IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

STEVEN E JOHNSON Claimant **EGS CUSTOMER CARE INC** Employer	**APPEAL 17A-UI-00241-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 11/27/16** **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 December 29, 2016, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on January 30, 2017. Claimant participated. Employer participated through Human Resources Generalist Turkessa Newsone and Team Leader Rita Mae Ricketts. Official notice was taken of the administrative record of 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 customer service representative from November 26, 2007, and was separated from employment on November 2, 2016, when he was discharged.

The employer has a progressive disciplinary policy, but the employer may skip steps in the progression depending on the incident. Rude and unprofessional behavior is at a minimum a final written warning, but may result in immediate discharge. Claimant was aware of the policy.

On October 24, 2016, claimant was working his scheduled shift when Ms. Ricketts overheard him on a call and Ms. Ricketts thought he sounded unprofessional. Claimant was going through his list to see if a plan would accept or deny a medication for a patient. According to claimant's matrix/list, it appeared that the patient should have been accepted. Toward the beginning of the

phone call, claimant stopped a resolution expert that advised him to contact a pharmacist on the mail order side the issue. Claimant then called a coworker in the mail order services department and asked to get in contact with a pharmacist. The coworker told claimant that they would see what they could do and then there was twenty minutes of dead air. Claimant thought that every two minutes the coworker should have come back on the line to update what was going on. Claimant admitted to making comments to the original caller that he should not have made. After approximately twenty minutes, the coworker informed claimant that the pharmacist would not speak with him. Claimant started raising his voice and reiterated that he needed to speak to a mail order pharmacist. There was another twenty minutes of dead air. Claimant then spoke to a supervisor in that department when the pharmacist would not speak with him. Claimant explained the situation to the supervisor and his voice was raised and he sounded irritated. Claimant testified he blew up and stated it was unacceptable. Claimant then apologized and finally spoke to a pharmacist in his department. The pharmacist in claimant's department resolved the issue.

After claimant's call ended, Ms. Ricketts listened to the phone call. Ms. Ricketts thought claimant was unprofessional on the call and referred it to her supervisor and Ms. Newsone. The supervisor and Ms. Newsone reviewed the call and they both felt it was unprofessional. The call lasted approximately an hour, but it should have only lasted about five minutes. The request was such that claimant could not comply with request and he should have transferred the call to a different department. Although claimant should have transferred the call to a different department, he was trying to help the customer. During the phone call, claimant talked over the individuals and was discourtesy. Due to the length of the phone call, claimant worked approximately an hour past when his shift was scheduled to end. Ms. Newsone was on the fence about whether to separate claimant. Ms. Newsone's supervisor reviewed the call and the decision was made to separate claimant because of the way he treated the individuals. The first time claimant became aware that there was an issue with his employment was when he was separated on November 2, 2016.

The employer gave claimant a final written warning in June 2015 for unprofessional behavior. The employer also gave claimant a final written warning for being unprofessional on the calling floor on August 20, 2015. The employer's warnings are active for one year.

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 § 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.
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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(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.

On October 24, 2016, claimant's conduct during his final call was unprofessional and although he had received two previous final warnings, they occurred in June 2015 and August 20, 2015 and had expired prior to October 24, 2016. Ms. Newsone testified that the warnings are only active for one year; therefore, claimant was not under any active warning regarding unprofessional conduct when the final incident occurred.

The conduct for which claimant was discharged was an incident of poor judgment and inasmuch as employer had not recently 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. Benefits are allowed.

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

DECISION:

The December 29, 2016, (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