IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

SARAH A COCHRAN Claimant **BROADLAWNS MEDICAL CENTER** Employer	**APPEAL 17A-UI-08249-JCT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 07/23/17** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant appealed the initial decision dated August 8, 2017 (reference 01) that denied benefits based upon her separation with this employer. The claimant, through counsel, appealed the decision on August 14, 2017. A first notice of hearing was mailed to parties on August 17, 2017, for an August 31, 2017 hearing. The claimant submitted discovery requests on August 24, 2017. Both parties requested a postponement to the August 31, 2017 hearing and the request was granted. The hearing was rescheduled to September 27, 2017. On September 8, 2017, the employer requested an extension to respond to the claimant's discovery. The deadline to respond was extended to September 15, 2017. The claimant did not request a pre-hearing conference or file a motion to compel to address deficiencies to the employer responses.

A telephone hearing was held on September 27, 2017. The claimant participated personally and represented by Lori Bullock, attorney-at-law. (Beatriz Mate-Kodjo served as co-counsel.) The employer was represented by Stacie M. Codr, attorney at law. Julie Kilgore, vice president of human resources, testified for the employer.

Employer Exhibits A through D, and Claimant Exhibits 1 through 11 were received into evidence. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

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: The claimant was employed full-time as a service coordinator and was separated from employment on July 25, 2017, when she was discharged (Employer Exhibit A). The reasons cited to discharge were "on-going documentation and performance issues, and your falsification of time worked on July 18, 2017" (Employer Exhibit A). At the time of hire, the claimant was issued

employer rules and policies which included falsifying timecards being grounds for discharge (Employer Exhibit D).

On March 22, 2017, the claimant was issued a written warning (Employer Exhibit B/Claimant Exhibit 8) in response to an incident of unprofessional communications she had at the Central Iowa Shelter and Services, where she was assigned. As part of the warning for her conduct, several other unrelated concerns were outlined in the disciplinary notice, including a reminder to the claimant to follow the employer's cell phone policy that she must timely complete her documentation, and "your work schedule will be followed consistently; working 8:00 a.m.-4:30p.m. If you need to request time off during your work shift, you must contact your supervisory staff" (Employer Exhibit B/Claimant Exhibit 8).

The claimant was then issued a "special or follow up" performance evaluation on April 4, 2017 (Claimant Exhibit 7). The employer, through Julie Kilgore, then directed the claimant's management to revise the performance evaluation to further elaborate on the March 22, 2017 incident (Employer Exhibit C/ Claimant Exhibit 9). The result of the revised evaluation was a lower overall performance rating (Employer Exhibit C/ Claimant Exhibit 9). The claimant was also made aware that effective April 12, 2017, she was on a 90 day probationary period. She completed the 90 day period before discharge.

Following the March 22, 2017, warning and special performance evaluations in April 2017, the claimant followed up with the employer regarding time away from the office. The claimant provided examples including emails on March 27, 2017 (Claimant Exhibit 5), April 3, 2017, (Claimant Exhibit 6), and April 24, 2017 (Claimant Exhibit 4). Administrative Assistant, Lyndsey Canfield was included on some of these communications as she handled the timekeeping. The claimant was then advised by her managers, Mr. Martinez and Ms. Smoldt that she was "over-communicating" with them and as a result, the claimant primarily notified Ms. Canfield when changes were needed to her timekeeping records.

The employer allowed the claimant to take a 30 minute meal break and a 15 minute break during her shifts. The claimant often worked offsite, outside of the offices and was never told she had to remain on premises for breaks or meals. The claimant's managers, Gabe Martinez and Kae Smoldt, worked at a different location than the claimant. The claimant was also informed that to avoid overtime, and because sometimes she would have meetings on behalf of the employer clients outside of usual business hours, she could flex her time, meaning if she stayed an extra 30 minutes for one day, the next day she could work 30 minutes less to offset her time worked. This would mean she would also sometimes work outside of the usual expected hours of 8:00 a.m.-4:30 p.m. The employer did not furnish any written policies about breaks, timekeeping or flex time, for the hearing.

The final incident occurred on July 18, 2017. The claimant stated her time card reflects she clocked out for a meal break, and the employer disagreed. The time card was not submitted for the hearing. The evidence is disputed as to whether the claimant was absent for approximately 45 minutes or 90 minutes during her break period. The claimant stated she used her meal break plus extra break, consisting of 45 minutes, to go to a walk in clinic for a rash that was bothering her that day. The claimant stated she clocked out at 1:19 p.m. to 1:58 p.m. and that she emailed Lyndsey Canfield about her combining her lunch and break times. She also informed her co-worker, Travis Robinson, before she left of her plan to go to the walk in clinic, in case she ran late. The claimant stated she then informed Ms. Smoldt on July 19, 2017, that she had gone to the doctor and gone over her expected break time, and Ms. Smoldt responded it was "ok." On July 24, 2017, Ms. Smoldt contacted the claimant about her timesheet, and

questioned her about her entries. She reminded Ms. Smoldt of the July 18, 2017 doctor's appointment at that time, and there was no further discussion about the timecard submission.

On July 25, 2017, the claimant was discharged by Ms. Smoldt and Mr. Martinez, for reportedly falsifying her timecard on July 18, 2017. The employer further asserted the claimant did not follow the time off policy by failing to inform management of her doctor's appointment. The claimant asserted she took the appointment over her break time so she did not think she needed permission. Once she realized she exceeded the permissible time, she notified Lyndsey Canfield, who managed timekeeping and notified Ms. Smoldt the following day.

At the hearing, the claimant stated when the discharge was executed by her managers, Gabe Martinez and Kae Smoldt, and Dr. Kilgore and Mrs. Kilgore were not present. The claimant was also told by her managers that it was Mrs. and Dr. Kilgore who actually wanted to discharge the claimant. Ms. Kilgore asserted it was Mr. Martinez and Ms. Smoldt who wanted to discharge the claimant and she supported it based upon reviewing the claimant's history, and that Dr. Kilgore, also participated in the decision. Prior to discharge, the claimant had made a complaint about Dr. Kilgore's treatment of her to her immediate manager, Gabe Martinez. If the claimant had gone directly to human resources to file a complaint about Dr. Kilgore, it would have been to his wife, Julie Kilgore, who is the vice president of human resources.

For the hearing, only Ms. Kilgore attended on behalf of the employer. Absent from the hearing were either of the claimant's supervisors, Gabe Martinez and Kae Smoldt. Neither administrator, Lyndsey Canfield, nor Dr. Earl Kilgore, attended the hearing, even though Ms. Smoldt, Mr. Martinez and Dr. Kilgore reportedly participated in the decision to discharge the claimant (Claimant Exhibit 1) and Ms. Canfield was responsible for timekeeping records. No statements were offered in lieu of their participation.

REASONINGS AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason

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:
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> 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).

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. 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). 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. IDJS*, 364 N.W.2d 262 (Iowa 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. IDJS*, 425 N.W.2d 679 (Iowa App. 1988).
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*. Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

The credible evidence presented supports the claimant was placed on a disciplinary warning and subsequent performance reviews on March 22, 2017 and April 2017. She was put on notice her job was in jeopardy at that time. While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. 871 IAC 24.32(8).

In this case, the claimant was discharged after purportedly falsifying her timecard on July 18, 2017, when she attended a doctor's appointment. The credible evidence presented does not

support the employer's assertion that she violated the employer's reasonable policy, which prohibits falsification of timecards (Employer Exhibit D), but rather, the claimant went over her lunch break to a walk in clinic to tend to a rash, ran beyond her scheduled lunch, informed the administrator, who handles timekeeping. She notified her manager, Kae Smoldt, who works offsite, the following day of her extended lunch. At that time, Ms. Smoldt responded with "ok". The claimant further testified she clocked out for the time she was absent. No timecards were furnished by the employer to corroborate its assertion the claimant falsified her timecard.

It is true that the claimant could have alerted her manager that she intended to use her lunch to visit the clinic, just in case. However, the claimant could not have reasonably anticipated she would be a few minutes late from the clinic, and the administrative law judge is not persuaded the claimant violated a policy by leaving the premises for lunch or not telling her manager she intended to use her lunch time for a personal appointment. Therefore, the administrative law judge does not conclude the claimant tried to conceal her extended absence or violated the employer's policies and expectations regarding requesting time off.

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 Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). The focus is on deliberate, intentional, or culpable acts by the employee. See *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992). If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. *Crosser v. Iowa Dept. of Public Safety*, 240 N.W.2d 682 (Iowa 1976).

The people with any direct knowledge of the situation, other than claimant, were Mr. Martinez, Ms. Smoldt, and Ms. Canfield. None of these individuals participated in the hearing to refute the claimant's credible testimony. No request to continue the hearing was made to allow for their participation, and no written statements of those individuals were offered. Given the serious nature of the proceeding and the employer's allegations resulting in claimant's discharge from employment, the employer's nearly complete reliance on hearsay statements is unsettling. Nor did the employer submit a copy of its policies regarding breaks or flex times, or even the timecard the claimant reportedly falsified. In comparison, the claimant provided detailed, specific first-hand testimony about conversations with her managers, at the time of disciplinary meetings, conversations directing her not to "over-communicate" and regarding her contact with the employer on July 18 and 19, 2017 about her extended lunch. Mindful of the ruling in *Crosser*, *id.,* and noting that the claimant presented direct, first-hand testimony while the employer relied upon second-hand reports, the administrative law judge concludes that the claimant's recollection of the events is more credible than that of the employer. For these reasons, the administrative law judge concludes the claimant did not falsify her timecard on July 18, 2017, and no final act of misconduct has been established. Benefits are allowed.

Nothing in this decision should be interpreted as a condemnation of the employer's right to terminate the claimant. The employer had a right to follow its policies and procedures. The analysis of unemployment insurance eligibility, however, does not end there. This ruling simply holds that the employer did not meet its burden of proof to establish the claimant's conduct leading separation was misconduct under Iowa law.

The parties are reminded that under Iowa Code § 96.6-4, a finding of fact or law, judgment, conclusion, or final order made in an unemployment insurance proceeding is binding only on the parties in this proceeding and is not binding in any other agency or judicial proceeding. This

provision makes clear that unemployment findings and conclusions are only binding on unemployment issues, and have no effect otherwise.

DECISION:

The August 8, 2017, (reference 01) decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. The benefits claimed and withheld shall be paid, provided she is otherwise eligible.

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Jennifer L. Beckman
Administrative Law Judge

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Decision Dated and Mailed

jlb/scn