IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

SUSAN M NOREN Claimant **KDH HOME HEALTH INC** Employer	**APPEAL 16A-UI-06821-DB-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 05/15/16** **Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant/appellant filed an appeal from the June 8, 2016, (reference 01) unemployment insurance decision that denied benefits based upon her discharge from employment for failure to follow instructions in the performance of her job. The parties were properly notified of the hearing. A telephone hearing was held on July 14, 2016. The claimant, Susan M. Noren, participated personally. The employer, KDH Home Health Inc., participated through Owner Karen Huber.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Did claimant voluntarily quit the employment with good cause attributable to employer?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as an Office Manager of the employer's Benton County branch. She was employed from August 21, 2013 until her employment ended on May 11, 2016. Claimant's job duties included managing the Benton County branch. This employer provides non-medical in-home care to the elderly population. Claimant was in charge of starting the new branch. This included hiring workers to provide in-home care, training the workers, monitoring the workers and supervising client relations. Claimant was also responsible for recruiting new clients, marketing the company, and advertising the business to the local community through local networking. Ms. Huber was claimant's immediate supervisor.

When claimant first began running the store claimant started with zero employees and zero clients. Claimant eventually drew in business and hired and trained several employees. Ms. Huber was pleased with claimant's job performance at the beginning of her employment. However, for the past year prior to the claimant's discharge Ms. Huber did not see that the branch was growing business and the branch was not profitable.

Ms. Huber discussed this with claimant and the other office worker on March 7, 2016 and March 30, 2016. Ms. Huber noted that claimant needed to focus on marketing the branch in order to increase clients and profitability. Ms. Huber asked claimant to meet with a woman named Lisa at the corporate office in order to discuss a marketing plan. Claimant did not reach out to Lisa because she was busy with other tasks. Lisa reached out to claimant on one occasion via email and claimant responded a few days later that she was very busy with other tasks and would let her know when she could meet. No future dates were proposed. Claimant sent another email to Lisa again explaining to her she was busy with other tasks and could not meet regarding the marketing plan. Claimant believed that the meeting would be extensive and wanted time to prepare for the meeting ahead of time. No meeting was scheduled between March 7, 2016 and claimant's discharge in May of 2016.

Another point of contention between claimant and Ms. Huber involved the claimant joining a community group for purposes of marketing the business. Ms. Huber had asked claimant to join the Vinton Lions Club or Vinton Kiwanis Club. These clubs had members of the community that Ms. Huber believed she could network with in order to market the branch. The meetings were over the lunch hour on a weekly basis.

Claimant did join the Garrison Lions Club in October of 2015 and advised Ms. Huber of this. Claimant discussed with Ms. Huber that she was uncomfortable joining the Vinton Lions Club and Vinton Kiwanis Club because she was uncomfortable around the type of people that were in those clubs. Mainly claimant argued that many of the members were professionals and well educated and she was more comfortable with the Garrison Lions Club because it consisted mostly of farmers or others who worked in agriculture. Claimant grew up on a farm and was comfortable with persons who worked in agriculture.

During the course of claimant's employment she did not receive any written discipline. Ms. Huber contends that the meetings on March 7, 2016 and March 30, 2016 were verbal discipline against claimant, however, the other office co-worker attended those meetings and they were simply discussions on how to increase the branch revenues and profits.

There was no deadline given to claimant as to when she needed to schedule a meeting with Lisa in order to discuss a marketing plan. There was no deadline given to her or written requirement that should she fail to join the Vinton Lions Club or Vinton Kiwanis Club that her job was in jeopardy or that she would be subject to discharge. Claimant worked on marketing between March of 2016 and her discharge on May 11, 2016 by visiting with local hospitals, medical clinics, and making arrangements for two separate public speaking events for the company.

Claimant was discharged on May 11, 2016 for failing to meet with Lisa regarding the marketing plan and failing to join a Vinton community club for purposes of marketing the company.

REASONING AND CONCLUSIONS OF LAW:

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

As a preliminary matter, I find that the Claimant did not quit. Claimant was discharged from employment.

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).

871 IAC 24.32(4) provides:

> (4) Report required. The claimant's statement and the 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.

871 IAC 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.

Further, 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). Further, 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). There was no evidence presented that any of the omissions claimant was discharged for were intentional or were caused by claimant's carelessness which indicated a wrongful intent. It was suggested that claimant join the Vinton Lions Club or Vinton Kiwanis Club but she did not feel comfortable doing so. Ms. Huber never told claimant that her job was in jeopardy if she failed to do this. Further, this omission is not substantial.

Claimant had not been able to schedule a meeting with Lisa to discuss a marketing plan because she was busy with other tasks. There was no evidence that claimant willfully or wantonly disregarded the employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of her, or that she acted with carelessness or negligence of such degree of recurrence as to manifest equal culpability. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000). There is no evidence that the claimant's actions had any wrongful intent against the employer's interests. Further, this omission is not substantial.

Reoccurring acts of negligence by an employee would probably be described by most employers as in disregard of their interests. *Greenwell v Emp't Appeal Bd.*, No. 15-0154 (Iowa Ct. App. March 23, 2016). The misconduct legal standard requires more than reoccurring acts of negligence in disregard of the employer's interests. *Id*.

Further, a claimant's poor work performance does not disqualify her from receiving benefits. Failure in job performance due to inability or incapacity is not considered misconduct because the actions were not volitional. *Huntoon,* 275 N.W.2d at 448 (Iowa 1979). Where an individual is discharged due to a failure in job performance, proof of that individual's ability to do the job is required to justify disqualification, rather than accepting the employer's subjective view. To do so is to impermissibly shift the burden of proof to the claimant. *Kelly v. Iowa Dep't of Job Serv.*, 386 N.W.2d 552 (Iowa Ct. App. 1986). While claimant did more marketing at the beginning of her employment this is rational considering she did not have any clients or workers at this time. Her time at work would not be consumed with training and monitoring workers and client interactions. As she gained more business over the course of the years it is natural that her job duties would focus on maintenance of existing clients and workers rather than focusing on new business.

The employer carries the burden of proof in a discharge from employment. The employer had not previously warned claimant about its specific expectations and that her conduct was unacceptable. The March meetings to discuss marketing and options to increase revenue were

not verbal disciplinary actions taken against claimant. While claimant did not join a Vinton community club and did not immediately set a meeting to visit with Lisa she might even infer employer acquiescence after multiple days elapsed without warning or counseling regarding these issues.

An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct prior to discharge. 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.

The employer failed to meet its burden of proof in establishing disqualifying job-related misconduct. As such, benefits are allowed.

DECISION:

The June 8, 2016, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. The benefits claimed and withheld shall be paid, provided she is otherwise eligible.

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Dawn Boucher
Administrative Law Judge

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Decision Dated and Mailed

db/pjs