

**BEFORE THE  
EMPLOYMENT APPEAL BOARD  
Lucas State Office Building, 4<sup>TH</sup> Floor  
Des Moines, Iowa 50319  
eab.iowa.gov**

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**DEBORAH C MARCOV**

Claimant

: **APPEAL NUMBER:** 23B-UI-02456

: **ALJ HEARING NUMBER:** 23A-UI-02456

:

and

:

**EMPLOYMENT APPEAL BOARD**

:

**DECISION**

**FOCUS SERVICES LLC**

:

:

Employer

:

**NOTICE**

**THIS DECISION BECOMES FINAL** unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT IS FILED WITHIN 30 days** of the date of the Board's decision.

A **REHEARING REQUEST** shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

**SECTION:** 96.5-2-A, 96.3-7

**DECISION**

**UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE**

The Claimant appealed this case to the Employment Appeal Board. Two members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

**FINDINGS OF FACT:**

The Claimant began working for the employer on December 5, 1994. She was a full-time Agent who separated from employment on February 7, 2023, when she was discharged.

The Employer has a code of conduct that prohibits employees from engaging in unethical sales. The Claimant was aware of the policy and signed an acknowledgement of the policy on February 15, 2021.

The Claimant was assigned to work for the Employer's client Charter Communications (Charter). The Employer's employees were responsible for providing customer service and upselling services to Charter's customers. This could include, but is not limited to, offering internet, mobile phone, and/or television services. The employees would take protected personal information from customers. If a customer was buying mobile services, the customer's social security number would be obtained to determine if a down payment was needed. The Claimant was never told why she was collecting the customer's social security number.

In September 2022, the Claimant's supervisor told her that she was making her job more difficult than it needed to be. He advised the Claimant to use a default social security number because they had the customer's date of birth and that was adequate. The Claimant informed the supervisor that she did not want to do anything that would get her in trouble and he assured her it would not be a problem. The Claimant was required to record sales information and the Employer would pull calls and verify the sales were being done correctly, so she assumed she was doing things correctly if no one said anything to her. The Claimant had not received any warnings for violation of the unethical sales policy during her 28-year tenure with the Employer.

On February 7, 2023, Charter notified the Employer that a customer complaint had resulted in an investigation into the Claimant's sales from October 2022 through January 2023. Charter determined the Claimant had used the same social security number on 33 different sales. The Employer also investigated and terminated the Claimant for violation of the Employer's unethical sales policy. The Employer also paid a monetary penalty outlined in the agreement with Charter and the Employer reverted to auditing all sales going forward to maintain its business with Charter.

#### **REASONING AND CONCLUSIONS OF LAW:**

Iowa Code section 96.5(2) provides, in relevant part:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

...

d. For the purposes of this subsection, "*misconduct*" means a deliberate act or omission by an employee that constitutes a material breach of the duties and obligations arising out of the employee's contract of employment. Misconduct is 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. Misconduct by an individual includes but is not limited to all of the following:

...

(2) Knowing violation of a reasonable and uniformly enforced rule of an employer.

...

(10) Falsification of any work-related report, task, or job that could expose the employer or coworkers to legal liability or sanction for violation of health or safety laws.

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). "Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of benefits." *Lee v. Employment Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000).

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 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). The focus is on deliberate, intentional, or culpable acts by the employee.

It is the duty of the Board as the ultimate 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 Board, 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, as well as the weight to give other evidence, a Board member 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 evidence to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other evidence the Board believes; 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). The Board also gives weight to the opinion of the Administrative Law Judge concerning credibility and weight of evidence, particularly where the hearing is in-person, although the Board is not bound by that opinion. Iowa Code §17A.10(3); *Iowa State Fairgrounds Security v. Iowa Civil Rights Commission*, 322 N.W.2d 293, 294 (Iowa 1982). We also note that the three Members of this Board each listens to the digital recording of this hearing and each has equal access to factors such as tone of voice, hesitancy in responding, etc. as the Administrative Law Judge. The findings of fact show how we have resolved the disputed factual issues in this case. We have carefully weighed the credibility of the witnesses and the reliability of the evidence considering the applicable factors listed above, and the Board's collective common sense and experience. We have found credible the Claimant's testimony that she was advised by her supervisor to engage in the conduct that led to the termination.

The Employer has not met the burden of proof to establish that the 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.

In this case, the Claimant's conduct is not a knowing or deliberate disregard of the Employer's policies when she was following instructions from her supervisor and she had not previously been warned about the conduct. The Claimant did not try to hide her actions which were discoverable by the Employer. While the Claimant may have used incorrect information in filing a claim, the falsification of any documentation did not "expose the employer or coworkers to legal liability or sanction for violation of health or safety laws," even though it may have resulted in penalties as a result of the contract between the Employer and Charter. As the claimant's conduct was not a deliberate violation of the Employer's policy, benefits are allowed.

As benefits are allowed, the issues of overpayment and participation are moot. Any benefits claimed and withheld as the result of the administrative law judge's decision shall be paid to the claimant.

**DECISION:**

The administrative law judge's decision dated March 24, 2023 is **REVERSED**. The Employment Appeal Board concludes that the claimant was not discharged for disqualifying misconduct. Benefits are allowed and the employer's account may be subject to charge.

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James M. Strohman

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Ashley R. Koopmans



**DISSENTING OPINION OF MYRON R. LINN:**

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the administrative law judge's decision in its entirety.

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Myron R. Linn

SRC/fnv