IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

MARIA G MIRANDA Claimant **MERCY HEALTH SERVICES - IOWA CORP** Employer	**APPEAL 18A-UI-00092-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 12/03/17** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the December 22, 2017, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on January 24, 2018. Claimant participated. Employer participated through interpreter services coordinator Sonia Coria and human resources employee relation consultant Beckie Wahlberg. Employer Exhibit 1 was admitted into evidence with no objection. Official notice was taken of the administrative record 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 part-time as an interpreter from June 2, 2016, and was separated from employment on November 3, 2017, when she was discharged.

The employer has a written code of conduct requiring employees to act professionally and accept appropriate feedback. Employer Exhibit 1. The employer also has a progressive disciplinary policy; the first incident is a verbal warning, then a written warning, then a suspension, and finally discharge. Employer Exhibit 1. The employer may skip steps depending on the seriousness of the incident. Employer Exhibit 1. Claimant was aware of the employer's policies.

On November 3, 2016, the employer gave claimant a verbal warning for inappropriate/disrespectful behavior with a patient. Employer Exhibit 1. On June 1, 2017, the employer gave claimant a verbal warning for being on her phone and eating when she was supposed to be interpreting, and for not interpreting everything. Employer Exhibit 1.

On October 3, 2017, a patient (hereinafter "the patient") was scheduled to come to the employer, but claimant was not going to be able to interpret for the patient. Claimant had interpreted during the patient's six prior visits. Claimant told to Ms. Coria that she thought the

patient would benefit from a program that her daughter worked at. Claimant asked Ms. Coria to give the patient a pamphlet for the program. On October 3, 2017, after the patient arrived, the speech therapist said it was ok to give the pamphlet, but the speech therapist did not want to be a part of it. Ms. Coria gave the patient's family the pamphlet and they did not have any questions. Claimant then spoke to Ms. Coria and asked if the patient was interested. Ms. Coria told claimant that the family did not think the program was appropriate for the patient.

On October 5, 2017, the patient returned to the employer and Ms. Coria interpreted for the patient because claimant was busy. Ms. Coria received a message that claimant was not at a scheduled meeting. Ms. Coria sent claimant a text message asking where she was at and claimant responded she was still busy. Claimant told Ms. Coria she was almost done. Claimant told Ms. Coria she would contact the clinic when she was done. After claimant finished, she went and looked for a phone to call the clinic when she received another message from Ms. Coria asking where she was at. Claimant responded she had finished and was going to contact the clinic to let it know she was on her way. Claimant called the clinic and informed it that she was running late and was on the way there. As claimant was leaving she encountered the patient and the patient's mother. The patient's mother asked claimant for the phone number for the program from the pamphlet. Claimant waited with the patient and the patient's mother until the father picked them up. Claimant then provided the patient's family with the program's number. Claimant spent less than five minutes with the patient's family. The patient's family later complained to the employer because they felt that claimant was pushing the patient's family to send the patient to the program. Employer Exhibit 1. On October 5, 2017, the director sent claimant an e-mail that she was not to have any more contact the patient's family and that the employer would meet with her the following week to discuss the issue. Claimant received the e-mail on October 6, 2017 and she did not have any further contact with the family after October 6, 2017. On October 14, 2017, Ms. Coria gave claimant a verbal warning for the incident that occurred on October 5, 2017.

The finial incident that led to discharge occurred on October 27, 2017. On October 27, 2017, the employer decided to give claimant a written warning for her three prior verbal warnings (November 3, 2016, June 1, 2017, and October 14, 2017). On October 27, 2017, claimant met with Ms. Coria and the director. Claimant was aware the employer was going to give her a written warning at the meeting. When the meeting started, the director began asking claimant about the November 3, 2016 incident. Claimant tried to explain her side of what happened, but the director interrupted everything she said. Claimant felt intimidated by the director. Claimant denied raising her voice. Claimant felt the director raised her voice. Claimant also tried to explain that on October 5, 2017, she was trying to do a good thing by providing information to the patient's family about a program. Claimant told the employer she acted out of her good heart and would not change her behavior. Claimant testified that she meant she would help a patient that had approached her and asked her for help. The director kept interrupting claimant. After they discussed the three prior incidents, the employer started asking claimant about her use of paid time off (PTO). Claimant felt the environment in the meeting was hostile. Claimant told the director and Ms. Coria that she felt like she was being "ganged up on" and she left the room. Employer Exhibit 1. Claimant did not use profanity in the meeting. The employer had not given claimant the written warning before she left. There were two employees outside the office but in the area of the meeting when claimant left. The two employees told Ms. Wahlberg that voices were raised in the meeting. One of the individuals heard claimant say "you guys ganging up on me." The employer contacted security and informed claimant that she was suspended until a decision was reached by the director and human resources. Claimant was told to take her belongings, but to leave her key and badge.

On October 28, 2017, Ms. Wahlberg met with the director. The director explained what happened during the meeting. On October 31, 2017, claimant met with Ms. Wahlberg and the director. Claimant explained what happened and the hostility that went on during the October 27, 2017 meeting. Claimant explained that she felt intimidated. On November 3, 2017, the employer called claimant and informed her she was discharged.

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 that was 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.*
>
> *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) and (8) provide:

> **(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.
> …
> **(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). "The use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct, even in the case of isolated incidents or situations in which the target of abusive name-calling is not present when the vulgar statements are initially made." *Myers v. Emp't Appeal Bd.*, 462 N.W.2d 734 (Iowa Ct. App. 1990).

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.

The conduct for which claimant was discharged occurred during a meeting on October 27, 2017. The employer's argument that claimant was disrespectful during the meeting is not persuasive. Claimant did not use profanity or offensive language during the meeting. Claimant credibly testified that during the meeting she tried to explain to the employer her version of what happened during each incident that she had received a verbal warning. Claimant credibly testified that the director kept interrupting her and she felt intimidated. Claimant further credibly testified that she eventually had to leave the meeting due to the intimidation and hostile nature of the meeting. Claimant's testimony that she felt intimidated and the meeting was hostile was corroborated by her statement that she made when she left. When claimant left the meeting, she told the employer she felt they "ganged up on her." Employer Exhibit 1. Claimant's statement as she left the meeting was corroborated by an employee that was in the area outside the meeting and the employer's termination notice. *See* Employer Exhibit 1. Furthermore, two employees outside the meeting also told Ms. Wahlberg they heard raised voices in the meeting. If management wishes to be treated with respect, it must enforce respectful treatment amongst coworkers and supervisors and apply those expectations consistently throughout the chain of command. The employer did not provide sufficient evidence of job-related misconduct to rebut claimant's denial of said conduct. "Allegations of misconduct … without additional evidence shall not be sufficient to result in disqualification." Iowa Admin. Code r. 871-24.32(4). "If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established." Iowa Admin. Code r. 871-24.32(4). The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

DECISION:

The December 22, 2017, (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