IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

LAKESHA A GREEN Claimant **THOMAS L CARDELLA & ASSOCIATES INC** Employer	**APPEAL 15A-UI-00265-KCT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 12/14/14** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the January 6, 2015 (reference 01) unemployment insurance decision that denied benefits based upon the claimant's failure to follow instructions, resulting in discharge. The parties were properly notified about the hearing. A telephone hearing was held on February 2, 2015. Claimant participated. The employer registered to participate through representative Raul Ybanez with two witnesses. The representative did not participate in the hearing when his witnesses were unavailable. He also withdrew his motion to admit documents into evidence.

ISSUE:

Was the claimant discharged for disqualifying misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full time as a supervisor in training beginning on April 9, 2014. Her last day of work was December 18, 2014.

Although she was hired as a full-time employee, the employer began requiring employees to take "voluntary time off" when there was insufficient work for all of the employees scheduled to work at a certain time. Beginning in late November 2014 the claimant's 40 hour per week schedule began averaging 16 - 28 hours per week.

The claimant gave a written note to direct supervisor Nicole LaBarge on December 1, 2014 stating that she planned to resign at a future date in December, in order to move. She left the date blank but informed them of her intentions. The supervisor signed that she received the document.

On December 17, 2014 she was told to take "voluntary time off" and go home because there was inadequate work available. She informed one of her supervisors that she needed the hours and had already been forced to take VTO earlier in the pay period; however, she went home two hours early as instructed.

When she returned to work the next day, she told another supervisor Adam, who is a contact between Wells Fargo and Thomas Cardellas, which she spoke with an Iowa Workforce Development representative and was planning to file for partial unemployment due to the VTO. Adam is the person she was directed to go to with questions about what is permitted to say on Wells Fargo calls. He is considered one of the claimant's supervisors.

On December 18, 2014 she received contradictory instructions from two supervisors: one told her to stay in Wells Fargo accounts; the other told her to conduct political surveys in a different account. Jason Tylee, the center manager, told her to work the political program. She told him that Jess Boyer and Adam both told her that she was supposed to be completing her work with Wells Fargo, not the political programs.

Thereafter, supervisor Josh Farrell came to her with her incomplete resignation originally submitted on December 1, 2014 with a potential end date of December 27, 2014. The supervisor advised her that they would accept the resignation and told her to sign it with the effective date of December 18, 2014. She told him that she was not resigning and the form should indicate that she was being terminated.

She was then escorted from the building by administrator Lori Brauns. The claimant questioned the form she was given and Brauns gave her a corrected sheet indicating that the claimant had been terminated for insubordination effective December 18, 2014. Brauns had signed the sheet. The claimant understood that she had been terminated.

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 § 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:
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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, (4), (8), and (9) provide:

> 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.
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> 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).
>
> (4) Report required. The claimant's statement and the 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.
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> (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.
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> (9) Suspension or disciplinary layoff. Whenever a claim is filed and the reason for the claimant's unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as discharged, and the issue of misconduct must be resolved. Alleged misconduct or dishonesty without corroboration is not sufficient to result in disqualification.

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.

Insubordination does not equal misconduct if it is reasonable under the circumstances. The question of whether the refusal to perform a specific task constitutes misconduct must be determined by evaluating both the reasonableness of the employer's request in light of all circumstances and the employee's reason for noncompliance. *Endicott v. Iowa Dep't of Job Serv.*, 367 N.W.2d 300 (Iowa App. 1985).

Where claimant was required to work in two separate positions and received contradictory instructions from two different supervisors and quit after being reprimanded for his job performance was entitled to benefits. *McCunn v. Emp't Appeal Bd.*, 451 N.W.2d 510 (Iowa Ct. App. 1989).

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.

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). Mindful of the ruling in *Crosser*, *id.,* and noting that the claimant presented direct, first-hand testimony while the employer relied upon second-hand reports, the administrative law judge concludes that the claimant's recollection of the events is more credible than that of the employer.

Two people with direct knowledge of the situation, other than claimant, were listed as witnesses by the employer but were not available to testify. No request to continue the hearing was made and no written statements of those individuals were offered. Given the serious nature of the proceeding and the employer's allegations resulting in claimant's discharge from employment, the employer's nearly complete reliance on hearsay statements is unsettling. Mindful of the ruling in *Crosser*, *id.,* and noting that the claimant presented direct, first-hand testimony while the employer relied upon second-hand reports, the administrative law judge concludes that the claimant's recollection of the events is more credible than that of the employer.

The claimant's testimony demonstrates that she was terminated for no disqualifying reason. First, she informed a supervisor that she was going to file for partial unemployment. Second, she was given contradictory directions by different supervisors which they did not resolve among themselves. She declined to resign immediately. Finally, she was told that she was terminated for insubordination. In less than 24 hours, and after the claimant reported her intent to seek partial unemployment, the employer provided multiple inconsistent instructions to the claimant and then terminated employment reportedly due to insubordination.

DECISION:

The January 6, 2015 (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

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Kristin A. Collinson
Administrative Law Judge

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Decision Dated and Mailed

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