IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

CRYSTAL K CONROY Claimant **MARK J RASMUSSEN** Employer	**APPEAL 17A-UI-04802-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 04/09/17** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the April 25, 2017, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on May 23, 2017. Claimant participated. Nicole Murphy and Shirley Rice appeared on behalf of claimant. Employer participated through attorney James Van Dyke and owner Mark Rasmussen.

Employer Exhibit 1 was admitted into evidence with no objection. Employer Exhibit 2 was offered into evidence. Claimant objected to the Employer Exhibit 2 because she had not received Employer Exhibit 2. Claimant's objection was sustained and Employer Exhibit 2 was not admitted into evidence. Employer Exhibit 3 was offered into evidence. Claimant objected to the Employer Exhibit 3 because she had not received Employer Exhibit 3. Employer Exhibit 3 was easily read into the record and claimant's objection was overruled. Employer Exhibit 3 was admitted into evidence over claimant's objection. Employer Exhibit 4 was offered into evidence. Claimant objected to the Employer Exhibit 4 because she had not received Employer Exhibit 4 and they are not relevant. Employer Exhibit 4 was easily read into the record and claimant's objection was overruled. Employer Exhibit 4 was admitted into evidence over claimant's objection. Employer Exhibit 5 was offered into evidence. Claimant objected to the Employer Exhibit 5 because she had not received Employer Exhibit 5. Employer Exhibit 5 was not easily read into the record and claimant's objection was sustained. Employer Exhibit 5 was not admitted into evidence. Employer Exhibit 6 was offered into evidence. Employer Exhibit 6 was a receipt from Pretty Nails. Claimant objected because she had not received Employer Exhibit 6 and it is not relevant regarding the reasons for her separation. Employer Exhibit 6 was easily read into the record and claimant's objection was overruled. Employer Exhibit 6 was admitted into evidence. Employer Exhibit 7 was offered into evidence. Claimant objected to the Employer Exhibit 7 because she had not received Employer Exhibit 7. Employer Exhibit 7 was not easily read into the record and claimant's objection was sustained. Employer Exhibit 7 was not admitted into the record. Employer Exhibit 8 was offered into evidence. Claimant objected to the Employer Exhibit 8 because she had not received Employer Exhibit 8. Employer Exhibit 8 was not easily read into the record and claimant's objection was sustained. Employer Exhibit 8 was not admitted into the record. Employer Exhibit 9 was offered into evidence. Claimant objected to the Employer Exhibit 9 because she had not received Employer Exhibit 9. Employer Exhibit 9 was not easily read into the record and claimant's objection was sustained. Employer

Exhibit 9 was not admitted into the record. Employer Exhibit 10 was offered into evidence. Claimant objected to the Employer Exhibit 10 because she had not received Employer Exhibit 10. Employer Exhibit 10 was not easily read into the record and claimant's objection was sustained. Employer Exhibit 10 was not admitted into the record. Employer Exhibit 11 was offered into evidence. Claimant objected to the Employer Exhibit 11 because she had not received Employer Exhibit 11. Employer Exhibit 11 was not easily read into the record and claimant's objection was sustained. Employer Exhibit 11 was not admitted into the record. Employer Exhibit 12 was offered into evidence. Claimant objected to the Employer Exhibit 12 because she had not received Employer Exhibit 12. Employer Exhibit 12 was not easily read into the record and claimant's objection was sustained. Employer Exhibit 12 was not admitted into the record. Employer Exhibit 13 was offered into evidence. Claimant objected to the Employer Exhibit 13 because she had not received Employer Exhibit 13. Employer Exhibit 13 was not easily read into the record and claimant's objection was sustained. Employer Exhibit 13 was not admitted into the record. Employer Exhibit 14 was offered into evidence. Claimant objected to the Employer Exhibit 14 because she had not received Employer Exhibit 14. Employer Exhibit 14 was not easily read into the record and claimant's objection was sustained. Employer Exhibit 14 was not admitted into the record. Employer Exhibit 15 was offered into evidence. Claimant objected to the Employer Exhibit 15 because she had not received Employer Exhibit 15. Employer Exhibit 15 was not easily read into the record and claimant's objection was sustained. Employer Exhibit 15 was not admitted into the record. Although Employer Exhibits 2, 5, 7, 8, 9, 10, 11, 12, 13, 14, and 15 were not admitted into evidence, the employer was allowed to present testimony and ask questions of the witnesses about the contents of the exhibits.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a bookkeeper from December 13, 2013, and was separated from employment on April 10, 2017, when she was discharged.

The employer has a notebook that claimant is supposed to record receipts for any money that comes into the office. Employer Exhibit 3. Prior to claimant's separation, the last receipt that was recorded in this notebook was for February 28, 2017. Employer Exhibit 3. The employer's bookkeeper was responsible for putting the receipts in the notebook. The employer uses the notebook to cross check when a client pays money to the employer. The notebook allows Mr. Rasmussen to look up payments if a client asks him about whether they have paid money. Claimant was aware of the procedure to record the receipts. The employer did not have any money documented in the notebook for the month of March 2017. Employer Exhibit 3. Mr. Rasmussen testified that the employer did receive money during March 2017, which should have been documented by claimant in the notebook. During the last several months of claimant's employment, Mr. Rasmussen reminded claimant about recording the receipts, but he did not give claimant a written warning. Claimant told Mr. Rasmussen that it was difficult and she was not getting it done.

During the last week of March 2017, Mr. Rasmussen testified that he discovered that a client's trust account balance showed $0.00. Mr. Rasmussen testified there should have been $1,400.00 showing in the trust account for this client. Mr. Rasmussen testified he had not taken the money out of the trust account. During the last week of March 2017, Mr. Rasmussen

confronted claimant about the client's trust account balance. Claimant testified that Mr. Rasmussen had previously told her the money had been transferred so she had recorded the transaction in the client's trust account. Claimant told Mr. Rasmussen she would look into the client's account. As an attorney, Mr. Rasmussen is required to keep and accurate accounting of funds in the trust account. The employer did not give claimant a written warning.

During the week of April 3, 2017 through April 7, 2017, claimant was scheduled to work. On April 3, 2017, Mr. Rasmussen was present at the office for a period of time in the morning, but left to go to court. Before Mr. Rasmussen left the office, claimant did not request any time off of work. Prior to Mr. Rasmussen returning to the office, claimant left him a note that she was going to be gone April 3, 4, and 5, 2017. Employer Exhibit 1. The note also indicated claimant may be gone on April 6 and 7, 2017. Employer Exhibit 1. Claimant was going to be absent because she was moving to a new residence. Employer Exhibit 1. The employer has a written policy that requires employees to contact Mr. Rasmussen prior to their absence to have the absence approved and they are to mark the absence on the calendar. Claimant did not get prior approval for her absences for the week of April 3, 2017. Mr. Rasmussen received claimant's note when he returned from lunch, but she had already left. Employer Exhibit 1. Claimant did not contact the employer on April 4 or 5, 2017. After Mr. Rasmussen received the note, he did not try to contact claimant until April 6, 2017.

On April 6, 2017, claimant did not contact Mr. Rasmussen. On April 6, 2017, Mr. Rasmussen attempted to contact claimant, but he had to leave her a voice message. In the morning on April 7, 2017, the employer's receptionist contacted claimant via text message about whether she was coming in. Claimant responded that she would be in to do payroll. Claimant was responsible for payroll. Later, Mr. Rasmussen spoke to claimant on the phone. Mr. Rasmussen asked claimant if she was coming in to due payroll because it was due that day. Claimant responded to Mr. Rasmussen that she was not coming in due to a family emergency and requested to do payroll over the phone. Mr. Rasmussen declined to allow claimant to do the payroll over the phone. Mr. Rasmussen testified that claimant had not previously done payroll over the phone. Mr. Rasmussen told claimant to come to the office at 7:30 a.m. on April 10, 2017. Mr. Rasmussen was able to process payroll for the receptionist.

Mr. Rasmussen also had concerns about the monthly posting of bills for clients in the clients' hardcopy files. During the week April 3, 2017, Mr. Rasmussen discovered that the monthly posting of bills for clients were not being put in their hardcopy files. Mr. Rasmussen had previously discussed this with claimant and explained that she needed to do this. Claimant told Mr. Rasmussen that she was too busy and did not have the time to get it done. Mr. Rasmussen explained the importance of getting this done, but he did not give claimant a written warning.

On April 10, 2017, Mr. Rasmussen met with claimant. Mr. Rasmussen requested claimant provide the password for the bookkeeping computer. During the week of April 3, 2017, Mr. Rasmussen discovered that he did not have the bookkeeping computer's password, so he did not have access to any of the records. Claimant had not written the password on the password sheet like she was supposed to. When Mr. Rasmussen discovered he did not have the password, he did not contact claimant and request the password. Mr. Rasmussen then asked claimant about the issue on the client's trust account they had previously discussed. Claimant asked if she was being let go and Mr. Rasmussen told her yes. Claimant then packed her things and left. Mr. Rasmussen did not get a chance to discuss the lack of receipts posted in the notebook for the month of March 2017 prior to claimant leaving. Mr. Rasmussen testified it was one of the items he was going to discuss with claimant on April 10, 2017. Mr. Rasmussen testified he was also going to discuss with claimant about not posting clients' bills in their hardcopy files on April 10, 2017, but he did not get a chance.

The employer also has a monthly account payable spreadsheet of who the employer owes money to. Claimant was responsible for preparing this spreadsheet. For several months prior to claimant's discharge, Mr. Rasmussen had concerns regarding the credit card accounts and the amount that claimant was reporting. On multiple occasions before claimant's discharge, Mr. Rasmussen asked her for hard copies of the credit card statements. Claimant did not provide Mr. Rasmussen the requested hard copy statements. Claimant testified that she would place any hardcopy statements the employer received in the vendor folders. Claimant also testified Mr. Rasmussen had the ability to review credit card statements online. Mr. Rasmussen testified claimant would give him excuses as to why she could not provide the information to him. Mr. Rasmussen did not discipline claimant for not providing the requested statements. After claimant was discharged, Mr. Rasmussen reviewed the credit card statements. Mr. Rasmussen testified he discovered that claimant had misrepresented what was actually owed to the credit card companies on the spreadsheets, but he did not discover it until after she was discharged. After claimant was discharged, Mr. Rasmussen also discovered multiple instances of the employer's credit card being used for personal items in 2015 and 2016 that he did not purchase, including items that were shipped to claimant's address and payment of her utilities. Mr. Rasmussen did not contact claimant about the issue. Mr. Rasmussen contacted law enforcement, the credit card company, and the businesses where the credit card was used. Mr. Rasmussen did not discover the personal items on the employer's credit card until after claimant was discharged. Claimant denied using the employer's credit card for personal use, unless she had prior approval (e.g., claimant testified Mr. Rasmussen approved her use of the employer's credit card to pay for her utilities). Claimant testified it was common for Mr. Rasmussen to purchase personal items on the employer's credit card.

Claimant had not been previously warned about not informing Mr. Rasmussen properly about her absences. Mr. Rasmussen has previously spoken to claimant about the duties of a bookkeeper and her requirements as a bookkeeper. Mr. Rasmussen would speak to claimant every couple of weeks about getting things caught up; however, the employer did not give claimant a written warning. In 2016, Mr. Rasmussen verbally told claimant her job was in jeopardy and if she could not get her job duties done she would have to quit or be discharged. Claimant testified she was performing her job to the best of her abilities and did not intentionally make mistakes. Mr. Rasmussen did not give claimant any written disciplinary warnings.

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.

Iowa Code section 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. 871-24.32(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.

Iowa Admin. Code r. 871-24.32(8) provides:

(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.

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). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990); however, "Balky and argumentative" conduct is not necessarily disqualifying. *City of Des Moines v. Picray*, (No. __-__, Iowa Ct. App. filed __, 1986).

First, it is noted that although Employer Exhibits 2, 5, 7, 8, 9, 10, 11, 12, 13, 14, and 15 were not admitted into evidence, the employer was allowed to present testimony about the exhibits and the majority of these exhibits were regarding the employer's credit cards and transactions that but were not discovered by the employer until after claimant's discharge. Testimony and evidence was also presented by the employer about unauthorized personal use of the employer's credit card and incorrect reporting on the employer's spreadsheet by claimant. Although the employer had concerns about the spreadsheets, it did not discover the incorrect reporting and the use of the employer's credit cards for personal use until after claimant was discharged. Therefore, because this information was not discovered by the employer until after claimant was discharged, this information did not factor into her discharge and is not relevant as a reason for discharge.

One of the final incidents that led to discharge was claimant failing to properly report her absences to Mr. Rasmussen during the week of April 3, 2017. Although claimant failed to verbally tell Mr. Rasmussen she would be absent before she left on April 3, 2017, she did provide Mr. Rasmussen a note regarding her absences before leaving. Furthermore, the employer had not previously warned claimant for not properly reporting her absences. Another incident that led to claimant's discharge was for not properly documenting the receipts for money in the appropriate notebook for the month of March 2017. Although the employer had previously discussed with claimant the importance of documenting the money as it came in, it did not warn her that her job was in jeopardy for not keeping the notebook up-to-date. Furthermore, claimant credibly testified she explained to Mr. Rasmussen she did not have time to keep the notebook updated because of her other duties. The final incident that resulted in claimant's discharge was because Mr. Rasmussen found claimant incorrectly reported that a client's trust account balance was at $0.00 even though Mr. Rasmussen testified he had not transferred the client's money to the trust account and had not instructed claimant that the money had been transferred. Mr. Rasmussen spoke to claimant about this issue during the last week of March 2017. Claimant testified that Mr. Rasmussen had previously told her the money had been transferred to the operating account. Claimant told Mr. Rasmussen she would look into the situation; however she was absent the majority of the next week and discharged when she returned to work, thus the employer did not give her an adequate opportunity to investigate this issue. Furthermore, the employer had not previously given claimant a written warning for similar conduct. Claimant testified she was doing the job to the best of her ability.

The conduct for which claimant was discharged were incidents of poor judgment. The employer did not give claimant any written disciplinary warnings during her employment. 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. The employer failed to meet its burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning.

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. While the employer may have been justified in discharging claimant, work-connected misconduct as defined by the unemployment insurance law has not been established in this case. Nothing in this decision should be interpreted as a condemnation of the employer's right to discharge claimant. The employer had a right to make business decisions as it determined were in its best interests. However, the analysis of unemployment insurance edibility does not end there. This ruling simply holds that the employer did not meet its burden of proof to establish claimant's conduct leading to separation was disqualifying job misconduct. Benefits are allowed.

DECISION:

The April 25, 2017, (reference 01) unemployment insurance decision is reversed. 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