IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

MARK L ODOR Claimant **SAC & FOX TRIBE** Employer	**APPEAL 17A-UI-09881-JP** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 08/27/17** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the September 21, 2017, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. An in-person hearing was held on November 1, 2017, at 3420 University Avenue, Suite A, in Waterloo, Iowa. Claimant participated. Employer participated through director of finance Chris Ledgerwood and revenue audit manager Angie Johnson. Human resources director Lucie Roberts was present on behalf of the employer.

The employer offered Employer Exhibit 1 into evidence. Claimant objected to Employer Exhibit 1 because it did not appear to be from the employer's handbook. Claimant's objection was overruled and Employer Exhibit 1 was admitted into evidence. Employer Exhibits 2 and 3 were admitted into evidence with no objection. The employer offered Employer Exhibit 4 into evidence. Claimant objected to Employer Exhibit 4 because it was irrelevant. Claimant's objection was overruled and Employer Exhibit 4 was admitted into evidence.

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 revenue auditor from May 3, 2016, and was separated from employment on September 1, 2017, when he was discharged.

The employer has a written computer usage policy that prohibits a majority of non-work related activity on the employer's computer system. Employer Exhibit 1. Claimant was aware of the policy. *See* Employer Exhibit 3.

On July 7, 2017, the employer discovered claimant had altered the slot machine audit history meters that the employer is required to maintain. Employer Exhibit 4. The employer had to obtain outside help to fix claimant's alterations. It took the employer and its outside help at least two to three weeks to fix the issues that resulted from claimant's alterations. The employer

informed claimant he was not to alter the slot machine audit history meters. The employer instructed claimant again that he was to go to a supervisor if he had a problem. Claimant was not given a written warning for altering the slot machine audit history meters until September 1, 2017. Employer Exhibit 4. On September 1, 2017, the employer gave claimant a "Final Written Notice" for altering the slot machine audit history meters. Employer Exhibit 4. On September 1, 2017, the employer warned claimant, in writing, that any further infractions would result in discharge. Employer Exhibit 4.

The employer prepared a written report dated July 20, 2017 regarding two e-mails claimant sent. Employer Exhibit 3. Claimant sent an e-mail on July 7, 2017 and another e-mail on July 11, 2017, that the employer determined contained inappropriate "personal" comments. Employer Exhibit 3. The employer spoke to claimant about not including "personal" comments in his e-mails. The employer did not give claimant a written warning for the July 7, 2017 and July 11, 2017 e-mails until September 1, 2017. Employer Exhibit 3. On September 1, 2017, the employer gave claimant a "Final Written Notice" for including comments in e-mails. Employer Exhibit 3. On September 1, 2017, claimant was warned, in writing, that his job was in jeopardy. Employer Exhibit 3. On September 1, 2017, the employer warned claimant that any further infractions would result in discharge. Employer Exhibit 3.

On July 20, 2017, claimant was upset that the employer had requested him to perform a reasonable suspicion drug test. *See* Employer Exhibit 3. Claimant had a verbal altercation with an administrative assistant. Claimant also expressed his displeasure to Mr. Ledgerwood. Employer Exhibit 3. Thee employer sent claimant home because of his attitude and demeanor on July 20, 2017. Employer Exhibit 3. Claimant believed he was being suspended for the rest of the day on July 20, 2017. The employer told claimant his attitude had to improve. Employer Exhibit 3. Claimant denied the employer told him he would get a final written warning. Claimant denied that the employer warned him his job was in jeopardy. Claimant did not receive a written warning for his conduct on July 20, 2017 until September 1, 2017. Employer Exhibit 3. On September 1, 2017, the employer gave claimant a "Final Written Notice" for his conduct on July 20, 2017. Employer Exhibit 3. On September 1, 2017, claimant was warned, in writing, that his job was in jeopardy. Employer Exhibit 3. On September 1, 2017, the employer warned claimant that any further infractions would result in discharge. Employer Exhibit 3.

Around July 20, 2017, claimant performed internet searches while he was at work and on the employer's computer system. Employer Exhibit 3. Claimant was performing searches about drug testing procedures. Employer Exhibit 3. Claimant received multiple responses and had multiple e-mails through his work e-mail address. Employer Exhibit 3. After July 20, 2017, claimant also had multiple e-mails from his work e-mail account where he was looking for other employment. Employer Exhibit 3. The employer discovered claimant's personal usage of its computer system for these incidents when it was reviewing his computer usage history. *See* Employer Exhibit 3. Between August 18, 2017 and August 26, 2017, the employer reviewed claimant's computer activity from April 2017 through August 8, 2017. Employer Exhibit 3. The employer reviewed claimant's computer activity for this time period because off an e-mail he sent to himself on August 8, 2017 and a document verbal warning he received on August 16, 2017. Employer Exhibits 2 and 3.

On August 8, 2017, claimant sent an e-mail to his work e-mail address that stated "Testing the bull sh** e-mail filter." Employer Exhibit 2. Claimant's job duties did not include testing the employer's e-mail filter. On August 16, 2017, the employer gave claimant a document verbal counseling because of this e-mail. Employer Exhibit 2. Claimant was not warned his job was in jeopardy. Employer Exhibit 2. The employer warned claimant that his "[a]ccount will continue to be monitored." Employer Exhibit 2. After August 16, 2017, claimant changed his computer

usage/activity behavior. Claimant's computer usage/activity after August 16, 2017 did not violate the employer's policy. Claimant was not aware that from August 18, 2017 through August 26, 2017 the employer was reviewing his past computer usage/activity.

On September 1, 2017, the employer gave claimant three "Final Written Notice[s]" for his conduct in July 2017. Employer Exhibits 3 and 4. The employer then discharged claimant for violating its computer usage policy and because of his final warnings. Employer Exhibit 3. The employer did not present any evidence that claimant committed any new violations of its computer usage policy after August 16, 2017.

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:
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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.
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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.

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.

The employer presented sufficient evidence that around July 7, 2017, claimant improperly had altered the slot machine audit history meters. The employer also presented sufficient evidence that claimant sent e-mails on July 7, 2017 and July 11, 2017, that contained unnecessary comments. The employer further presented sufficient evidence that on July 20, 2017, claimant was upset and had an altercation with a coworker, which resulted in him being sent home for the day. The employer was aware of the July 7, 2017 and July 20, 2017 incidents when they happened and it was aware of claimant's e-mails with inappropriate comments in July 2017. Despite knowing about these incidents in July 2017, the employer did not give claimant any written warnings; however, the employer did verbally warn claimant and sent him home for the July 20, 2017 incident. Even though the employer was aware of these incidents in July 2017, it failed to give claimant any written warnings for these incidents and warn him that his job was in

jeopardy until September 1, 2017, when it discharged him. An employer may "not save up acts of misconduct and spring them on an employee when an independent desire to terminate arises." Milligan v. EAB, 10-2098 (Iowa App. June 15, 2011). 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.

On August 16, 2017, the employer gave claimant a documented verbal warning for violating its computer usage policy on August 8, 2017. The employer did not present any evidence that claimant violated the computer usage policy after the August 16, 2017 warning. Furthermore, claimant denied violating the employer's computer usage policy after the August 16, 2017 document verbal warning. Although Mr. Ledgerwood was informed on August 31, 2017 that claimant had violated the employer's computer usage policy from July 20, 2017 through August 8, 2017, claimant did not violate the employer's computer policy after he was given a document verbal warning on August 16, 2017. Employer Exhibits 2 and 3.

Inasmuch as employer had warned claimant about violating its computer usage policy on August 16, 2017 and there were no incidents of alleged new misconduct thereafter, it has not met the burden of proof to establish that claimant acted deliberately or negligently after the most recent warning. An employer may "not save up acts of misconduct and spring them on an employee when an independent desire to terminate arises." Milligan v. EAB, 10-2098 (Iowa App. June 15, 2011). The employer has not established a current or final act of misconduct, and, without such, the history of other incidents need not be examined. Furthermore, 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. Accordingly, benefits are allowed.

DECISION:

The September 21, 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