IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

JANET F DANEHY Claimant **ALL SEASONS CLEANING MANAGEMENT** Employer	**APPEAL 18A-UI-00785-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 12/10/17** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the January 8, 2018, (reference 01) unemployment insurance decision that denied benefits. The parties were notified about the hearing. A telephone hearing was held on February 20, 2018. Claimant participated. Britny Button testified on claimant's behalf. Employer participated through manager Michele Hotz. Employer Exhibit 1 was admitted into evidence with no objection. Claimant Exhibit A was admitted into evidence with no objection. Official notice was taken of the administrative record with no objection.

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 janitor from April 10, 2017, and was separated from employment on December 7, 2017, when she was discharged.

On December 7, 2017, claimant exchanged multiple text messages with Cheyenne Dwyer (claimant's direct supervisor) before her shift. Ms. Dwyer started the conversation with a text message to claimant stating: "Please make sure the warehouse at Mediacom is getting once a week and checking for garbage. Laura said it hasn't been done for awhile." Employer Exhibit 1 and Claimant Exhibit A. Claimant responded that she had been performing the cleaning. Employer Exhibit 1 and Claimant Exhibit A. After some text messages back and forth, claimant sent a message to Ms. Dwyer stating: "Look im tired of u nick picking at me i know how to do my job u didnt ask me nothin u told me totally different[.]" Employer Exhibit 1 and Claimant Exhibit A. Ms. Dwyer responded that it is her job to correct claimant. Employer Exhibit 1 and Claimant Exhibit A. After a couple more text messages, claimant sent Ms. Dwyer a text message stating: "It is work im done talking to u so do not text me back[.]" Claimant Exhibit A. Ms. Dwyer responded to claimant that she will print out the rules for claimant and there will be a checklist at the jobsite. Employer Exhibit 1 and Claimant Exhibit A. Claimant responded: "No go" and "Ur checklist is bulls**t like said no go u can meet me at mediacom[.]" Employer Exhibit 1 and Claimant Exhibit A. Ms. Dwyer responded: "Okay." Claimant Exhibit A. Ms.

Dwyer then sent a text message to claimant stating: “Please just bring all your keys and shirts.” Claimant Exhibit A. As a janitor for the employer, claimant needed her keys and shirts to perform her job duties. Claimant understood Ms. Dwyer was discharging her. Claimant responded that she did not quit and if Ms. Dwyer wanted her keys, Ms. Dwyer can come get them. Claimant Exhibit A. Ms. Dwyer responded “Fine, where would you like me to pick them up at?” Claimant Exhibit A. Ms. Dwyer and claimant then agreed to meet at a gas station (Neighborhood Mart) so claimant could drop off her keys. Claimant Exhibit A. Claimant then met Ms. Dwyer at the gas station and gave Ms. Dwyer her keys. Claimant denied Ms. Dwyer gave her a written warning on December 7, 2017. Claimant denied seeing a written warning on December 7, 2017. Claimant denied refusing to sign a written warning on December 7, 2017. Ms. Dwyer is still employed with the employer, but did not testify at the hearing.

On July 19, 2017, the employer gave claimant a written warning for not cleaning properly. Employer Exhibit 1. Claimant was warned that further incidents would result in a second warning. Employer Exhibit 1.

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 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).

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 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.*
>
> *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.

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 had the power to present testimony from Ms. Dwyer, but chose to provide her written notes instead. Written notes do not carry as much weight as live testimony because the testimony is under oath and the witness can be questioned. It is noted that the employer and claimant both provided text messages that were exchanged between claimant and Ms. Dwyer; however, the employer did not provide certain text messages that occurred during this exchange. *See* Employer Exhibit 1 and Claimant Exhibit A. It is also noted that Ms. Hotz initially testified that claimant's discharge took place at the Mediacom location; however, after claimant's testimony and Claimant Exhibit A was admitted into evidence, Ms. Hotz agreed with claimant that the discharge did not occur at the Mediacom location. Furthermore, claimant presented substantial and credible evidence that she did not ever meet with Ms. Dwyer at the Mediacom location on December 7, 2017. Claimant presented substantial and credible evidence that Ms. Dwyer discharged her via text message on December 7, 2017 and they met at a gas station so claimant could drop off her keys. Claimant presented direct, first-hand testimony that she was never presented with a second warning and she did not refuse to sign a second warning. Claimant had never been warned for insubordination prior to her discharge. 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, 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. "Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification." Iowa Admin. Code r. 871-24.32(4). "If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established." Iowa Admin. Code r. 871-24.32(4). The employer did not meet its burden of proof to show misconduct. Accordingly, benefits are allowed.

DECISION:

The January 8, 2018, (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