IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

LORI GRAFF Claimant **HY-VEE INC** Employer	**APPEAL 17A-UI-01263-JP** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 01/01/17** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the January 30, 2017, (reference 02) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. An in-person hearing was held at 1000 East Grand Avenue in Des Moines, Iowa on March 1, 2017. Claimant participated. Attorney Steven Lawyer participated on behalf of claimant. Human resources manager Julie Headley and dietitian Heather Illg testified on claimant's behalf. Employer participated through hearing representative Paul Jahnke, store director Joe Milnes, and retail dietetic supervisor Elisa Sloss.

On February 28, 2017, claimant filed a second motion to compel. On March 1, 2017, prior to the start of the hearing, claimant withdrew her motion to compel.

Employer Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12 were admitted into evidence, with no objection. Claimant Exhibits D, I, and J were admitted into evidence, with no objection. Claimant offered Exhibits E and H into evidence. The employer objected to the exhibits as they are irrelevant. The employer's objection was overruled and the Claimant Exhibits E and H were admitted into evidence. Claimant offered Exhibit B into evidence. Claimant Exhibit B was not allowed into evidence because the patient was not present or notified that the exhibit was being offered.

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 dietician starting in 2006, and was separated from employment on January 5, 2017, when she was discharged.

The employer has a written policy that requires dieticians, including claimant, to electronically chart patient information and interactions. Employer Exhibit 7. Claimant was aware of the requirement and had used the electronic charting system before.

On December 15 or 16, 2016, claimant had an appointment with a patient (hereinafter "the patient"). Claimant understood the purpose of the appointment was to create a menu plan for the patient. During the appointment, claimant attempted to create a menu for the patient, but the patient would inform clamant that the patient could not eat or did not like the food choices. The patient told claimant about her past medical history and occurrences and why she was upset. Claimant charted the patient's information on a paper form, not the electronic form. The paper form contained the same information as the electronic chart, just on paper. Claimant normally recorded the information on the paper form and then she would transfer the information to the electronic chart sometime after the appointment. Claimant testified that most dietitians do not chart immediately afterwards, but that it is normally done that day, but usually no later than one week. During the appointment, claimant recommended supplements to the patient. Claimant testified she does not tell patients they have to take a supplement. Dietitians are allowed to recommend supplements to patients. The patient was not receptive to taking the supplements. The patient also told claimant about the medicine she was taken. Claimant and the patient had a discussion about the patient's medication. The patient told claimant why the medication was prescribed. Claimant did not tell the patient to stop taking the medication. It would be potentially harmful to a patient for a dietitian to tell a patient to stop taking medication. Claimant has never told patients to stop taking medication. As a registered dietitian, claimant cannot prescribe medication to a patient. Claimant testified if she had a concern about the medication patients were taking, she would contact the physician. Claimant testified she explained how some of the medications worked, but did not advise the patient to stop taking medication. During the appointment, the patient told claimant she had a certain medical issue. Claimant did not know if there was a doctor's diagnosis for the patient's certain medical issue because the patient came in for menu planning. Claimant believed she was proceeding under the nutrition education tract and there would not be a physician's referral. Employer Exhibit 7. During the appointment, claimant failed to collect the patient's height, weight, and patient's home address, which is information that is entered on the electronic chart. Claimant testified she did not ask the patient to perform a "spit" test. A "spit" test is used to determine if there is a yeast problem and is normally done at the person's house. After the appointment ended, claimant did not immediately chart the patient's information electronically.

The next day, claimant went to electronically chart the patient's information and realized she did not have all of the patient's information (no height, weight, or home address). Claimant did not believe she could chart the patient electronically without this specific information. Claimant discussed the situation with a co-worker (another dietitian) and they determined that since she did not have the information that she would just use the paper file. Claimant did not contact the patient because she was fearful of the patient due to the patient's confrontation during the appointment. Claimant did consider telling the store director, but ultimately she decided not to tell the store director. Claimant did not attempt to electronically chart the patient without the information to see if it was possible. Claimant also did not consider contacting Ms. Sloss. Claimant did not believe it was as important to have an electronic chart for the patient because the patient's appointment was merely for education purposes; however the employer's policy still required an electronic chart. Employer Exhibit 7.

On December 23, 2016, the employer received a complaint from the patient about the appointment with claimant. Ms. Sloss contacted the patient and the patient told Ms. Sloss that the patient thought the patient got bad advice from claimant. The patient also told the patient's physician and the patient's physician was not happy. The patient had been prescribed medication from doctors and the patient told Ms. Sloss that during the appointment, claimant had told the patient to stop taking the medication and take supplements. Ms. Sloss reviewed the patient's chart.

On December 28, 2016, claimant met with Ms. Sloss regarding the patient's complaint. Ms. Sloss told claimant about the complaint and what the patient stated. Ms. Sloss asked claimant for her version of what happened during the appointment. Claimant told Ms. Sloss that she did not tell claimant to stop taking medication. Ms. Sloss told claimant she needed to electronically chart the patient. During the meeting, Ms. Sloss did not tell claimant that her job was in jeopardy or that it was a second offense. After the meeting, claimant electronically charted the patient. Claimant did not have the missing information when she electronically charted the patient.

After the meeting on December 28, 2016, claimant did perform her job duties for the employer. On January 3, 2017, claimant met with Ms. Headly and Mr. Milnes. Mr. Milnes told claimant she was under investigation and she was being placed on a paid suspension. The employer told claimant they would let her know as soon as they could. The employer did not ask claimant any questions. Claimant told the employer that she did not tell the patient to stop taking the medication.

On January 5, 2017 claimant met with the employer and it told her she was discharged. Employer Exhibit 12. The employer's written termination notice stated claimant was discharged for "charting and counseling". Employer Exhibit 12. The employer discharged claimant for telling the patient to stop taking medication, a "spit" test, and diagnosing the patient to take supplements.

Claimant had no prior disciplinary warnings from the employer. The argument that claimant was disciplined in 2013 for charting issues and using the LEAP program, is not persuasive. Claimant entered a settlement agreement with the Iowa Board of Dietetics around February 1, 2013 and successfully completed her probation on September 19, 2014; however, the employer did not discipline claimant for the incident(s) that resulted in the settlement agreement. Employer Exhibits 8, 9, and 10; Claimant Exhibit D. Prior to the settlement agreement, the employer was allowing its dietitians to utilize the LEAP program. Claimant Exhibits E and H.

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.

It is the duty of an administrative law judge and 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, as the finder of fact, 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. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). 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 evidence you believe; 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. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

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.

This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. This administrative law judge reviewed the exhibits submitted by both parties. This administrative law judge finds claimant's version of events to be more credible than the employer's recollection of those events.

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 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).

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).

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.

One of the reasons claimant was discharged was for not electronically charting the patient's information until Ms. Sloss told her to electronically chart the patient. It is clear, claimant knew she was supposed to electronically chart the patient, but she choose not to until she was told to; however, this was merely an isolated incident of poor judgment. Claimant had no prior disciplinary warnings from the employer. Claimant had not been disciplined by the employer for failing to electronically chart patients. Inasmuch as the employer had not previously warned claimant about the issue leading to the separation, it 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.

The employer also discharged claimant for allegedly having the patient perform a "spit" test and telling the patient to stop taking prescribed medication, which claimant denied. The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. *Crosser v. Iowa Department of Public Safety*, 240 N.W.2d 682 (Iowa 1976). The employer did not present any witness or witness statement from the patient regarding the patient's appointment with claimant on December 15 or 16, 2016. The employer presented testimony from witnesses that spoke to the patient regarding the appointment; however, these statements do not carry as much weight as live testimony because live testimony is under oath and the witness can be questioned. Claimant credibly testified that she did not have the patient do a "spit" test. Furthermore, claimant credibly testified she did not tell the patient and would not tell any patient to stop taking prescribed medication. The employer did not provide first-hand testimony at the hearing and, therefore, did not provide sufficient eye witness evidence of job-related misconduct to rebut the claimant's denial of said conduct.

The employer did not meet its burden of proof to show disqualifying job misconduct. Benefits are allowed.

DECISION:

The January 30, 2017, (reference 02) 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