IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

BEVERLY A MURPHY Claimant **THE PLANNERS TAX & ACCOUNTING INC** Employer	**APPEAL 17A-UI-00021-DB-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 12/04/16** **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 December 23, 2016 (reference 01) unemployment insurance decision that disallowed benefits based upon her being discharged from employment. The parties were properly notified of the hearing. A telephone hearing was held on January 23, 2017. The claimant participated personally and through witnesses Robyn Murphy and Kody Cockrum. The employer was represented by attorney Patrick White and participated through witnesses Richard Siron and Chris Blong. Claimant's Exhibits 1 – 6 were admitted. Employer's Exhibits A – G were admitted.

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 a store manager from July 5, 1979 until her employment ended on November 30, 2016 when she was discharged from employment. This employer operates a retail store. Claimant's job duties included supervision of employees, scheduling employees to work, making deposits to the bank, and other day to day activities of operating the retail store. Claimant's direct supervisor was Mr. Siron.

Claimant's daughter, Robyn Murphy, worked at the store as an assistant manager. Claimant's grandson, Kody Cockrum, worked at the store as a truck driver. On September 2, 2016 Mr. Siron changed the company policy regarding employee shopping. See Exhibit B. This policy was intended to override any previous policies. Copies of the policy were distributed to all employees.

On September 21, 2016 Mr. Cockrum wanted to purchase a table and chairs that was for sale in the store. Both Mr. Siron and Mr. Blong believed that Mr. Cockrum did not pay for the table and chairs. There was no receipt found for this transaction on September 21, 2016. Mr. Cockrum

testified that he had paid for the table and chairs prior to loading it into the vehicle. On October 24, 2016 claimant decided to pay for the table and chairs. See Exhibit A. Claimant testified she was paying for the table and chairs again because the receipt showing when Mr. Cockrum paid for the table and chairs had been lost. See Exhibit A.

On October 17, 2016 Mr. Cockrum sorted through tools that had been donated to the store. He was interested in purchasing the tools so he requested that claimant price the tools for him. Claimant priced the tools for Mr. Cockrum. Mr. Cockrum then paid for the tools at Sandra Beerbower's cash register. See Exhibit 1. Mr. Blong reported to Mr. Siron that Mr. Cockrum had loaded the tools into his vehicle prior to purchasing them. Mr. Siron believed that this was a violation of the employee shopping policy which was established on September 2, 2016 because Mr. Blong reported that the tools were loaded into the vehicle prior to payment being received. Mr. Cockrum testified that he paid for the tools prior to loading them into the vehicle.

Mr. Siron and claimant met on October 25, 2016 to discuss these incidents. Claimant was given verbal discipline for not enforcing the employee shopping policy and for failing to discipline Mr. Cockrum for his actions regarding the tools and table. During this meeting it came to Mr. Siron's attention that Mr. Cockrum was receiving cash for transporting scrap metal to the recycler. Mr. Cockrum reported that the previous manager had approved for him to use the company truck to transport the scrap metal to the recycler. When Mr. Cockrum returned to the store he would turn in the paper check from the scrap metal recycler to the cashier on duty and would receive the same amount in cash back. This was the process that Mr. Cockrum had followed since he first began working at this employer since 2011 and the same process the previous truck drivers had followed. The truck drivers received these payments because they were working off the clock when they performed these tasks. Mr. Siron stated during the meeting that this practice was inappropriate and needed to stop. No further issues regarding the scrap metal occurred after this meeting. No further incidents of alleged misconduct by the claimant occurred after her verbal warning on October 25, 2016.

On November 4, 2016 Mr. Siron received Board approval to discharge claimant from employment. Mr. Siron decided that November 30, 2016 would be a good date for discharge because that would allow him time to put a management structure in place so that the store could continue operating and would allow the store to operate through the Thanksgiving holiday. Prior to her discharge the claimant had received the October 25, 2016 verbal warning and one written warning for poor store performance approximately fifteen years prior to her discharge.

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 § 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.

Iowa Admin. Code r. 871-24.32(1)a provides:

> Discharge for misconduct.
>
> (1) Definition.
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> 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.

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). 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 must be a current act of misconduct to disqualify the claimant from receiving benefits. In this case, there was none. After claimant's verbal reprimand on October 25, 2016 regarding the employee shopping policy and scrap metal policy, there were no further alleged incidents of misconduct.

Iowa Admin. Code r. 871-24.32(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.

Inasmuch as the employer had warned claimant about the final incident on October 25, 2016 and there were no incidents of alleged misconduct thereafter, it has not met the burden of proof to establish that claimant acted deliberately or negligently after the most recent warning. The employer has not established a current or final act of misconduct. The employer cannot on one hand argue that the conduct was so egregious that it warranted discharge instead of a lesser penalty, but then allow the claimant to continue working for over a month before determining she should be discharged.

The employer cannot bank an incident of alleged misconduct and hold it against an individual until it no longer desires continuing employment. An employer who sits with the knowledge of an act of misconduct and allows the individual continuing employment for an unreasonable period of time does not terminate for a current act. Without a current act, the employer failed to meet its burden of proof of establishing disqualifying job misconduct. As such, benefits are allowed.

DECISION:

The December 23, 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. Any benefits claimed and withheld on this basis shall be paid.

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Dawn Boucher
Administrative Law Judge

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Decision Dated and Mailed

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