IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

JO M HASBROUCK Claimant **AMERICAN HOME SHIELD CORP** Employer	**APPEAL 17A-UI-03319-LJ-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 02/26/17** **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 March 15, 2017 (reference 01) unemployment insurance decision that allowed benefits based upon a determination that the record did not indicate claimant was discharged for willful or deliberate misconduct. The parties were properly notified of the hearing. A telephone hearing was held on April 20, 2017. The claimant, Jo M. Hasbrouck, participated. The employer, American Home Shield Corporation, participated through Christy Reis, Human Resources; Karen Janning, Supervisor; and Eddie Kautzky, Support Operations Manager; and Michele Hawkins of Equifax/Talx represented the employer. Employer's Exhibits 1 through 28 was received and admitted into the record without objection. Official notice taken of fact-finder's determination that the employer did not meet the standards of participation;

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, most recently as an appliance purchasing associate, from June 4, 2007, until March 1, 2017, when she was discharged for violation of call standards. On February 27, 2017, Janning was monitoring claimant's calls and noticed that claimant made several short outbound calls lasting eight seconds or less in length. Janning testified that claimant's job duties did not regularly involve making outbound calls. Additionally, claimant was making these calls to another department within American Home Shield. On February 28, Janning had a conversation with claimant about these calls. Claimant admitted that she would make these brief outbound calls when returning from break or lunch to avoid going on "not ready" time. Claimant testified that a supervisor trained her to transition from break or lunch to resuming call-

taking in this manner when she was initially assigned to work from home approximately eight years ago. Claimant testified that the employer's computer system does not allow an individual to go into "not ready" time unless he or she is on an active call, either inbound or outbound. The employer witnesses denied this and testified that the "not ready" option is always available on the computer screen.

Claimant testified that she was aware of the employer's Call Center Associate Standards for Phone Excellence. (Exhibits 14-16) However, when this policy was implemented, she was instructed by a supervisor to disregard the provision regarding calling internal workgroups and then disconnecting, as this is the method she was instructed to use to get to "not ready." Claimant had been making outbound calls of a similar length throughout her employment to transition from break or lunch to "not ready" to call-taking. Claimant's calls were monitored throughout her employment, and she was never instructed to stop making these brief outbound calls. Claimant was not aware she could lose her job for making these calls. The employer testified that claimant was on a final warning at the time her employment ended, though that warning was related to attendance.

The administrative record reflects that claimant has received unemployment benefits in the amount of $2816.00, since filing a claim with an effective date of February 26, 2017, until the week ending April 15, 2016. The administrative record also establishes that the employer did not participate in the fact-finding interview.

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, provided she is otherwise eligible.

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).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *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). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000).

Misconduct must be "substantial" to warrant a denial of job insurance benefits. *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).

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. Here, claimant testified that she was instructed to make brief outbound calls to transition from break to "not ready" work to call-taking by a previous supervisor. Claimant was never counseled to stop engaging in this practice. While she received a copy of the employer's call-taking expectations, she was instructed to disregard the provision that conflicted with her supervisor's past instruction. The employer has not met its burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy or prior warning. Benefits are allowed. As claimant's separation is not disqualifying, the issues of overpayment, repayment, and chargeability are moot.

DECISION:

The March 15, 2017 (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. The issues of overpayment, repayment, and chargeability are moot.

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Elizabeth A. Johnson
Administrative Law Judge

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Decision Dated and Mailed