IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

BARBARA A BELL Claimant **U DRIVE ACCEPTANCE CORPORATION** Employer	**APPEAL 18A-UI-07388-H2T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 06/03/18** **Claimant: Respondent (1)**

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

STATEMENT OF THE CASE:

The employer filed an appeal from the June 26, 2018, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on July 26, 2018. Claimant participated. Employer participated through (representative) Brian Berkenpas, Owner and Myrna Reynoso, Title Clerk.

ISSUE:

Was the claimant discharged for job-connected misconduct or did she voluntarily quit her employment without good cause attributable to the employer?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as the office manager beginning in 2005 through May 4, 2018, when she was discharged.

Until January 2018, the claimant worked in the dealership location where both the safe and the other employees worked, including Neil, Steve, Patty and Myrna. In January of 2018, the claimant was moved to the business office where she would not have any day-to-day contact with the other employees. As the claimant was no longer physically at the dealership, a "runner" was hired to help her. The runner, Brenda, was to go to the dealership every day, take the cash from the safe and take it downtown to the claimant's new office location. Brenda had the code or combination to the safe. Brenda would also go to the post office and the bank to make deposits. Brenda's husband Steve was employed at the dealership as the lot attendant. Prior to the claimant being moved out of the dealership, Steve never accessed the safe with or without permission.

Other than one or two months in January and February 2018, the claimant did not reconcile the monthly credit card statements for employee's corporate cards, that was done by another employee in the office. Claimant had not reconciled employee credit card statements in more than five years, other than the two month in January/February 2018.

Mr. Berkenpas gave Steve permission to use his company credit card to buy cigarettes on occasion from the local gas station. Steve would pay for the cigarettes by giving the money to the claimant when she was at the dealership or to his wife Brenda after the claimant was moved out of the dealership. Brenda would then give the money to claimant to put back into the company account. The claimant knew that Mr. Berkenpas had given Steve permission to use his company credit card account for personal items on occasion. At no time did Mr. Berkenpas tell the claimant that he had rescinded Steve's permission to use his corporate credit card for cigarettes or personal items.

Patty and Myrna were coworkers in the dealership. They would visit the gas station where Steve would gas up the dealership automobiles and purchase cigarettes on the company credit card. Employees of the gas station reported to both Patty and Myrna that Steve was buying lottery tickets and cigarettes on the company credit card. Neither Patty nor Myrna ever told claimant what the gas station employees had told them. Neil was the sales manager at the dealership and was the person in charge of day to day operations. Myrna told Neil what the gas station employees had told her about Steve. Neil never told Mr. Berkenpas or claimant what he was told by Patty and Myrna.

In February 2018, Neil was arrested and charged with operating a vehicle while under the influence of alcohol (DUI). Neil called the dealership where Patty was working and asked her to come and bail him out of jail. Patty called Myrna to come into work so she could go bail Neil out of jail. Myrna was alone in the dealership and called the claimant at the office to tell her that Neil had been arrested and Patty had gone to bail him out. At that time Myrna did not know why Neil was arrested so she could not have told the claimant that he was charged with DUI.

Patty arrived back at the dealership after lunchtime. Myrna learned that when Patty had tried to bail out Neil she too was arrested as there was an outstanding warrant out for her arrest. Steve made arrangements to go get the dealership car out of the impound lot. Neil never told the owner Mr. Berkenpas or the claimant that he had been arrested for DUI while driving a company vehicle or that he had lost his driver's license. Neil continued to drive a company owned car. The claimant never knew why Neil had been arrested and did not ask him as she was not his manager, nor did she work in the same location as he did.

Sometime in mid-April Steve brought Myrna an envelope with $242.50 cash in it and told her that he had taken the money from the safe the day or night before and he was repaying the money. Myrna never told the claimant that had occurred but she did tell her manager Neil what had happened. Neil told Myrna he would take care of it. Neil never told the claimant or Mr. Berkenpas that Steve had taken money from the safe. At that time, it was clear Steve had to have accessed the safe using the combination or code that his wife Brenda had. At no time did any employee tell the claimant that had occurred. Since claimant was not working in the same location, there would have been no way for her to know unless she was told. Brenda, whose husband 'borrowed' the money, never told the claimant what had happened.

On Friday, May 4, Brenda told the claimant that she thought Steve had her code or combination to the safe. At no time did Brenda tell the claimant that Steve had previously used her code or combination to get into the safe, nor did she tell the claimant that she thought Steve was going to break into the safe that weekend. On Saturday night, Steve broke into the safe and took four thousand dollars out of the safe that he promptly took to a local casino and gambled away. The claimant had no idea that Steve had accessed the safe on Saturday and had no idea that he had done so previously. Steve went to Mr. Berkenpas' home on Saturday and confessed that he had taken the four thousand dollars out of the safe and gambled it away. Steve also told Mr. Berkenpas at that time that Neil had been arrested for drunk driving back in February and

had continued to drive cars owned by the dealership despite the fact that he had no driver's license. Steve then told Mr. Berkenpas that he had told the claimant about the fact that Neil had been arrested and charged with DUI.

Sunday night, Mr. Berkenpas called the claimant and immediately assumed she was covering up for Neil and Steve. The claimant did not know Steve had stolen the money, nor did she know that Neil had been arrested for drunk driving. The claimant told Mr. Berkenpas she had no idea Neil had been charged with driving a dealer owned car while drunk. She denied that Steve had ever told her that Neil was charged with drunk driving. The claimant believed Mr. Berkenpas was taking Steve's version of events over hers, (this is the same Steve who just confessed to stealing four thousand dollars out of the safe) and she asked Mr. Berkenpas if he wanted her keys. When Mr. Berkenpas told her he wanted the claimant to turn in her keys, she reasonably assumed she was discharged. Claimant had no intention of quitting and only turned in her keys when the owner told her he wanted them back. At no time during the conversation did Mr. Berkenpas tell the claimant he wanted to discuss all of this with her in the morning, he simply told her he wanted her keys.

No one ever accessed the safe when the claimant worked at the dealership location. No other employee has been accused of using their corporate credit card for personal items. Neil, the sales manager, knew what Steve was doing and did not report it to Mr. Berkenpas. Nor did Neil ever report to Mr. Berkenpas that he had been arrested and charged with DUI while driving company owned vehicle.

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, 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:
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> 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.
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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).

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 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. IDJS*, 364 N.W.2d 262 (Iowa 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. IDJS*, 425 N.W.2d 679 (Iowa 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." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Employment Appeal Board*, 423 N.W.2d 211 (Iowa App. 1988).

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 Ct. 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. *State v. Holtz*, 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. *State v. Holtz*, Id.

The testimony of the claimant is more credible than that of the employer. The claimant was a twelve year employee with a spotless disciplinary history. No one accessed the safe when she was physically working at the dealership, including Steve, the admitted thief. There is no allegation that any theft occurred before the claimant was moved from the dealership location to the business office in January 2018. Neither Brenda, Myrna, Patty nor Neil ever told the claimant that Steve had taken cash from the safe two weeks prior to his four thousand dollar theft. Had claimant been provided with that information, when Brenda told her on Friday that she thought Steve had her code to access the safe she could have acted quickly to change the code. The claimant was isolated in her new work location and any information she could have picked up when she was physically in the dealership was no longer available to her.

Myrna admits she did not tell claimant that Steve was arrested for DUI when she first called her because she did not know. Myrna waited until Patty had left before she even called the claimant because she did not want Neil to know she was reporting what was occuring. It is not believable that Myrna would have called the claimant after both Patty and Neil returned to tell claimant in front of her manager that Neil had been arrested for DUI and that Patty had been arrested too for an outstanding warrant. The claimant was never told why Neil was arrested.

Neil had the obligation to report his actions to Mr. Berkenpas. The administrative law judge finds the claimant credible when she stated that if she had known she would have reported it to Mr. Berkenpas immediately. The evidence does not establish any reason at all for the claimant to cover up for Steve's theft or Neil's drunk driving. The claimant simply did not know so was not able to report it.

The claimant was understandably upset that Mr. Berkenpas was taking the word of Steve, an admitted thief over her and specifically asked Mr. Berkenpas if he wanted her keys. It is clear that the claimant thought Mr. Berkenpas was going to discharge her when he told her he wanted her keys. Had the claimant wanted to quit, she would have simply told Mr. Berkenpas she was quitting. Her inquiry was reasonable in that she was inquiring if he wanted her to turn in her keys because she was being fired. The claimant was discharged, she did not quit.

The claimant did not reconcile the monthly employee credit card accounts so there was no way for her to know if Steve was charging inordinate amounts to his card. Also none of the employees who learned from the gas station what Steve was doing, ever told the claimant so she could act on that information or provide it to Mr. Berkenpas.

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, employer incurs potential liability for unemployment insurance benefits related to that separation. The employer has failed to establish deliberate misconduct on the part of the claimant. The claimant did not cover up any theft by Steve. She did not know Steve was stealing from the safe or using his company credit card inappropriately. She did not cover up Neil's drunk driving. She did not know why Neil was arrested. As she was not Neil's manager, there was no reason for her to ask Neil about the arrest. The claimant had no reason to cover up the misconduct of others. The employer has failed to establish misconduct on the part of the claimant. The claimant's separation was not disqualifying for purposes of unemployment insurance benefits. Benefits are allowed.

DECISION:

The June 26, 2018, (reference 01) decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

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Teresa K. Hillary
Administrative Law Judge

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Decision Dated and Mailed

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