IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

MARY A STRICKLER Claimant **MAIN STREET MONTESSORI AND MIDDLE** Employer	**APPEAL 18A-UI-05485-NM-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 04/08/18** **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 4, 2018, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified of the hearing. A telephone hearing was held on June 27, 2018. The claimant participated through her attorney Kate Strickler and via written statement. The employer participated through attorney Chandler Surrency and witness Tanya Apana. Alayne Patterson was also present on behalf of the employer as an observer and did not testify. Employer's Exhibits A through J and claimant's Exhibits 1 through 10 were received into evidence. Official notice was taken of the administrative record.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

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

Can any 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 full time as a lower elementary/upper elementary teacher from August 1, 2014, until this employment ended on March 23, 2018, when she was discharged.

Prior to March 2, 2018, claimant's immediate supervisor was an employee named Christine Ihrig. Ihrig resigned effective March 2, 2018 and Apana became claimant's immediate supervisor. At the time of Ihrig's separation Apana met with employees and advised them that any issues or tasks that had previously gone to Ihrig would now come to her.

On March 20, 2018, Apana received an inquiry from a parent of one of claimant's students. The parent reported claimant had told the students Ihrig would be substituting for the class while she was at an appointment of March 20. This was the first Apana had heard of claimant's appointment. Apana testified normal procedure is to tell a supervisor if you are going to be gone and need a substitute. Apana told the parent this was not accurate and went to go speak to claimant, whom she believed to be working at the school's before-care program.

When Apana arrived she found claimant was not working, but had arranged for the after-care teacher to cover her shift so she could go to her appointment. Apana then called claimant. She asked claimant if Ihrig was substituting for her that day and claimant said she was. Apana told claimant that was not acceptable as Ihrig was no longer an employee on payroll. She also reminded claimant that she was to be notified of any absences or the need for a substitute. Claimant then asked if they could "skip the lecture" because she was at her appointment. Apana could not say for certain whether claimant had previously reported and had her absence approved by Ihrig, nor was she sure whether it was written on the calendar. The Board had previously been investigating claimant for unrelated allegations of misconduct and, after hearing of the March 20 incident, determined it would discharge claimant from employment based on that incident. Claimant had no prior warnings or disciplinary action for incidents similar in nature to the March 20 incident.

The claimant filed a new claim for unemployment insurance benefits with an effective date of April 8, 2018. The claimant filed for and received a total of $816.00 in unemployment insurance benefits for the weeks between April 29 and June 2, 2018. Both the employer and the claimant participated in a fact finding interview regarding the separation on May 3, 2018. The fact finder determined claimant qualified for benefits.

REASONING AND CONCLUSIONS OF LAW:

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

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.

871 IAC 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 Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

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). 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).

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 after she arranged for a substitute that was no longer on the employer's payroll and failed to notify Apana of her absence. The conduct for which claimant was discharged was merely an isolated incident of poor judgment. A claimant will not be disqualified if the employer shows only "inadvertencies or ordinary negligence in isolated instances." 871 IAC 24.32(1)(a). The employer's policies require employees to notify an immediate supervisor if they are going to be absent and will need a substitute. The employer could not say whether claimant notified Ihrig of her appointment while she was still her supervisor.

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. While claimant's decision to use Ihrig as her substitute, even after she resigned employment, shows a lack of judgement, without prior warning, it is not in and of itself disqualifying misconduct. 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. As benefits are allowed, the issues of overpayment and participation are moot.

DECISION:

The May 4, 2018, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid. The issues of overpayment and participation are moot.

_____
Nicole Merrill
Administrative Law Judge

_____
Decision Dated and Mailed

nm/rvs