IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

ROSALIE M WEBER Claimant **ALLEN MEMORIAL HOSPITAL** Employer	**APPEAL 16A-UI-12385-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 10/23/16** **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 November 9, 2016, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on December 21, 2016. Claimant participated. Attorney Bradley Strouse participated on claimant's behalf. Employer participated through attorney Kami Petigoue, vice-president of human resources Steve Sesterhenn, executive director of compliance Tori Stafford, and business partner Mary Peterson. Manager of surgery center Brian Van Brocklin attended the hearing on behalf of the employer. Supervisor of the surgery center Judy Bauthier registered for the hearing on behalf of the employer, but she did not attend the hearing. Employer Exhibit 1 were 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 registered nurse from March 21, 2000, and was separated from employment on October 19, 2016, when she was discharged.

The employer has a written progressive disciplinary policy. Employer Exhibit 1. Depending on the nature of the infraction, an employee may receive a first level written warning, a second level written, or a third level (suspension). Employer Exhibit 1. When an employee reaches the fourth level, it results in discharge. Employer Exhibit 1. The progression through the warning levels does not depend on the reason for the infraction and the prior warning(s). Claimant was

aware of the disciplinary policy. The employer has a written security policy about accessing records. Employer Exhibit 1. Employees are to only access "business-related information needed for the performance of [their] duties and responsibilities." Employer Exhibit 1. Employees may access their own patient records or their family records through a website (Patient Portal) or the Release of Medical Information process (a separate piece of paper that has to be signed). Employer Exhibit 1. The employer also defines what protected health information (PHI) is and what the consequences are for employees that violate a patient's privacy. Employer Exhibit 1. The policy describes the difference between violations that are a result of carelessness or inadvertent action versus those that are a result of curiosity or concern. Employer Exhibit 1. Claimant was aware of patient privacy rules and compliance. Employer Exhibit 1.

The final incident occurred on September 14, 2016 when claimant was at the employer during her spouse's surgery. Claimant received permission from the employer to work while she was waiting for the surgery to finish. The employer allowed claimant to audit records at the surgery center. During claimant's audit, she accessed her spouse's medical records, which the employer determined violated its policies. Claimant did not have a release of medical information to access her spouse's records. Claimant did not access her spouse's records through the website/Patient Portal. Claimant used the company computer system (EPIC), which is used to access patient medical records, to access her spouse's medical records. Claimant testified that while she was performing audits, a coworker asked her when her spouse's surgery was scheduled to be finished because the coworker wanted to go help out in a different area and wanted to know when to return. Claimant accessed her spouse's medical records and informed the coworker of the status of the surgery. The coworker then left and told claimant to contact the coworker if the surgery ended early.

The September 14, 2016, incident was discovered by an automated system the employer uses to monitor employee activity. The automated system looks for employees accessing certain records, such as family members, and indicates to the compliance department that a report needs to be run and investigated. The automated system runs a report/alert every week, so the employer was aware of the incident by September 21, 2016. Ms. Stafford was not alerted about the incident for approximately three weeks after September 21, 2016. After Ms. Stafford was alerted, Mr. Van Brocklin conducted an initial review.

On October 17, 2016, the employer met with claimant regarding the incident on September 14, 2016. October 17, 2016, was the first time claimant was aware there was an issue with her accessing her spouse's medical records on September 14, 2016. Claimant admitted to looking into her husband's records. Claimant told the employer she was doing audits when a coworker requested the scheduled end time of her spouse's surgery. The employer told claimant it was going to gather further information and release her to go back to work. The employer determined claimant had performed audits starting with September 8, 2016 and then worked sequentially through the days, but she skipped September 13, 2016 and for the date of September 14, 2016 she only entered her spouse's medical records. Claimant met with the employer again on October 19, 2016 to discuss the incident.

Ms. Stafford testified the employer determined after its investigation that claimant's violation was due to curiosity or concern, which was to result in a second level warning. Because claimant had two prior warnings, including a second level warning, according to the employer's progressive disciplinary policy, the second level warning from the incident on September 14, 2016 would result in a fourth level warning, which calls for discharge. On October 19, 2016, the employer discharged claimant according to its progressive disciplinary policy. Ms. Stafford testified that had claimant not had her prior warnings, she would have just gotten a second level

warning and still be employed. The employer has had similar incidents with other employees and those employees received second level warnings and depending on their prior warning(s), they may not have been discharged.

On May 9, 2016, the employer gave claimant a second level written warning for absenteeism. Claimant was not warned her job was in jeopardy. On December 3, 2015, the employer gave claimant a first level written warning for absenteeism. Claimant did not have any prior warnings for incidents to September 14, 2016. Claimant had no prior discipline for HIPAA, compliance, or privacy issues.

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:
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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 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 reviewing past acts as influencing a current act of misconduct, the ALJ should look at the course of conduct in general, not whether each such past act would constitute disqualifying job misconduct in and of itself. *Attwood v. Iowa Dep't of Job Serv.*, No. _-__, (Iowa Ct. App. filed __, 1986).

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 September 14, 2016, claimant violated the employer's policies when she accessed her spouse's medical records. Although she had to prior warnings for absenteeism, claimant had no prior warnings for improperly accessing medical records.

The conduct for which claimant was discharged was merely an isolated incident of poor judgment and inasmuch as 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. A warning for absenteeism is not similar to improperly accessing medical records 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.

Furthermore, claimant was not notified there was an issued with her accessing her spouse's medical records until October 17, 2016. The employer was alerted to the incident through its automated system no later than September 21, 2016, but an investigation was not started until three weeks later on October 12, 2016. After the automated system alerted the employer, it was over three weeks until claimant was notified there was an issue. An unpublished decision held informally that two calendar weeks or up to ten work days from the final incident to the discharge may be considered a current act. *Milligan v. Emp't Appeal Bd.*, No. 10-2098 (Iowa Ct. App. filed June 15, 2011). It is noted that claimant was not notified there was an issue until over a month after the incident occurred.

Although claimant did access her spouse's medical records on September 14, 2016, inasmuch as employer was alerted by its automated system there may be an issue within a week, did not advise claimant it was an issue that would be investigated until over three weeks later and discharged her an additional two days after that, the act for which claimant was discharged was no longer current. The employer has not established a current or final act of misconduct, and, without such, the history of other incidents need not be examined. Accordingly, benefits are allowed.

As benefits are allowed, the issues of overpayment, repayment, and the chargeability of the employer's account are moot.

DECISION:

The November 9, 2016, (reference 01) unemployment insurance decision is affirmed. 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