

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**ALEXANDRA L MILLER**  
Claimant

**S & S TIRES AND ASSOCIATES LLC**  
Employer

**APPEAL 17A-UI-10240-NM-T**  
**ADMINISTRATIVE LAW JUDGE**  
**DECISION**

**OC: 09/10/17**  
**Claimant: Respondent (1)**

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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 September 26, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified of the hearing. A telephone hearing was held on October 23, 2017. The claimant participated and testified. The employer participated through Hearing Representative Steven Zaks and witness Gailen Minne. Official notice was taken of the fact-finding documents.

**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 sales person from July 3, 2017, until this employment ended on September 5, 2017, when she was discharged.

On August 31, 2017, claimant had a meeting with Minne, the general manager, to discuss her sales. During this meeting claimant was issued disciplinary action based on dropping sales and specific sales goals were outlined. Claimant was told by Minne that if she did not reach her goals within a two-week period, she would be discharged from employment. Claimant then returned to work. Claimant testified, shortly after her meeting with Minne, she asked her immediate supervisor if she could go home because she was experiencing a migraine headache. Her supervisor advised her to call Minne and ask him, which she did. Claimant testified Minne said it was fine for her to go home, so she left around 10:00 a.m. Minne testified

claimant could have called to ask him if she could go home, but that he would have referred her back to her immediate supervisor.

According to Minne claimant was next scheduled to work September 1, 2017, but did not show up for her shift. Minne testified claimant's immediate supervisor attempted to contact her but did not get a response. Minne further testified claimant was a no-call/no-show for her scheduled shifts on September 4 and 5, 2017. According to Minne claimant's immediate supervisor called her on each of these days to see where she was and got no response. Claimant testified she was never scheduled to work September 1 and did not receive any calls from anyone with the employer asking where she was that day. Claimant further testified, and Minne then agreed, she was not scheduled to work on September 4, as the employer was closed for the Labor Day holiday. Finally, claimant testified, and Minne then agreed, she was called on September 5 and notified of her discharge from employment by Minne prior to the start of her shift. According to claimant, when Minne called to inform her of her discharge, he told her it was because she did not sign the written disciplinary action she was issued on August 31, which she testified he had told her she was not required to do at the time it was issued.

The claimant filed a new claim for unemployment insurance benefits with an effective date of September 10, 2017. The claimant filed for and received a total of \$1,635.00 in unemployment insurance benefits for the weeks between September 10 and October 14, 2017. The employer did not participate in a fact finding interview regarding the separation on September 25, 2017. 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.

The decision in this case rests, at least in part, on the credibility of the witnesses. 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.*

After assessing the credibility of the witnesses who testified during the hearing, reviewing the exhibits submitted by the parties, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the claimant's version of events to be more credible than the employer's recollection of those events. Minne's testimony was uncertain and, at times, contradictory. For example, Minne initially testified that claimant was a no-call/no-show on September 4 and 5, 2017 and that her supervisors called to see where she was each of those days without response. Minne later conceded that the employer was closed on September 4 for Labor Day and that he discharged claimant from employment prior to the start of her shift on September 5. Claimant's testimony, on the other hand, was confident and consistent throughout the hearing.

Claimant provided credible testimony that she was discharged for failing to sign a written disciplinary action. While refusing to sign a written reprimand can be considered misconduct, claimant provided credible testimony that Minne specifically told her she was not required to sign the document. 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. 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. Accordingly, benefits are allowed. As benefits are allowed, the issues of overpayment and participation are moot.

**DECISION:**

The September 26, 2017, (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. As benefits are allowed, the issues of overpayment and participation are moot.

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Nicole Merrill  
Administrative Law Judge

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Decision Dated and Mailed

nm/rvs