IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

JENNIFER L CARPENTER Claimant **HY-VEE INC** Employer	**APPEAL 18A-UI-01465-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 12/17/17** **Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Admin. Code r. 871-24.32(9) – Suspension or Disciplinary Layoff

STATEMENT OF THE CASE:

The claimant filed an appeal from the January 22, 2018, (reference 02) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on February 23, 2018. Claimant participated. Employer participated through hearing representative Barbara Buss, store director Brett Shellman, and store director Kelly Kayser. Claimant Exhibit A was admitted into evidence with no objection. Official notice was taken of the administrative record with no objection.

ISSUE:

Was the separation a layoff, discharge for misconduct, or voluntary quit without good cause?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant is employed part-time as a pharmacist (floater). Claimant started with the employer on October 22, 2014. December 12, 2017, is the last day claimant has performed work for the employer. Claimant and the employer still consider claimant to be employed at the employer. Claimant Exhibit A. As a floater, claimant would pick up available hours at different store locations. The market scheduler would post hours that were available at various stores and then claimant would respond regarding the hours she was available. The market scheduler would then assign claimant based on her availability and the various stores' needs.

On December 12, 2017, claimant had been scheduled hours at various store locations through January 7, 2018. Claimant Exhibit A. On December 12, 2017, the employer sent claimant an e-mail informing her that she was no longer going to be scheduled in the Des Moines area. Claimant Exhibit A. The employer informed claimant there was three reasons she was no longer going to be scheduled in the Des Moines area. Claimant Exhibit A. December 12, 2017 was the first time claimant became aware there were any issues with her employment. The employer then removed claimant from the hours she was already scheduled. The employer informed claimant she should contact store director Brett Shellman about her next steps.

Claimant Exhibit A. Claimant never received a written warning and did not have any discussion with the employer about the issues in Ms. Kopriva's December 12, 2017 e-mail. Claimant admitted in a written statement dated January 12, 2018 that she has "been a couple minutes late from time to time," but she was never disciplined for her tardiness. Claimant Exhibit A. Claimant denied knowledge of the medical errors. Claimant Exhibit A. Claimant also denied being "rude to the customers[.]" Claimant Exhibit A. At 10:08 a.m., on December 12, 2017, claimant e-mailed the employer, including store director Brett Shellman, requesting a meeting to discuss these three issues. Claimant Exhibit A. At 10:41 a.m., on December 12, 2017, claimant e-mailed Mr. Shellman, "Do you have time for a phone call this afternoon at all?" Claimant Exhibit A. Claimant did not receive a response to either e-mail from Mr. Shellman. On December 13, 2017, claimant contacted the Indianola store director regarding the customer complaints at that location. Claimant Exhibit A. Claimant did not receive a response from the Indianola store director. On December 19, 2017, claimant contacted the Indianola pharmacy manager regarding the customer complaints at this location. Claimant Exhibit A. Claimant did not receive a response from the Indianola pharmacy manager. The employer did not give claimant a written warning for any of the reasons listed in its December 12, 2017 e-mail. Claimant does not have any documented discipline during her employment with the employer.

After December 12, 2017, claimant has requested hours from the employer, including hours that were posted as available. Claimant Exhibit A. After December 12, 2017, claimant has tried to pick up hours outside of the Des Moines area when there have been postings of hours, but the employer has not given her any of these hours. Claimant Exhibit A. After December 12, 2017, the employer has not given claimant any hours, but maintains she is still and employee. Claimant Exhibit A.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was suspended from employment for no disqualifying reason. Benefits are allowed.

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:
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> 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(9) provides:

> **(9)** *Suspension or disciplinary layoff.* Whenever a claim is filed and the reason for the claimant's unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as discharged, and the issue of misconduct must be resolved. Alleged misconduct or dishonesty without corroboration is not sufficient to result in disqualification. This rule is intended to implement Iowa Code section 96.5 and Supreme Court of Iowa decision, *Sheryl A. Cosper vs. Iowa Department of Job Service and Blue Cross of Iowa*.

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.

Although the parties describe claimant as still an employee and eligible for work, after December 12, 2017, the employer removed claimant from the schedule and despite her requests, it has failed to provide her any further hours. Essentially the employer has placed claimant on a disciplinary suspension.

On December 12, 2017, the employer informed claimant she was being removed from the schedule and could no longer work in the Des Moines area because of certain allegations. Although claimant may have been late on occasion, she denied the other allegations. Claimant had no disciplinary warnings prior to December 12, 2017 and the employer did not discuss these allegations with her despite her requests to discuss the allegations. *See* Claimant Exhibit A. 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. It is also noted that in the employer's December 12, 2017 e-mail, it specifically encouraged claimant to contact Mr. Shellman, but when she immediately contacted Mr. Shellman, she never received a response.

An employer may remove/suspend an employee for any number of reasons or no reason at all, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, employer incurs potential liability for unemployment insurance benefits related to that separation. Inasmuch the employer did not provide first-hand testimony regarding claimant's alleged misconduct at the hearing, it did not provide sufficient eye witness evidence of job-related misconduct to rebut claimant's denial of said conduct. "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. Benefits are allowed.

DECISION:

The January 22, 2018, (reference 02) unemployment insurance decision is reversed. Claimant was suspended from employment without establishment of misconduct. 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