IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

SACO DOLIC Claimant **LUTHER CARE SERVICES** Employer	**APPEAL 17A-UI-06371-NM-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 05/21/17** **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:

The employer filed an appeal from the June 12, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified of the hearing. A telephone hearing began on July 10 and was concluded on July 17, 2017. The claimant participated and was represented by attorney Tom Berg. The employer participated through Hearing Representative Diana Perry-Lehr and witnesses Connie Connolly, Kristen Anderson, and Jenny Furnia-Reyes. Employers Exhibits 1 through 7 were received into evidence.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can any 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: Claimant was employed full time as an assistant dietary manager from April 20, 2016, until this employment ended on May 23, 2017, when she was discharged.

Claimant requested, and was granted, leave for an extended vacation out of the country beginning April 26, 2017. The leave request included 21 hours of personal time, eight days of vacation, and the remainder was unpaid time off. According to claimant she requested to be off through May 20, 2017. Reyes testified claimant only requested off through May 18. The leave request form signed by claimant does not list the specific dates she was requesting off, but Reyes later added a post-it note with the dates of April 26 through May 18. (Exhibit 4). Reyes testified claimant should have known her time off request was only approved through May 18,

because on April 24, prior to claimant leaving, she gave her a copy of the May schedule, which showed her working on May 19 and 20. According to Reyes another employee was also present for this exchange. Claimant denied she ever received a copy of the May schedule. The employer did not include a copy of the schedule with its exhibits.

Reyes testified she expected the claimant to show up for work on May 19, 20, and 21, but she did not show up or call in for any of these shifts. According to Reyes, the next time she heard from claimant was on May 21. Reyes testified she could not remember exactly when claimant called, but that she thought it was after 11:00 a.m. and before her 12:00 p.m. shift. When the two spoke, claimant informed Reyes she had just gotten back from her trip and denied she was aware she was supposed to work the two days prior. Claimant stated she had requested time off through May 20. Reyes explained claimant had told her she was returning on May 18 which is why she had expected her to work on May 19 and 20. Reyes had already found a replacement for claimant's shift on May 21 prior to the phone call and testified she assumed if claimant had just gotten back into town she would not be able to work that day. The conversation became heated and Reyes told claimant they would talk about it on Monday. She also mentioned it might be helpful if claimant could provide her travel itinerary.

Claimant testified, on May 21, 2017, she attempted to call the facility to see when she was scheduled to work next. Claimant did a google search for the facility telephone number and tried calling five times between 12:00 and 12:20 p.m., but the phone would just ring. Reyes testified during the hearing that the telephone number provided in claimant's internet search was actually an incorrect number. Claimant eventually was able to call and connect with someone at the nurses' station, who transferred her to the kitchen. One of the kitchen workers informed claimant she had been scheduled to work the two days prior and that the employer had considered her a no-call/no-show those two days. Claimant attempted to call Reyes twice but did not get an answer. Claimant then called another employee who informed her that Reyes had changed her telephone number and provided her with the new number. Claimant testified she was eventually able to connect with Reyes at 1:16 p.m., per her telephone records. Claimant confirmed much of the conversation as reported by Reyes, but denied she was unavailable to work on May 21. According to the claimant Reyes told her not to come in until Monday, but she would have been able to work the remainder of her shift on May 21 if needed. Claimant further testified she was unable to produce her travel itinerary because she disposed of all her travel documents once she was done with them.

When claimant met with the employer she was subsequently discharged for her absences on May 19 through 21. The employer testified this decision was reached because their policies provide for termination after one no-call/no-show. (Exhibit 3). Claimant had no prior warnings for attendance related-issues.

The claimant filed a new claim for unemployment insurance benefits with an effective date of May 21, 2017. The claimant filed for and received a total of $3,336.00 in unemployment insurance benefits for the weeks between May 21 and July 15, 2017. Both the employer and the claimant participated in a fact finding interview regarding the separation on June 9, 2017. The fact finder determined claimant qualified for benefits.

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:
>
> 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.
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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 Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

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). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

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. 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 decision in this case rests, at least in part, on the credibility of the witnesses. 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 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. *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. *Id*.

After assessing the credibility of the witnesses who testified during the hearing, reviewing the exhibits submitted by the parties, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the claimant's version of events to be more credible than the employer's recollection of those events. The employer contends that claimant was given a copy of the schedule prior to leaving and that another employee witnessed this event. However, neither the schedule nor the other witness were made available for the hearing. 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). It is permissible to infer that the records were not submitted because they would not have been supportive of employer's position. See, *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976). Furthermore, claimant's recollection of the events of May 21, was clearer, more detailed, and more consistent that Reyes' version of those same events.

The conduct for which claimant was discharged appears to be based on a misunderstanding or miscommunication between claimant and her employer. Claimant reasonably believed that she had requested and been approved for time off work from April 26 through May 20, 2017. Reyes believed claimant was returning to work on May 18 and would be available for work on May 19. Such a misunderstanding could have been resolved by having the employee write the dates of the leave on the leave request, but that was not done here. This failure was not due to any failing or misconduct on behalf of the claimant. It is the employer's burden to show claimant knew she was expected to return to work on May 19 and it has failed to meet this burden.

Furthermore, 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. Inasmuch as employer had not previously warned claimant about the issue leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. Benefits are allowed. As benefits are allowed, the issues of overpayment and participation are moot.

DECISION:

The June 12, 2017, (reference 01) unemployment insurance decision is affirmed. 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. The issues of overpayment and participation are moot.

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Nicole Merrill
Administrative Law Judge

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Decision Dated and Mailed

nm/rvs