IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

KAYLA A KERR Claimant **GOODWILL INDUSTRIES OF NE IA INC** Employer	**APPEAL 17A-UI-05094-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 04/16/17** **Claimant: Respondent (1)**

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 May 5, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on June 2, 2017. Claimant participated. Jill Kerr participated on claimant's behalf. Employer participated through hearing representative Thomas Kuiper, store manager Harrison Shelby, LPN Haley McElhose, and LPN Sherrye Sharar. Official notice was taken of the administrative record, including claimant's benefit payment history and wage history, with no objection.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can 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 part-time as a sales associate from November 16, 2011, and was separated from employment on April 15, 2017, when she was discharged.

Claimant was discharged for violation of Standard of Conduct. The employer has a written Standard of Conduct policy. Claimant was aware of the policy. The employer has a written drug and alcohol policy, which it provided to claimant. The policy provides for a uniform standard of action to be taken in case of a confirmed positive test or a refusal to submit to testing.

On April 7, 2017, claimant was randomly selected to take a random drug screen. Mr. Shelby notified claimant on April 7, 2017 that she had been randomly selected to take a drug screen. This was the first time claimant was randomly selected to perform a drug test. Claimant asked Mr. Shelby why she was chosen to take the test. Claimant also asked what random meant. Mr. Shelby explained to claimant what random meant and instructed her to go to the Arrowhead Medical Center for the drug screen. Claimant agreed to take the drug screen and went to the Arrowhead Medical Center.

Once claimant arrived at the Arrowhead Medical Center for the drug screen, she was directed to the drug screen area and the procedure was explained to her. Claimant was then directed to a private bathroom and informed she could not use the toilet. Claimant provided a small amount of urine, but it was not a sufficient amount for testing. Claimant was then given a glass of water and sent to the waiting room. Claimant was instructed that she could not leave the area until she provided a specimen. At 4:51 p.m., Ms. McElhose brought claimant back to the bathroom to provide a specimen in a second cup. Claimant again was unable to provide a sufficient amount to be tested. Claimant was then provided another glass of water and sent back to the waiting room. While claimant was in the waiting room, a front desk employee came to Ms. McElhose and stated that claimant was using inappropriate language. Claimant kept repeating she was going to "sh** her pants." Ms. McElhose then brought claimant back to the drug screen area. Claimant was upset that she had to wait to take the drug screen. Claimant kept saying she had a bone disease that was going to cause her to "sh** her pants." Ms. McElhose explained to claimant that she could use the toilet to defecate, but she had to put the urine in the specimen cup. Ms. McElhose also explained to claimant that the toilet would not flush. Claimant went into the bathroom and was encouraged to do the best she could. Claimant came back out and told Ms. McElhose that she was going to "sh** on the floor." Ms. McElhose then gave claimant another specimen cup and she went back into the bathroom. When claimant exited the bathroom, Ms. McElhose observed that claimant had defecated on the floor in the bathroom. Claimant then told Ms. McElhose she had to go again. Ms. McElhose let claimant use the bathroom, but when she exited the bathroom, Ms. McElhose observed that claimant had defecated on the floor again. Claimant kept stating "I told you I was going to sh** on the floor." Ms. Sharar cleaned up the defecation on the floor. Ms. Sharar testified claimant was irritated with the whole process. Claimant eventually provided a sufficient urine sample for the drug screen. Claimant was at the Arrowhead Medical Center for approximately two hours. Jill Kerr testified claimant is taking medication that causes her bathroom issues.

Claimant did not have any prior warnings for violating the employer's Standard of Conduct policy. Claimant did have prior warnings for absenteeism and work performance.

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.*
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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.

Claimant was discharged for violating the employer's Standard of Conduct policy when she defecated on the floor of the bathroom during a drug screen. Claimant was at the clinic for approximately two hours trying to provide a sufficient urine sample for her first drug screen. During this two hours, claimant repeatedly advised the staff at the clinic that she needed to have a bowel movement and although the staff sent her to the bathroom, the staff advised her that the toilet would not flush if she used it. It is understandable that claimant may have been confused about whether she could use the toilet in the bathroom since she was advised it would not flush. Although claimant defecated on the floor, she did not defecate in a public area as an act of disobedience, she defecated in the bathroom with the door closed.

"[T]he definition of misconduct requires more than a 'disregard' it requires a '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.'" *Greenwell v. E.A.B. and Professional Transportation, Inc.*, No. 15-0154 (Iowa Ct. App. filed March 23, 2016) (citing Iowa Admin. Code r. 871-24.32(1)(a)) (emphasis in original). "Reoccurring acts of negligence by an employee would probably be described by most employers as in disregard of their interests." *Id*. "The misconduct legal standard requires more than reoccurring acts of negligence in disregard of the employer's interests." *Id*. "[T]he acts [should constitute] an 'intentional and substantial' disregard of the employer's interests[.]"*Id*. The employer failed to show that on June 18, 2016, claimant's conduct was "an 'intentional and substantial' disregard of the employer's interests[.]" *Id*. Therefore, although Ms. Sharar testified claimant appeared irritated, no evidence was presented that claimant intentionally defecated on the floor to avoid taking the drug screen, in fact claimant provided a sufficient sample after defecating on the floor. Benefits are allowed.

Furthermore, the conduct for which claimant was discharged was merely an isolated incident of poor judgment and inasmuch as employer had not previously warned claimant about the issue leading to the separation (violating the Standard of Conduct policy), 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. A warning for absenteeism and work performance is not similar to claimant's conduct and a simple accrual of a certain number of warnings counting towards discharge does not establish repeated negligence or deliberation and is not dispositive of the issue of misconduct for the purpose of determining eligibility for unemployment insurance benefits. Benefits are allowed.

As benefits are allowed, the issues of overpayment, repayment, and the chargeability of the employer's account are moot.

DECISION:

The May 5, 2017, (reference 01) unemployment insurance decision is affirmed. 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