IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

MARLENA R HEWLETT Claimant **ROCKY MOUNTAIN HOTEL** Employer	**APPEAL 17A-UI-06926-NM-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 06/04/17** **Claimant: Respondent (1)**

Iowa Code § 96.5(1) – Voluntary Quitting
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 June 30, 2017, (reference 02) unemployment insurance decision that allowed benefits. The parties were properly notified of the hearing. A telephone hearing was held on July 26, 2017. The claimant participated and testified. The employer participated through Vice President Mike Harris and President Ken Garvin. Employer's Exhibits1 and 2 and claimant's Exhibit A were received into evidence. Official notice was taken of the fact-finding documents.

ISSUES:

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

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 general manager from February 23, 2017, until this employment ended on May 29, 2017, when she was discharged.

On or around May 20, 2017, in the early morning hours, Harris received a phone call from an employee claiming he was being harassed and discriminated against. Harris was very confused by the situation, but shortly thereafter received a call from claimant stating that this employee was threatening her. These calls prompted Harris to look in to the situation further. In speaking

to other employees, Harris discovered there had been ongoing issues with the other employee, including that employee bringing a handgun to work on one occasion, in violation of the employer's policies, and possibly selling drugs on the premises. Harris discovered claimant knew about these situations and did not tell himself, the owner, or Garvin. It was also reported to Harris that this employee was seen regularly coming in and out of claimant's living quarters, located on the premises, and that it was believed the two were in a relationship, in violation of the employer's fraternization policy. Based on this information, the decision was made to end claimant's employment. Claimant had no prior discipline.

Claimant adamantly denied being in a relationship with the employee in question. Claimant explained the employer business is a hotel, where she did have an apartment. Claimant testified she told all staff they could use the refrigerator and stove in her apartment for meals any time they wanted, though only the other employee in question took her up on this offer. Claimant testified she was unaware allowing employees access to her apartment for these reasons would violate any work rules or policies.

According to claimant, several weeks before her termination she was on leave out of town. When she returned she was informed by the manager on duty that the other employee had brought a gun to work. The manager on duty told claimant she reported the incident to claimant's supervisor and was directed to instruct claimant to write the employee up. Claimant then followed this instruction and issued the written discipline. Claimant testified the employee's behavior then began to change and he became more aggressive while at work.

Approximately one week prior to May 20, claimant met with management staff to discuss some general performance issues. During this meeting the discussion turned to the topic of the other employee and his behavior. It came to claimant's attention that other staff members suspected the two were in a relationship, as he was frequently seen coming and going from her apartment, sometimes in the early morning hours. Claimant testified she was previously unaware of how often this employee was in her apartment or that he was there outside of his normal 3:00 p.m. to 11:00 p.m. shift. When claimant heard this information she told staff from now on they needed to get permission to enter her apartment. Claimant noted, however, that her apartment worked like any hotel room and staff could just make a key card to enter at any time.

Around this same time claimant observed the other employee interacting with another member of the staff in a manner that led her to believe the interaction could be a drug transaction. Claimant was not sure about what she had seen but spoke to the employee about it. The employee denied he had been selling drugs. Claimant spoke about the situation with another manager and determined it would be best to discuss the situation with a supervisor. The employee somehow discovered claimant intended to inform a supervisor about the situation and, on the night on May 20, 2017, entered her apartment, admitted he had been selling drugs, and threatened her. The employee, knowing claimant was going to report the situation, then phoned Harris and made accusations against the claimant. Claimant was able to connect with Harris shortly thereafter, and apprised him of the situation. Claimant had since obtained a restraining order against the other employee in question. Claimant remained in contact with Harris about the situation, including forwarding him text messages from the other employee, until she was separated from employment. (Exhibit A). When claimant learned she was going to be discharged from employment, she requested to resign in lieu of termination, as she felt it would look better on her résumé. Claimant submitted her resignation in lieu of termination on May 29, 2017. (Exhibit 1).

The claimant filed a new claim for unemployment insurance benefits with an effective date of June 4, 2017. The claimant filed for and received a total of $464.00 in unemployment insurance

benefits for the weeks between June 4 and June 24, 2017. The employer did not participate in the telephone fact finding interview regarding the separation on June 28, 2017, but submitted claimant's resignation document to the fact-finder. The fact finder determined claimant qualified for benefits.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant did not quit but was discharged from employment for no disqualifying reason.

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 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).

Iowa Admin. Code r. 871-24.26(21) 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:
>
> (21) The claimant was compelled to resign when given the choice of resigning or being discharged. This shall not be considered a voluntary leaving.

Since claimant would not have been allowed to continue working had she not resigned, the separation was a discharge, the burden of proof falls to the employer, and the issue of misconduct is examined.

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." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). 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. 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, employer incurs potential liability for unemployment insurance benefits related to that separation.

The decision in this case rests, at least in part, on the credibility of the witnesses. It is the duty of the administrative law judge as 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 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. *Id.*. 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 believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id*.

Here, the employer contends that claimant was in a relationship with a subordinate employee in violation of its policies and that relationship put claimant, her coworkers, and the employer at risk. Claimant denied this allegation. After assessing the credibility of the witnesses who

testified during the hearing, reviewing the exhibits submitted by the parties, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the claimant's version of events to be more credible than the employer's recollection of those events. Claimant provided credible, first-hand testimony about the situation, while the employer replied entirely on second-hand reports and information.

The employer has not provided sufficient evidence to establish that claimant violated its fraternization policy. Claimant did admit she opened her apartment up to use by other employees and that this was a poor decision. 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. Without fair warning, such behavior cannot be considered misconduct. Claimant also provided credible testimony that she felt she was handling the situation with the employee in an appropriate manner at the time. Claimant's behavior, given the information she had at the time was reasonable. Inasmuch as the employer has not met the burden of proof to establish that claimant engaged in misconduct, benefits are allowed. As benefits are allowed, the issues of overpayment and participation are moot.

DECISION:

The June 30, 2017, (reference 02) decision is affirmed. Claimant did not quit but was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. The issues of overpayment and participation are moot.

_____
Nicole Merrill
Administrative Law Judge

_____
Decision Dated and Mailed

nm/rvs