IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

JENNIFER A DENNIS Claimant **THE UNIVERSITY OF IOWA** Employer	**APPEAL 17A-UI-13262-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 11/19/17** **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 December 18, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on January 19, 2018. Claimant participated. Attorney Lori Bullock participated on claimant's behalf. Attorney Leonard Bates attended the hearing on claimant's behalf. Employer participated through benefits specialist Mary Eggenburg and associate director food and nutritional services Levi DeVries.

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 in a full-time capacity with two different job titles with the employer at the time she was separated from employment. Claimant was employed in a 50% capacity as a store keeper 1 from December 5, 2005 until November 17, 2017. Claimant was employed in a 50% capacity as a cook 1 from January 6, 1998 until November 17, 2017. Claimant was in charge of stocking vending machines. Claimant worked 7:30 p.m. to 4:00 a.m., Sunday through Thursday. Claimant did not have a set time to go on break during her shift.

The employer has a written policy that prohibits employees from neglecting job duties and responsibilities. The policy also requires employees to properly observe time limits of meal and rest periods. Claimant was aware of the policies.

On March 22, 2017, claimant's doctor provided the employer with an accommodation request. Claimant's doctor requested that if claimant felt anxiety or threatened that the employer provide her a quiet place for her to mediate or watch a breathing/meditation video for approximately fifteen to thirty minutes. In the doctor's request, the doctor indicated that claimant had agreed with the doctor to inform the employer if a situation occurred where she had to utilize this accommodation. The employer is not aware of anyone at the employer discussing with claimant that she should report to the employer if she had to utilize this restriction. Claimant was not aware she was required to report to the employer when she watched a video. As of March 22, 2017, the employer allowed/agreed claimant this accommodation. Claimant was informed she could watch the videos if needed. Claimant's supervisors were aware she would watch videos and uses breathing exercises during her shift. Claimant used the accommodation every day.

The final incident that led to discharge occurred on November 13, 2017, during claimant's shift. On November 13, 2017, claimant had her personal tablet with her at work, which she used for breathing/meditation videos and scenic pictures. Claimant denied watching a movie on her tablet during her shift on November 13, 2017, but she did use her personal tablet during her shift. Claimant looked at meditation and breathing videos. Claimant does not recall when during her shift that she was looking at the meditation and breathing videos. Claimant looked at the videos on more than one occasion on November 13, 2017. Claimant does not recall how many times looked at the meditation and breathing videos. When claimant was on break, she would also look at the meditation and breathing videos. Claimant took her break late on November 13, 2017 because she was busy. Claimant did not see anyone observing her watching videos. Claimant did not report to the employer on November 13, 2017 that she had watched videos. Claimant had higher anxiety on November 13, 2017, because she was returning from a disciplinary suspension. On November 13, 2017, at approximately 1:00 a.m., claimant was observed by her immediate supervisor (Jim Riddle) and a coworker (Byron Fisher) watching her personal tablet. The employer was not aware if claimant was on a scheduled break. The employer did not say anything to claimant at this time. At approximately 1:30 a.m., Mr. Riddle observed claimant in the same location watching her personal tablet. The employer was not aware if claimant was on a scheduled break. The employer did not say anything to claimant at this time. Mr. Riddle sent an e-mail documenting what he had observed. At approximately 2:00 a.m., Mr. Riddle observed claimant in the same location watching her personal tablet. Mr. Riddle sent another e-mail documenting the incident. At approximately 2:30 a.m., Mr. Riddle and another employee (Amber Hain) observed claimant in the same spot watching her personal tablet. Mr. Riddle sent another e-mail documenting the incident. At approximately 3:00 a.m., Mr. Riddle went to the same location and claimant was not present. Mr. Riddle sent another e-mail documenting that claimant had left. Around 7:30 p.m. on November 13, 2017, the employer gave claimant a notice that she was being placed on an investigatory suspension. The employer did not tell claimant why she was on an investigatory suspension. The suspension was the first time claimant became aware there was an issue with her employment. The employer then interviewed Mr. Riddle, Mr. Fisher, and Ms. Hain and obtained witnesses statements from them about what they observed. The employer did not provide the witness statements for this hearing. Mr. Riddle, Mr. Fisher, and Ms. Hain informed the employer that they observed claimant watching a tablet and when they observed her watching the tablet.

On November 15, 2017, the employer interviewed claimant about the incident. The employer asked claimant if there was anything out of the ordinary that happened during her shift on November 13, 2017. Claimant told the employer that other than being busy, there was nothing out of the ordinary. The employer told claimant that it had received a report that she had been watching a movie. Claimant denied watching a movie.

On November 17, 2017, the employer met with claimant again. The employer asked claimant if there was anything else she wanted the employer to know before a decision was made. Claimant informed the employer that this was retaliation by the employer for her receiving accommodations due to an incident that had occurred in 2015. The employer then informed claimant that she was discharged.

Claimant had three prior disciplinary actions in 2017. On November 6, 2017, the employer suspended claimant for three days for insubordination and neglecting job duties. Claimant's supervisor had requested claimant perform a job duty (stock vending machines) using a different stock chaser than she normally used because her normal stock chaser was not available. Claimant refused to use the other stock chaser because it did not work correctly and would not allow her to get away from someone if they were chasing her. The employer told claimant she could use a cart, but she refused because it was not working properly and she would not be able to get away from someone if they were chasing her. Claimant was warned her job was in jeopardy. After claimant was suspended on November 6, 2017, claimant put in a request for a functioning stock chaser. On September 17, 2017, the employer suspended claimant for one day for leaving work early without permission. Claimant testified she had received permission to leave the area to get a test performed. On March 1, 2017, the employer gave claimant a written reprimand for making false or malicious statements about coworkers.

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.

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

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:

> *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.**
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> (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.

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 has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. *Crosser v. Iowa Department of Public Safety*, 240 N.W.2d 682 (Iowa 1976). The employer had the power to present testimony or written statements from Mr. Riddle, Mr. Fisher, or Ms. Hain, but the employer instead chose to rely on Mr. Devries' testimony about what Mr. Riddle, Mr. Fisher, and Ms. Hain told the employer they observed on November 13, 2017. Mr. Devries' testimony as to what Mr. Riddle, Mr. Fisher, and Ms. Hain said or wrote does not carry as much weight as live testimony because live testimony is under oath and the witness can be questioned.

Claimant provided credible, first-hand testimony that she was not watching a movie on her tablet on November 13, 2017, but was watching breathing/meditation videos pursuant to her accommodation. Claimant provided credible, first-hand testimony that she would watch breathing/meditation videos every day and her supervisors were aware she was watching videos during her shift. Furthermore, claimant credibly testified that she was not aware she had to report to the employer if she watched a breathing/meditation video during her shift. Claimant's testimony was corroborated by Mr. Devries' testimony that the employer did not instruct claimant she had to report to the employer if she watched a breathing/meditation video. It is noted that the employer presented evidence that claimant's supervisor observed her watching her tablet on four occasions in a one and a half hour period, but never approached claimant regarding her actions. It is further noted the employer had not previously warned claimant about the issue leading to the separation (watching video(s) during her shift).

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 refusing to perform a job duty is not similar to watching a video as a part of an accommodation 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.

The employer 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. Furthermore, the employer did not provide first-hand testimony at the hearing and, therefore, did not provide sufficient eye witness evidence of job-related misconduct to rebut claimant's denial of said conduct. "Allegations of misconduct or dishonesty without additional evidence shall not

be sufficient to result in disqualification." Iowa Admin. Code r. 871-24.32(4). "If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established." Iowa Admin. Code r. 871-24.32(4). The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

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

DECISION:

The December 18, 2017, (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