IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

VALORIE R HOLLAN Claimant **THE UNIVERSITY OF IOWA** Employer	**APPEAL 17A-UI-03331-NM-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 02/26/17** **Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(1)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The employer filed an appeal from the March 20, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified of the hearing. A telephone hearing was held on April 19, 2017. The claimant participated and testified. The employer participated through Benefits Specialist Mary Eggenburg and Assistant Custodial Service Manager Jeffrey Rajtora.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can any 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 facilities services coordinator from December 2, 2002, until this employment ended on March 1, 2017, when she was discharged.

On October 19, 2015, claimant was transferred from one location to another. It was at this time that Rajtora became her immediate supervisor. At the time she was notified of her transfer, claimant was told to keep it confidential. Despite this directive, claimant told her immediate reports what was going on. Claimant was issued a reprimand for this action. The employer thought claimant might have been warned that further violations may lead to termination, but claimant denied this was the case. No documentation of the reprimand was provided.

Within a month or two of claimant being transferred, Rajtora became aware of several performance deficiencies related to claimant's leadership, communication, and accountability.

According to Rajtora claimant could have communicated more frequently with customers and staff and there was a few instances where she sent staff members directly to Human Resources with issues, rather than contacting Human Resources herself. In April 2016 claimant was placed on a performance improvement plan (PIP). On June 15, 2016, claimant was issued a one day suspension for failing to meet the expectations of the PIP. By February 28, 2017, Rajtora felt claimant was still unable to meet the expectations set forth in the PIP, though he was unable to provide any specific details on claimant's failures other than her leadership, communication, and accountability needing more work. A copy of the PIP was not provided for the hearing.

A meeting was held with claimant on February 28, 2017, to discuss her performance. Rajtora testified it came to his attention during this meeting that claimant had told a subordinate employee about her plans to discharge another subordinate employee. According to claimant it was clear to all employees that the employee was going to be discharged and she admitted to making some comments to another employee about a temp worker coming in to fill an opening, but denied specifically saying the employee was going to be terminated. Rajtora indicated he had some detailed notes from the February 28 meeting where claimant admitted to making the disclosure, but copies of those notes were not provided for the hearing. Based on this disclosure and claimant's general failure to meet performance expectations, the decision was made to terminate her employment.

The claimant filed a new claim for unemployment insurance benefits with an effective date of February 26, 2017. The claimant filed for and received a total of $2,235.00 in unemployment insurance benefits for the weeks between February 26 and April 15, 2017. Both the employer and the claimant participated in a fact finding interview regarding the separation on March 17, 2017. The fact finder determined claimant qualified for benefits.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

Iowa Code section 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 Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

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). 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).

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.

There is some dispute between the parties as to claimant's prior warnings related to confidential information and as to what she told Rajtora during their meeting on February 28, 2017. When the record is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. *Schmitz v. Iowa Dep't Human Servs.*, 461 N.W.2d 603, 607 (Iowa Ct. App. 1990). Both the quality and the quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See, Iowa Code § 17A.14 (1). In making the evaluation, the fact-finder should conduct a common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be fulfilled. *Schmitz*, 461 N.W.2d at 608. The Iowa Supreme Court has ruled that if a party has the power to produce more explicit and direct evidence than it chooses to present, the administrative law judge may infer that evidence not presented would reveal deficiencies in the party's case. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976). It is permissible to infer that the records were not submitted because they would not have been supportive of employer's position. See, *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976).

The employer did not present a witness with direct knowledge of the October 2015 situation, nor did it provide any documentation supporting its position. No request to continue the hearing was made and no written statement of the individual was offered. The employer also failed to

submit a copy of the policies or performance improvement plan at issue, or notes from the February 28 meeting. The employer provided no documentation supporting its position, though the testimony indicated such documentation was available. Mindful of the ruling in *Crosser*, *id.*, the administrative law judge concludes that the claimant's recollection of the events is more credible than that of the employer.

Claimant was discharged for a combination of reasons related to her failure to meet the employer's performance expectations and following the possible disclosure of confidential information. The incident involving the disclosure of confidential information was, at best, an isolated incident of poor judgment. Claimant's conduct may have been careless, but does not indicate "such degree of recurrence as to manifest equal culpability, wrongful intent or evil design" such that it could accurately be called misconduct. Iowa Admin. Code r. 871-24.32(1)(a); *Greenwell v. Emp't Appeal Bd.*, No. 15-0154 (Iowa Ct. App. Mar. 23, 2016).

Claimant did receive a prior warning regarding the disclosure of confidential information in October 2015, but the employer has not provided sufficient evidence to show she was advised that her job may be in jeopardy should something similar happen again in the future. 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. 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.

In regards to the employer's assertion that claimant was not meeting performance expectations, Iowa Admin. Code r. 871-24.32(5) provides:

> (5) Trial period. A dismissal, because of being physically unable to do the work, being not capable of doing the work assigned, not meeting the employer's standards, or having been hired on a trial period of employment and not being able to do the work shall not be issues of misconduct.

Failure in job performance due to inability or incapacity is not considered misconduct because the actions were not volitional. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979). Where an individual is discharged due to a failure in job performance, proof of that individual's ability to do the job is required to justify disqualification, rather than accepting the employer's subjective view. To do so is to impermissibly shift the burden of proof to the claimant. *Kelly v. Iowa Dep't of Job Serv.*, 386 N.W.2d 552 (Iowa Ct. App. 1986). The employer could not specifically identify any clear task or job duty claimant was failing to perform, nor was it clear that she was capable of performing to Rajtora's standards. Based on the testimony provided, claimant had never had a sustained period of time during which she performed her job duties to employer's satisfaction once she began working under Rajtora. Inasmuch as she did attempt to perform the job to the best of her ability but was unable to meet its expectations, no intentional misconduct has been established, as is the employer's burden of proof. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). Accordingly, no disqualification pursuant to Iowa Code § 96.5(2)a is imposed. As benefits are allowed, the issues of overpayment and participation are moot.

DECISION:

The March 20, 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. Any benefits claimed and withheld on this basis shall be paid. The issues of overpayment and participation are moot.

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Nicole Merrill
Administrative Law Judge

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Decision Dated and Mailed

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