant that it was going to continue to investigate the incident. The employer did not inform claimant that she may be disciplined for the incident. The employer never re-interviewed claimant about the incident. After November 8, 2017, the employer allowed claimant to continue to process confidential information until she was separated on February 28, 2018.

Although claimant may have engaged in the final act of misconduct, inasmuch as employer knew of the incident on November 7, 2017, did not advise claimant it was an issue that was going to be investigated or that she may be disciplined, and then discharged claimant over three months later, the act for which claimant was discharged was no longer current. Because the act for which claimant was discharged was not current and claimant may not be disqualified for past acts of misconduct, benefits are allowed.

DECISION:

The March 14, 2018, (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.

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Jeremy Peterson
Administrative Law Judge

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Decision Dated and Mailed

jp/rvs