IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

NANCI L HENNINGSEN Claimant **INNOVATIVE AG SERVICES CO** Employer	**APPEAL 20A-UI-09968-J1-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 06/07/20** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

On August 21, 2020, the claimant filed an appeal from the August 19, 2020, (reference 01) unemployment insurance decision that denied benefits based on job related misconduct. The parties were properly notified about the hearing. A telephone hearing was held on September 29, 2020. Claimant participated. Employer participated through Sandy Kelchen, HR Generalist, Rob Clark, Ellsworth Location Manager and John Conlon, West Regional Operations Manager. Exhibit A, consisting of 10 defend documents was admitted into the record.

ISSUE:

Did claimant commit misconduct in the course of her employment?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for employer on September 19, 2019. Claimant last worked as a full-time customer service employee. Claimant was separated from employment on June 11, 2020, when she was discharged due to an incident on April 13 or 14, 2020[1] where claimant signed a document on behalf of a customer to open an account.

Ms. Kelchen testified that the claimant submitted a credit application on behalf of a customer. The claimant faxed the application at 1:12 p.m. to the finance office. (Ex. A, p.1). Shelbi Nederhoff in the finance office noticed the Personal Guaranty section was not filled out and returned the form to claimant and requested that the form be completely filled out. The claimant filled out the bottom of the credit application that had the Personal Guaranty section and put in the customer's signature. That document was faxed back to Ms. Nederhoff at 1:39 p.m. The customer's name was misspelled, which was noticed by Ms. Nederhoff. At 4:17 p.m. a third credit application was submitted, with a different signature. Claimant testified that the customer signed this application.

[1] It is not entirely clear from the documents, but based upon the notation on the top of the three documents that were the Credit Applications it appears they were all completed on April 14, 2020. The Credit Application that claimant filled out the Personal Guaranty was dated April 13, 2020, but was most likely done on April 14, 2020.

According to a summary of the investigation prepared by Ms. Kelchen, Ms. Nederhoff called the customer who hung up on her. (Ex. A, 9/23/20 summary)

This incident was referred for additional investigation. Mr. Conlon testified that the employer wanted to investigate how claimant was performing her other work for other departments of the employer and was part of the reason the investigation took so long. Mr. Conlon did talk to various departments and noted various concerns that various staff provided to him about claimant's ability to perform her job, which was summarized in the Employee Progressive Documentation Form. (Ex. A) None of these items were brought to the attention of claimant's supervisor, Mr. Clark before her discharge. Mr. Clark and Mr. Conlon met with claimant on June 11, 2020 and asked her if she filled out and signed the credit application that had the customer's name misspelled. Claimant admitted she did and was discharged.

Claimant testified that a customer had purchased and already paid cash for 500 gallons of LP gas. Claimant testified that she submitted the first Credit Application (the unsigned one) so the customer could have an account. Claimant believed the customer needed an account in order for him to receive the gas he had already paid for. Claimant admitted she filled out and signed the credit application. Claimant testified she spoke to the customer who approved of her submitting the application. Claimant testified that the customer came in and signed the credit application that was submitted.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)a provides:

> 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:
>
> a. The disqualification shall continue 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.
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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.

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 job-related misconduct. *Cosper v. Iowa Dep't of Job Serv*., 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer made the correct decision in ending claimant's employment, 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 justifying termination of an employee and misconduct warranting denial of unemployment insurance benefits are two different things. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988).

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 is not 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).

Because our unemployment compensation law is designed to protect workers from financial hardships when they become unemployed through no fault of their own, we construe the provisions "liberally to carry out its humane and beneficial purpose." *Bridgestone/Firestone, Inc. v. Emp't Appeal Bd*., 570 N.W.2d 85, 96 (Iowa 1997). "[C]ode provisions which operate to work a forfeiture of benefits are strongly construed in favor of the claimant." *Diggs v. Emp't Appeal Bd*., 478 N.W.2d 432, 434 (Iowa Ct. App. 1991).

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.

Where an employer gives seven days' notice to the employee that it will consider discharging him, the date of that notice is used to measure whether the act complained of is current. *Greene v. Emp't Appeal Bd*., 426 N.W.2d 659 (Iowa Ct. App. 1988). An unpublished decision held informally that two calendar weeks or up to ten work days from the final incident to the discharge may be considered a current act. *Milligan v. Emp't Appeal Bd*., No. 10-2098 (Iowa Ct. App. filed June 15, 2011).

In *Milligan* the court held:

> We believe the purpose of this rule is to assure that an employer does not save up acts of misconduct and spring them on an employee when an independent desire to terminate arises. For example, an employer may not convert a lay off into a termination for misconduct by relying on past acts. We do not see any sign that Wells Fargo was motivated to save up acts of misconduct to terminate Milligan at a later date. There is nothing in the record to indicate Wells Fargo terminated Milligan for a reason other than her current misconduct.

> Our court addressed the distinction between a past act and a current act of misconduct in *Greene v. Employment Appeal Bd.,* 426 N.W.2d 659, 662 (Iowa Ct.App.1988). In deciding *Greene,* we considered the time between the employer's awareness of the misconduct and the employer's contact with the employee concerning the misconduct. *Greene,* 426 N.W.2d at 662. Our court concluded the date the employee was notified that his conduct provided grounds for dismissal was the proper date for determining if the act was past or current. *Id.* Therefore, when the employer notified the employee that his conduct provided grounds for dismissal two business days after learning of the misconduct, the termination was for current conduct, despite the fact that he was not terminated until seven business days after the employer learned of the misconduct. *Id.*
>
> Under the analysis in *Greene,* Milligan's termination was not based upon a past act. A Wells Fargo supervisor contacted Milligan regarding the misconduct on the next business day after learning of her actions, even sooner than in *Greene.* Although Wells Fargo may not have explicitly told Milligan her actions were grounds for dismissal, the gravity of the matter should have been evident to her from the two interviews Sheridan conducted. In addition, Milligan testified before the ALJ that she had access to the Wells Fargo employee handbook and was familiar with the company's code of ethics. Her familiarity with Wells Fargo policy should also have alerted her to the fact that her misconduct was grounds for dismissal. The circumstances in this case closely mirror those of *Greene,* supporting the view that Wells Fargo terminated Milligan for current acts.
>
> Although *Greene* did not address how long between employee notification and termination is too long, we believe ten business days is a reasonable amount of time, especially when the employer conducted a second interview with both employees under investigation. In addition, it is reasonable to allow a company time for its human resources department to assess the situation.

Milligan v. Employment Appeal Bd., 802 N.W.2d 238 (Tabel) (Iowa Ct. App. 2011).

In this case, the allegations were reported on April 14, 2020 and no one spoke to the claimant about the incidents until she was discharged on June 11, 2020. The claimant was allowed to continue working during that eight plus weeks prior to her discharge. Mr. Conlon testified that the employer wanted to review claimant's performance in other areas of her employment. The eight plus weeks to investigate in this case does not appear to be a reasonable length of time. I have not found any Iowa appellant court cases that held eight plus week's delay from incident to termination is a reasonable time. The employer did not establish that the claimant engaged in a current act of disqualifying misconduct.

DECISION:

Regular Unemployment Insurance Benefits Under State Law
The August 19, 2020, (reference 01) unemployment insurance decision is reversed. Benefits are payable, provided claimant is otherwise eligible.

James F. Elliott
Administrative Law Judge

October 1, 2020
Decision Dated and Mailed

je/sam