IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

ELLSBETH M TOWNSEND Claimant **HIGBEE WEST MAIN LP** Employer	**APPEAL 16R-UI-09321-SC-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 06/05/16** **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:

Higbee West Main, LP (employer) filed an appeal from the June 22, 2016, (reference 01) unemployment insurance decision that allowed benefits based upon the determination it failed to provide sufficient evidence to show it discharged Ellsbeth M. Townsend (claimant) for disqualifying misconduct. The parties were properly notified about the hearing. A telephone hearing was held on September 19, 2016. The claimant participated personally and was represented by John Graupmann. The employer participated through Assistant Manager Ralph Buelow. Claimant's Exhibit A was received. Employer's Exhibit 1 was received.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid unemployment insurance benefits?

Can the repayment of those benefits to the agency be waived?

Can 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: The claimant was employed full-time as a Cosmetic Sales Specialist beginning on June 26, 2015, and was separated from employment on June 6, 2016, when she was discharged. The claimant began her employment working at a cosmetic counter and two weeks before the end of her employment she began working at the fragrance counter. There had been ongoing tension between the nine cosmetic and fragrance employees regarding their sales territories and commissions. The employer has work rules, specifically work rule nine that requires employees treat co-workers with respect. The claimant reported directly to Area Sales Manager Julia Kalin.

On June 4, 2016, Kalin informed the claimant that additional appointments needed to be scheduled for a promotion in cosmetics. The claimant asked if she would be allowed to be the consultant for any of the appointments she scheduled. Kalin told her that she would and the claimant questioned if this would create problems. Kalin assured her it would not as the appointments were not being scheduled and other employees were being asked to pick up the slack. The claimant repeated the conversation she had with Kalin to cosmetic associates Krissy Griffin and Jackie. Griffin became upset and reported to management that the claimant had told her she was not adequately performing her job. Kalin and Store Manager Bridget Miller spoke to both employees about the incident. The claimant denied Griffin's accusations and became upset about the situation. Griffin stated she no longer felt comfortable working with the claimant. During one of the conversations, Kalin and the claimant each used a minor amount of profanity which was commonly used in that department. The claimant was sent home from work that day and Kalin apologized to her for taking the incident to upper management.

On June 5, 2016, the claimant reported to work and worked her normal shift. On June 6, 2016, Miller told the claimant she had spoken with other employees and determined the claimant was no longer happy with her employment; therefore, the employer was no longer happy with the claimant as an employee. She also documented in the termination paperwork that the claimant was disrespectful to her co-worker and supervisor. The claimant had not previously received any warnings for similar conduct.

The administrative record reflects that claimant has received unemployment benefits in the amount of $4,368.00, since filing a claim with an effective date of June 5, 2016, for the 15 weeks ending September 17, 2016. The administrative record also establishes that the employer participated in the fact-finding interview.

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.

Iowa law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id*. Iowa regulations define misconduct:

> "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.

Iowa Admin. Code r. 871-24.32(1)a. 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 regulations also require that the employer and the claimant provide detailed facts as to the specific reason for the discharge. Iowa Admin. Code r. 871-24.32(4). It further states, "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." *Id.*

When the record is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. *Schmitz v. Iowa Dep't Human Servs.*, 461 N.W.2d 603, 607 (Iowa Ct. App. 1990). Both the quality and the quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See, Iowa Code § 17A.14 (1). In making the evaluation, the fact-finder should conduct a common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be fulfilled. *Schmitz*, 461 N.W.2d at 608. The Iowa Supreme Court has ruled that if a party has the power to produce more explicit and direct evidence than it chooses to present, the administrative law judge may infer that evidence not presented would reveal deficiencies in the party's case. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976).

The decision in this case rests, at least in part, upon the credibility of the parties. The employer did not present a witness with direct knowledge of the incident on June 4, 2016 or anyone involved in the decision to end the claimant's employment. The employer did not make a request to continue the hearing. 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.

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 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." 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 employer has not established that the claimant was rude to a co-worker or in violation of any of its policies. However, there is sufficient information to determine that the claimant engaged in conduct which caused an issue among the employees in her department when she repeated the conversation Kalin had with her regarding the job performance of other employees. The claimant's conduct was merely an isolated incident of poor judgment and inasmuch as the employer had not previously warned the claimant about the issue leading to the separation, it

has not met the burden of proof to establish that the 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. Accordingly, benefits are allowed.

As benefits are allowed, the issues of overpayment, repayment, and the chargeability of the employer's account are moot.

DECISION:

The June 22, 2016, (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. The issues of overpayment, repayment, and the chargeability of the employer's account are moot.

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Stephanie R. Callahan
Administrative Law Judge

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Decision Dated and Mailed

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