IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

ANGELA M SALVADOR Claimant **ACCESS 2 INDEPENDENCE OF THE EAST** Employer	**APPEAL 15A-UI-07804-CL-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 06/14/15** **Claimant: Appellant (2)**

Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from the June 29, 2015, (reference 01) unemployment insurance decision that denied benefits based upon misconduct. The parties were properly notified about the hearing. A telephone hearing was held on August 7, 2015. Claimant participated. Employer participated through board chairperson Shawn Zierke. Witness Molly Campbell did not testify.

ISSUE:

Did claimant voluntarily leave the employment with good cause attributable to employer or did employer discharge claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as an executive director from May 5, 2014, and was separated from employment on June 15, 2015, when she was terminated. As executive director, claimant reported to the board of directors. Shawn Zierke is the board chairperson.

In March 2015, employer terminated its bookkeeper due to poor work performance. Employer's financial consultant, Susan Stutzel, recommended employer hire an independent contractor, Jonnie, to perform its bookkeeping duties. Jonnie offered to perform employer's bookkeeping work for a flat fee each month. Separately, Jonnie offered to fix errors with employer's tax documents at a rate of $50 per hour. Employer's board wanted to hire Jonnie. However, employer's board did not want to hire Jonnie at the fixed rate she was proposing without seeing a revised budget to ensure the funds were available. Additionally, employer's board did not believe the flat rate fee was reasonable. Employer did not hire Jonnie to perform its monthly bookkeeping duties, but she continued to work on the tax documents for an hourly rate. In the meantime, claimant transitioned employer's financial information to a new software, Quickbooks Online. Jonnie used Quickbooks Online. Claimant transitioned the financial information under the assumption that employer would eventually hire Jonnie and based on the recommendation

of Stutzel. Claimant completed the March and April 2015 financial documents. The documents contained many errors as the software transition was difficult for claimant.

The board did not hold a meeting in April 2015.

On May 18, 2015, employer's board held a meeting. Claimant was absent due to illness. During the meeting, the board discovered the March and April financial documents contained numerous errors. Employer's board discovered claimant issued two reimbursement checks to herself by direct deposit for travel and mileage expenses. Employer's board could not find receipts or documentation verifying the expenses. Employer additionally learned claimant did not pay the previous month's credit card bill on her company credit card, and that the previous month's statement contained one charge for two alcoholic drinks while claimant was on a business dinner. The board additionally learned employer's rent check for the previous month was returned because it was not signed by a second person, as required for acceptance. The board additionally discovered claimant had not completed performance reviews for any of her subordinate employees.

Claimant was hospitalized with septic pneumonia from May 19 through 23, 2015. Claimant was not released to work until June 1, 2015. Claimant was released to work only half days beginning June 3, 2015.

On May 24, 2015, board chairperson Shawn Zierke sent claimant an email asking her to provide the missing receipts and paperwork for reimbursements and asking her to provide the board with a weekly update on the work she completed in the future.

On May 29, 2015, another employee, Joy Beadleston, reported to employer's board that claimant had yelled at her in front of co-workers. Beadleston also reported claimant was not in the office on a regular basis.

On June 4, 2015, employer's board interviewed all of employer's employees, including claimant, about claimant's work performance. Employer confirmed claimant raised her voice at Beadleston. Employer also confirmed claimant was not working in the office on a regular basis.

During her employment, claimant often worked more than 40 hours per week. Claimant was paid on a salary basis. Many times, claimant was not working in the office as she attended events and meetings outside of work, took conference calls in her car, and worked on billing and budgeting at home on Saturdays and during the evenings. Claimant was never told she had to be working in the office 40 hours per week.

By June 7, 2015, claimant had the financial documentation employer's board had requested from her organized and available. The receipts were not available earlier as claimant had been ill and was working on a new organization system for the receipts per the suggestion of employer's financial consultant. Claimant inadvertently failed to pay the monthly credit card bill, and inadvertently did not get the second signature on the rent check. Claimant had previously discussed the issue with the rent check with the board treasurer. Claimant charged alcoholic drinks on her company credit card on one occasion as she inadvertently did not have her personal credit card with her at the restaurant where the business dinner was held. Claimant planned on paying for the personal charge, but became ill before she had a chance to do so.

Claimant had not completed the performance evaluations for her subordinate employees as evaluations were required only bi-annually and annually. Only one staff member had been employed by employer for longer than six months. Claimant gave that person a positive verbal

evaluation and did not document the evaluation. Documentation was only required for a negative evaluation.

Claimant tried to give Zierke the explanation for all of the issues raised by the board. However, Zierke was not receptive to hearing what claimant had to say and was very abrasive towards her.

Employer never took any disciplinary action against claimant or otherwise warned her that her job was in jeopardy if she did not improve her performance.

Instead, on June 15, 2015, employer's board voted to terminate claimant. However, the board immediately offered claimant a lower paying, subordinate position as an Independent Living Specialist. The board stated claimant had no sick or vacation time remaining, as it felt claimant had used the time unauthorized. Claimant denied the offer.

Board member John Hadley resigned from the board due to the hostile environment that had been created for claimant by Zierke.

REASONING AND CONCLUSIONS OF LAW:

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

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 employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *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). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000).

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).

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 assess points or impose discipline up to or including discharge for the incident under its policy.

Here, employer had not previously warned claimant about the issues leading to the separation. Although employer was unhappy with claimant's performance, it did not give her a sufficient opportunity to explain what had occurred or improve her performance in the future. Thus, 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.

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 the alternative, if claimant voluntarily quit her employment after receiving a disciplinary demotion, she remains eligible for benefits.

Iowa Code § 96.5-1 provides:

> An individual shall be disqualified for benefits:
>
> 1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

Iowa Admin. Code r. 871-24.26(1) provides:

> Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:
>
> (1) A change in the contract of hire. An employer's willful breach of contract of hire shall not be a disqualifiable issue. This would include any change that would jeopardize the worker's safety, health or morals. The change of contract of hire must be substantial in nature and could involve changes in working hours, shifts, remuneration, location of employment, drastic modification in type of work, etc. Minor changes in a worker's routine on the job would not constitute a change of contract of hire.

Here, the position employer offered to claimant was significantly different than the position of executive director. The new position paid less and greatly reduced claimant's authority and job responsibilities. Additionally, claimant was stripped of her paid vacation and sick leave.

Employer has not met the burden of proof to establish that claimant acted with culpability in the behavior leading to her demotion. Thus, the employer has not established that the demotion was related to any incident of misconduct. Inasmuch as the claimant would suffer a reduction in job responsibilities and pay and benefits, the change of the original terms of hire is considered substantial. Thus the separation was with good cause attributable to the employer.

DECISION:

The June 29, 2015, (reference 01) unemployment insurance decision is reversed. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements.

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Christine A. Louis
Administrative Law Judge
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Decision Dated and Mailed

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