IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

JODI L PAYNE Claimant **HY-VEE INC** Employer	**APPEAL 16A-UI-12427-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 10/16/16** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the November 14, 2016, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on December 14, 2016. Claimant participated. Attorney Luke Guthrie participated on claimant's behalf. Employer participated through hearing representative Sabrina Bentler and human resource manager Mark Spielman. Manager of store operations Charles Swischer attended the hearing on behalf of the employer. Employer exhibit 1 was offered into evidence. Claimant objected to the employer exhibit 1 because it was not a current act or relevant. Claimant's objection was overruled and the employer exhibit 1 was admitted. Employer exhibits 2, 3, and 4 were admitted into evidence with no objection. Claimant exhibit A 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 an assistant market grille restaurant manager from August 2, 2012, and was separated from employment on October 21, 2016, when she was discharged.

Claimant was discharged for performing a "sweetheart checkout" for her son, Ashley Tudor, on October 15, 2016. Employer Exhibit 4 and Claimant Exhibit A. The employer has a written "sweetheart checkout" policy that prohibits employees from checking out family members, friends, or themselves. Employer Exhibit 2. Claimant was aware of the policy. Employer Exhibit 3. The "sweetheart checking" policy "is a zero tolerance policy and can result in termination." Employer Exhibit 2.

On October 15, 2016, during claimant's scheduled shift, she performed a "sweetheart checkout" for Mr. Tudor; Mr. Tudor did receive an employee discount. Employer Exhibit 4 and Claimant Exhibit A. Mr. Tudor is an employee and eligible for an employee discount. There were at least four other employees working when the transaction was completed that could have provided Mr.

Tudor the discount. The employer discovered the incident on October 15, 2016 after an employee made a complaint about a possible hostile work environment claimant was creating. After the employer received the complaint Mr. Spielman started an investigation which included reviewing surveillance video from October 15, 2016. Mr. Spielman observed claimant performing the "sweetheart checkout" for Mr. Tudor on the surveillance video. Employer Exhibit 4 and Claimant Exhibit A. The employer suspended claimant for one week. Mr. Spielman told claimant the employer would follow-up with her in a week about whether she still had a job.

Mr. Spielman further investigated the report of a possible hostile work environment, but there was nothing conclusive and nothing in the last week or two. Mr. Spielman did not find anything that would result in discipline for claimant regarding a hostile work environment.

On October 21, 2016, the employer discharged claimant for performing a "sweetheart checkout" for her son.

Claimant did not have a prior warning for issuing "sweetheart checkouts". Claimant had not performed a "sweetheart checkout" prior to October 15, 2016. On April 25, 2016, claimant was given a written warning for time theft that occurred on April 22, 2016. Employer Exhibit 1. On April 25, 2016, claimant was given a written warning for a food safety violation on April 21, 2016. Employer Exhibit 1. On April 25, 2016, claimant was given a written warning for harassment (touching employees when walking by them and calling employees by a name that was not on their ID badge) on April 11, 2016. Employer Exhibit 1.

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 15, 2016, during claimant's shift, she checked out her son, which is defined by the employer's policy as a "sweetheart checkout". Although claimant was aware the employer's policy prohibited "sweetheart checkouts", she had no prior warnings for performing "sweetheart checkouts".

The conduct for which claimant was discharged (performing a "sweetheart checkout") was merely an isolated incident of poor judgment and inasmuch as the employer had not previously 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. Furthermore, a warning for time theft, food safety, and harassment are not similar to "sweetheart checkouts" and the employer's simple accrual of a certain number of warnings counting towards discharge does not establish repeated negligence or deliberation and is not dispositive of the issue of misconduct for the purpose of determining eligibility for unemployment insurance benefits. Benefits are allowed.

DECISION:

The November 14, 2016, (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