IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

SADIE J FAH Claimant **NEIGHBORHOOD CENTERS OF JOHNSON** Employer	**APPEAL 17A-UI-10378-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 08/27/17** **Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.6(2) – Timeliness of Appeal

STATEMENT OF THE CASE:

The claimant filed an appeal from the September 22, 2017, (reference 01) unemployment insurance decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call on October 30, 2017. Claimant participated. Employer participated through associate director Diane Dingbaum. Angie Hackenmiller appeared on the employer's behalf. Official notice was taken of the administrative record, including claimant's wage history, with no objection.

ISSUE:

Is the appeal timely?

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: An ineligibility unemployment insurance decision was mailed to claimant's last known address of record on September 22, 2017. Claimant received the decision on October 11, 2017, after the appeal period had expired. Claimant did not receive the decision until October 11, 2017, because a neighbor had initially received the decision and did not get it to claimant until October 11, 2017. The decision contained a warning that an appeal must be postmarked or received by the Appeals Bureau by October 2, 2017. The appeal was not filed until October 12, 2017, which is after the date noticed on the unemployment insurance decision.

Claimant was employed part-time as a before and after school youth counselor from February 17, 2016, and was separated from employment on September 1, 2017, when she was discharged. The employer has licensing protocols regarding where children can be at and the proper child to adult ratio that is to be maintained. For kindergartners, the proper ratio is one adult to fifteen children. The employer is licensed by the Department of Human Services and if the employer is found to be out of compliance, they could lose their license. Claimant was aware of the employer's licensing protocols. The employer requires its employees to follow the employer's guidelines. If an employee violates its guidelines, they are subject to a progressive disciplinary policy. Claimant was aware of the policies.

On August 31, 2017, during claimant's schedule shift, she was supervising a group of kindergarteners as they were washing their hands prior to going outside. Claimant was in charge of the kindergartners on August 31, 2017. There were only six or seven kindergartners claimant was supervising on August 31, 2017. After the kindergartners finished washing their hands, they are to line up in the hallway. While the kindergartners were washing their hands, claimant told her direct supervisor (Marissa) to watch the kindergartners so she could go get her backpack and walkie-talkie. Marissa told claimant ok. Claimant then went and got her backpack and walkie-talkie; however, Marissa did not watch the kindergartners while claimant was gone. Sydney Mason went into the hallway and found some of the kindergartners in the hallway unattended. When claimant returned to the hallway, she discovered Marissa was not watching the kindergartners, but Ms. Mason was watching the kindergartners. Ms. Mason told claimant that the kindergartners could not be in the hallway by themselves. If the kindergartners are in the hallway, there is supposed to be an adult supervising them. Claimant told Ms. Mason that she told Marissa to watch the kids. Claimant denied telling Ms. Mason it was fine. Ms. Mason e-mailed Ms. Dingbaum regarding some issues the employer was having with claimant. Ms. Dingbaum spoke with Ms. Mason about claimant.

On September 1, 2017, the employer called claimant in early for a meeting. During the meeting, Ms. Dingbaum told claimant she was discharged. Ms. Dingbaum told claimant she failed to follow the employer's licensing protocols.

Claimant did not have any prior written warnings. Claimant denied receiving a verbal warning a week prior to August 31, 2017. Claimant denied leaving kindergarteners alone a week prior to August 31, 2017. Ms. Dingbaum testified that approximately a week prior to August 30, 2017, claimant was instructed by the employer not to leave kindergarteners alone in the hallway, but the employer did not advise claimant it was a verbal warning.

REASONING AND CONCLUSIONS OF LAW:

The first issue to be considered in this appeal is whether the appellant's appeal is timely. The administrative law judge determines it is.

Iowa Code section 96.6(2) provides:

> 2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of section 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to section 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving section 96.5, subsections 10 and 11, and has the burden of proving that a voluntary quit pursuant to section 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 1, paragraphs "a" through "h". Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision. If an administrative law

> judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The appellant did not have an opportunity to appeal the unemployment insurance decision because she did not receive the decision in a timely fashion. The unemployment insurance decision was delivered to claimant's neighbor and her neighbor did not get the unemployment insurance decision to her until October 11, 2017, which was after the appeal deadline had expired. Without timely notice of a disqualification, no meaningful opportunity for appeal exists. See *Smith v. Iowa Emp't Sec. Comm'n*, 212 N.W.2d 471, 472 (Iowa 1973). The appellant filed her appeal the day after she received the unemployment insurance decision from her neighbor. Therefore, the appeal shall be accepted as timely.

The next issue is whether claimant was discharged for disqualifying job-related misconduct. The administrative law judge concludes claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

It is the duty of an administrative law judge and 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, as the finder of fact, 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. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). 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 evidence you believe; whether a witness has made inconsistent statements; the witness's 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*, 548 N.W.2d 162, 163 (Iowa App. 1996).

This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. This administrative law judge finds claimant's version of events to be more credible than the employer's recollection of those events.

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.

> 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). 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).

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 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). If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. *Crosser v. Iowa Department of Public Safety*, 240 N.W.2d 682 (Iowa 1976). The employer had the power to present testimony or a written statement from Ms. Mason, but the employer instead choose to rely on Ms. Dingbaum's testimony about what Ms. Mason told her. Ms. Dingbaum's testimony as to what Ms. Mason told her does not carry as much weight as live testimony from Ms. Mason because live testimony is under oath and the witness can be questioned. Claimant provided credible, first-hand testimony that she told her supervisor (Marissa) to watch the kindergarteners while she went and got her backpack and walkie-talkie. Claimant further credibly testified that her supervisor told her ok, but then failed to watch kindergarteners. Although claimant was responsible for supervising the kindergartners, she credibly testified her supervisor agreed to watch them, but then failed to do so. The employer did not provide first-hand testimony or a written statement from a first-hand witness at the hearing and, therefore, did not provide sufficient eye witness evidence of job-related misconduct to rebut claimant's testimony that her supervisor (Marissa) agreed to watch the kindergarteners, but then failed to do so. "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." Iowa Admin. Code r. 871-24.32(4).

Furthermore, claimant denied ever receiving a warning for not following the employer's licensing protocols. Therefore, the conduct for which claimant was discharged was merely an isolated incident of poor judgment and 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. 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. The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

DECISION:

The September 22, 2017, (reference 01) unemployment insurance decision is reversed. Claimant's appeal is considered timely. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

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Jeremy Peterson
Administrative Law Judge

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Decision Dated and Mailed

jp/rvs