**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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| **NICHOLE L BRUEGGE**<br>Claimant<br><br>**HY-VEE INC**<br>Employer | **APPEAL 15A-UI-11898-JP-T**<br><br>**ADMINISTRATIVE LAW JUDGE DECISION**<br><br>**OC: 09/27/15**<br>**Claimant: Respondent (2)** |

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 October 20, 2015, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on November 10, 2015. Claimant participated. Employer participated through representative, Frankie Patterson, store director ,Chad Romer, meat market manager, Todd Martin, human resources manager, Stacy Wahl, and floral shop manager, Megan Brason. Employer Exhibit One was admitted into evidence 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 floral clerk from February 15, 2011, and was separated from employment on September 29, 2015, when she was discharged.

The employer has a code of conduct policy that requires employees to treat others with integrity, respect, ethics, morals, and dignity. Employer Exhibit One. Claimant received the employer's policies. Employer Exhibit One.

On September 28, 2015, claimant spoke with Mr. Martin's sister-in-law in Wal-Mart and told her that Mr. Martin was having an affair with a co-worker. The sister-in-law then contacted Mr. Martin's wife. Mr. Martin's wife then told Mr. Martin who became very upset. When Mr. Romer found out what had happened, he and Ms. Wahl conducted an investigation. They

spoke with Mr. Martin about what was said and the back story. They found out that Mr. Martin's sister-in-law was told by claimant that Mr. Martin was romantically involved with a co-worker. Mr. Martin was livid when Mr. Romer spoke with him. Mr. Martin told Mr. Romer he was going to quit because of claimant's comments and that he did not want to work in this type of an environment. This situation was also causing issues with other employees. Mr. Romer calmed Mr. Martin down. Ms. Wahl and Mr. Romer then spoke with claimant to get her side of the story. Claimant admitted she had stopped Mr. Martin's sister-in-law and told her that Mr. Martin was having an affair with a co-worker. Claimant had no personal knowledge if Mr. Martin was having an affair. Claimant also agreed she had been spoken with on two prior occasions about creating a hostile work environment by her comments.

On July 31, 2015, Ms. Wahl had a conversation with claimant about an incident that occurred on business property. Employer Exhibit One. Claimant was told the conversation was a verbal warning. The incident involved claimant telling a female co-worker that the female co-worker's ex-boyfriend (also a co-worker) bought flowers for another girl. Employer Exhibit One. Claimant's conduct caused an issue between the two co-workers. This was also a violation of the employer's code of conduct. On June 1, 2015, Ms. Brason had a conversation with claimant about talking about other employees. A part-time employee came to Ms. Brason about conversations that had been happening in the floral department. The part-time employee turned in her two week notice to quit because of these conversations. The part-time employee specifically mentioned claimant as one of the employees having these conversations. Claimant had been having conversations about other employees in the store. Claimant was given a verbal warning not to talk about other employees again. This was also a violation of the integrity, ethics and morals under the employer's company policies. Employer Exhibit One.

The administrative record reflects that claimant has received unemployment benefits in the amount of $153.00, since filing a claim with an effective date of September 27, 2015, for the one week ending October 3, 2015. The administrative record also establishes that the employer did participate in the fact-finding interview.

**REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct. Benefits are denied.

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 submitted. This administrative

law judge finds the employer's version of events to be more credible than claimant's recollection of those events.

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.
>
> 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 Iowa Court of Appeals found substantial evidence of misconduct in testimony that the claimant worked slower than he was capable of working and would temporarily and briefly improve following oral reprimands. *Sellers v. Emp't Appeal Bd.*, 531 N.W.2d 645 (Iowa Ct. App. 1995). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). 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).

Under the definition of misconduct for purposes of unemployment benefit disqualification, the conduct in question must be "work-connected." *Diggs v. Emp't Appeal Bd.*, 478 N.W.2d 432 (Iowa Ct. App. 1991). The court has concluded that some off-duty conduct can have the requisite element of work connection. *Kleidosty v. Emp't Appeal Bd.*, 482 N.W.2d 416, 418 (Iowa 1992). Under similar definitions of misconduct, for an employer to show that the employee's off-duty activities rise to the level of misconduct in connection with the employment, the employer must show by a preponderance of the evidence that the employee's conduct (1) had some nexus with the work; (2) resulted in some harm to the employer's interest, and (3) was conduct which was (a) violative of some code of behavior impliedly contracted between employer and employee, and (b) done with intent or knowledge that the employer's interest would suffer. See also, *Dray v. Director*, 930 S.W.2d 390 (Ark. Ct. App. 1996); *In re Kotrba*, 418 N.W.2d 313 (SD 1988), quoting *Nelson v. Dept of Emp't Security*, 655 P.2d 242 (WA 1982); 76 Am. Jur. 2d, Unemployment Compensation §§ 77–78.

The employer is entitled to establish reasonable work rules and expect employees to abide by them. The employer has a code of conduct that requires employees to treat others with integrity, respect, ethics, morals, and dignity. Employer Exhibit One. Claimant was aware of this code of conduct. Employer Exhibit One. Prior to September 28, 2015, claimant twice violated this code of conduct. Employer Exhibit One. The employer warned claimant on June 1, 2015 and July 31, 2015 for talking about her co-workers, which created issues with her co-workers. Ms. Brason and Ms. Wahl told claimant to refrain from talking about her co-workers because it was causing issues. Ms. Branson had been approached by a co-worker of claimant's who wanted to quit because of claimant's conduct.

Although claimant had two prior warnings for talking about her co-workers, claimant ignored them on September 28, 2015, when she had a conversation with Mr. Martin's sister-in-law about Mr. Martin and a co-worker. Mr. Martin was claimant's co-worker. It is not persuasive that this conversation happened off the employer's property considering the substance of the conversation and claimant's prior warnings. Claimant told Mr. Martin's sister-in-law that Mr. Martin was having an affair with a co-worker. This clearly has a nexus with the employer and claimant reasonable should have known this may cause harm to the employer or its employees. It is also noted that claimant did not have any personal, direct knowledge that Mr. Martin was having an affair. As one could reasonably expect, the sister-in-law reported this information to Mr. Martin's wife, who reported it to Mr. Martin. Mr. Martin became livid when he found out about claimant's comments. Mr. Martin confronted two co-workers about what claimant had said. Mr. Martin also told the store director he was going to quit because he did not want to work in this hostile environment.

The employer has a duty to protect the safety of its employees and create a non-hostile work environment. Claimant's comments to Mr. Martin's sister-in-law that he was having an affair with a co-worker were clearly against the best interests of the employer and the morale of its employees. Claimant had been warned about talking about co-workers on two prior occasions. The employer has presented substantial and credible evidence that claimant created a hostile work environment by talking about co-workers, causing some co-workers to want to quit, after having been warned. This is disqualifying misconduct.

Iowa Code § 96.3(7)a-b, as amended in 2008, provides:

> 7. Recovery of overpayment of benefits.
>
> a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault,

the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding § 96.8, subsection 5.

b. (1) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding § 96.8, subsection 5. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to § 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this states pursuant to § 602.10101.

871 IAC 24.10 provides:

Employer and employer representative participation in fact-finding interviews.

(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code § 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as

set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

(2) "A continuous pattern of nonparticipation in the initial determination to award benefits," pursuant to Iowa Code § 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files appeals after failing to participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer's representative in writing after each such appeal.

(3) If the division administrator finds that an entity representing employers as defined in Iowa Code § 96.6, subsection 2, has engaged in a continuous pattern of nonparticipation, the division administrator shall suspend said representative for a period of up to six months on the first occasion, up to one year on the second occasion and up to ten years on the third or subsequent occasion. Suspension by the division administrator constitutes final agency action and may be appealed pursuant to Iowa Code § 17A.19.

(4) "Fraud or willful misrepresentation by the individual," as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code § 96.6, subsection 2, means providing knowingly false statements or knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant. Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.

This rule is intended to implement Iowa Code § 96.3(7)"b" as amended by 2008 Iowa Acts, Senate File 2160.

Because the claimant's separation was disqualifying, benefits were paid to which she was not entitled. The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits if it is determined that they did participate in the fact-finding interview. Iowa Code § 96.3(7), Iowa Admin. Code r. 871-24.10. In this case, the claimant has received benefits but was not eligible for those benefits. Since the employer did participate in the fact-finding interview the claimant is obligated to repay to the agency the benefits she received and the employer's account shall not be charged.

**DECISION:**

The October 20, 2015, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld

until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

The claimant has been overpaid unemployment insurance benefits in the amount of $153.00 and is obligated to repay the agency those benefits. The employer did participate in the fact-finding interview and its account shall not be charged.

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Jeremy Peterson
Administrative Law Judge

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Decision Dated and Mailed

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