

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

DEANNA L YOUNG
Claimant

HENDERSON-HIGHLAND PARK FUNERAL
Employer

APPEAL 19A-UI-01814-H2
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 02/03/19
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed an appeal from the February 27, 2019, (reference 01) decision that allowed benefits. After due notice was issued an in person hearing was held in Des Moines, Iowa on April 30, 2019. Claimant participated and was represented by Andrew B. Duffelmeyer, attorney at law. Employer participated through Donna Henderson, Owner; Debra Breeden, Accountant; and was represented by Todd M. Lantz, attorney at law. Employer's Exhibits 1 through 8 were admitted into the record. Claimant's Exhibit A was admitted into the record.

ISSUE:

Was the claimant discharged due to job connected misconduct sufficient to disqualify her from receipt of unemployment insurance benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed as the bookkeeper beginning in May 2017 through February 7, 2019 when she was discharged.

The business is a funeral home that is solely owned by Mrs. Henderson. Mrs. Henderson classified her husband Mr. Henderson as a quasi-employee. Mr. Henderson was paid by the business for some work performed. At most Mr. Henderson was paid six-thousand dollars per year. With his social security payment Mr. Henderson's income was approximately eighteen thousand dollars per year. Mr. and Mrs. Henderson live on the third floor of the business. The business mail and the Henderson's personal mail were delivered to the same address. Mr. Henderson would sometimes collect the mail. The claimant had no authority whatsoever to direct or control Mr. Henderson's actions with regard to the business.

When the claimant was hired the accounting records were an incomplete mess. The books had not been done correctly for years including 2016 and 2017. The business was in severe financial distress. Mrs. Henderson had filed bankruptcy in 2013. During claimant's first week of employment an employee of the Internal Revenue Services visited the business with the intention of shutting down the business due to unpaid taxes. At that time the business also

owed the Iowa Department of Revenue unpaid taxes. Claimant managed to work out payment plans with both entities.

Claimant worked to recreate the accounting records for 2016 and 2017. She specifically pointed out to Mrs. Henderson that there were checks that had been given to the business that had never been deposited into any of the business banking accounts. The checks had been credited to the correct customer account, indicating that they had arrived at the business but for some reason had never been deposited. When the claimant pointed this irregularity out to Mrs. Henderson, Mrs. Henderson explained to her that they needed cash on hand for the business to pay ministers, vocalists, or to rent a hall for a funeral dinner and that the checks that had been cashed but not deposited were used for those purposes. Mrs. Henderson instructed the claimant to allocate those checks to a "cash" fund. The claimant did as instructed. The claimant believed in 2016 and then throughout 2017 approximately eight-five thousand dollars was never deposited in business accounts, but instead the checks were cashed and the books reflected as "cash". The claimant had no way of knowing if the checks were "cashed" or if they were actually deposited into some other account as she would not have had access to that information.

Thereafter, every time a check came in but was not deposited into a business banking account the claimant would note that check as having been 'cashed' and it was kept in the QuickBooks system under the 'cash' heading. The claimant was never the person who "cashed" the checks. She assumed that it was Mr. and Mrs. Henderson who were cashing the checks. Mr. Henderson would regularly and routinely "go to the bank" with the deposit. Mr. Henderson took checks to the bank that did not ended up being deposited into the business bank account.

Customers would often come into the business to make cash or check payments on their accounts. The claimant was never the person who met with or spoke to the customer. When a check came in either via the mail or in person, the procedure was to make a photocopy of the check, and place the actual check into the lockbox. Only Mrs. Henderson had the key to the lock box. The photocopy of the check was placed in the customer's file which was placed in the claimant's basket of work "to do". The claimant would then credit the payment to the proper customer account in the QuickBooks system.

Mrs. Henderson and the claimant met each day to discuss the financial position of the business. Mrs. Henderson would decide which checks should be deposited into either the Bankers' Trust account or the Wells Fargo account. The business was having a severe cash flow problem and the employer was trying to make sure each account remained solvent. The claimant would fill out the deposit ticket for the Banker's Trust account as she would stop by the bank to make that deposit on her way home from work. Either Mr. or Mrs. Henderson made the deposit at Wells Fargo. The claimant did not make out the Wells Fargo deposit ticket. The claimant always made the Banker's Trust deposit as in October 2017 Mrs. Henderson forgot she had a seventeen-thousand dollar deposit in her purse and did not make the deposit.

The daily meeting put Mrs. Henderson on notice as to what the financial position of the business was on a daily basis. At no time did the claimant deny Mrs. Henderson access to the books, business information or try to hide anything from her. Mrs. Henderson had forgotten her password so she did not access the QuickBooks on her own. Mrs. Henderson did not ask the claimant to show her the QuickBooks accounts nor did she make arrangements to have her password changed. At the end of 2017 the claimant made out a chart showing what ministers had been paid. That chart, which was given to Mrs. Henderson, showed the vast amount of "cash" that was being funneled through the business.

Mr. Henderson had a personal bank account at Wells Fargo. He was depositing business checks into his personal account instead of into the business account. In 2018 alone Mr. Henderson took approximately eighty-five thousand dollars in checks that he should have deposited into the business account and put them into his own personal account. At no time did the claimant ever deposit a check into Mr. Henderson's personal bank account. The claimant had no idea that business checks were being deposited into Mr. Henderson's personal account. When the claimant received the Wells Fargo deposit ticket (which often did not have individual checks itemized) she would note which check(s) had not been deposited into the business account. The claimant believed that these checks were being used for cash payments in the business. Mrs. Henderson specifically told the claimant to designate those checks as to 'cash' when the claimant had brought the issue to her attention. The claimant was an experienced bookkeeper and believed that like many other small business owners she had worked for previously, the Henderson's were using cash from the business to support their lifestyle. As the bookkeeper the claimant did not believe she had the authority to question how the Henderson's treated the business accounts. The business paid for the Henderson's personal nonbusiness expenses including their mortgage, time share payments, utilities, gym membership, eating at restaurants, cell phones, vehicles and personal purchases at local stores.

Mr. and Mrs. Henderson took frequent trips. Mrs. Henderson indicated that while she listed her income as twenty-nine thousand dollar per year, she did that only so she could obtain "Obama Care." Mrs. Henderson said she took no money in salary at all from the business. Since the Henderson's took at least six trips in 2018, including to Cuba, Las Vegas, Chicago and Kentucky, it is difficult to see how they paid for their trips with no income other than Mr. Henderson's eighteen thousand dollar earnings over the course of an entire year. Even if Mrs. Henderson's son paid for the trip to Cuba, that does not explain payment for the other trips.

The employer alleges that the claimant signed two checks without authorization. Claimant's Exhibit A, text messages between Mrs. Henderson and the claimant makes abundantly clear that Mrs. Henderson told the claimant to write a check to herself to cover outstanding overdrafts. The claimant did as instructed, wrote the check and deposited it into a business account. Mrs. Henderson's testimony and memory of the event were not accurate. Mrs. Henderson's memory of events is not good.

Mrs. Henderson testified that about 3 or 4 years prior she had caught Mr. Henderson trying to steal four thousand dollars from the business. On cross examination it became clear that the event where she caught Mr. Henderson trying to steal was 8 or 9 years prior. Mrs. Henderson's memory was faulty about the details of the events. Even though Mrs. Henderson knew that Mr. Henderson had tried to steal from business, when she hired the claimant she never warned the claimant to watch Mr. Henderson around the money. Mrs. Henderson herself made the decision to allow Mr. Henderson access to the business checks by allowing him to go to the bank to make deposits. The claimant's job duties did not include policing Mr. Henderson's activities. If the claimant ever had any issue with Mr. Henderson, she was not even allowed to address him about it. Instead she was to go to Mrs. Henderson who would address the matter with Mr. Henderson.

Mr. Henderson's theft was discovered in December 2018 or January 2019 when Mrs. Henderson deposited a check that she had in her desk drawer into her account. The bank notified her that the check had already been cashed by Mr. Henderson into his personal account. The claimant had nothing to do with the check in Mrs. Henderson's desk drawer. Clearly Mr. Henderson had access to the mail, Mrs. Henderson's desk drawers and the deposits that were to be made in the business accounts.

Mrs. Henderson hired a consulting firm. The claimant cooperated completely with the consultants and explained to them the “cash” situation with checks that had not been deposited into the business bank accounts. The total of checks alone, excluding missing cash, was over eighty-five thousand dollars. Mrs. Henderson discharged the claimant for failing to notify her that checks had not been deposited into the business accounts. There is no allegation at all that the claimant stole money from the business. The claimant did not steal from her employer nor did she help anyone else steal from the employer nor did she cover up any of Mr. Henderson’s actions.

The claimant was paid properly for holiday pay and was given a Christmas bonus. Mrs. Henderson simply forgot that’s what she had instructed the claimant to do with regard to an advance she authorized for the claimant.

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:

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 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).

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).

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 simply has not met their burden to prove the claimant committed intentional misconduct or recurrent negligence.

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 claimant was a more credible witness than Mrs. Henderson. Mrs. Henderson’s poor memory issues are clear from both the testimony and the exhibits. The administrative law judge is persuaded that the claimant did alert Mrs. Henderson to the irregularities in the deposits when she first began her employment. At that time she was told by Mrs. Henderson that the checks were cashed, not deposited. The claimant then followed Mrs. Henderson’s instructions that she note any check that was not deposited to a “cash” account. Mrs. Henderson’s allegation that she took no money from the business to support her lifestyle only serves to support the claimant’s allegation that she thought both Mr. and Mrs. Henderson were not depositing all of the checks as a way to take cash from the business to support their lifestyle. In the claimant’s experience small business owners often took cash from their own businesses. It was not the claimant’s responsibility to monitor Mr. Henderson, particularly when Mrs. Henderson gave her no warning about possible theft despite having caught Mr. Henderson trying to steal years earlier.

The daily meeting put Mrs. Henderson on notice about the money issues. Mrs. Henderson simply chose not to look at the accurate bookkeeping records kept by claimant in part because she forgot her password. Claimant never deceived Mrs. Henderson; she reasonably believed Mrs. Henderson knew when Mr. Henderson was taking cash from the business.

Mrs. Henderson did not almost lose her business because of anything the claimant did or failed to do; but because her husband stole over eighty-five thousand dollars from the business in one year alone.

The claimant was following Mrs. Henderson's instructions and had given her adequate notice about the missing check deposits at the very beginning of her employment. Mrs. Henderson, for whatever reason, simply instructed her to note them as "cash" in the book keeping records. The claimant did as she was instructed.

The issue of signing the checks, the holiday pay, and the bonus were not known to Mrs. Henderson when she discharged claimant and thus, cannot serve as a reason for disqualification. Even if those issues had been known to Mrs. Henderson, the administrative law judge concludes that claimant had permission to sign the checks and did so at the explicit instruction of Mrs. Henderson herself. Claimant did not incorrectly pay herself or anyone else holiday pay or a bonus. Mrs. Henderson simply forgot the authorization about the check until shown the actual text message.

The employer's argument that claimant should have warned Mrs. Henderson about the checks that had not been deposited is simply not persuasive in light of all the facts. The claimant did warn Mrs. Henderson early on in her employment, but then did as Mrs. Henderson told her to do and denoted them as "cash" in the bookkeeping system. The claimant reasonably believed that like many small business owners, both Mr. and Mrs. Henderson were taking cash from the business via un-deposited business checks. The administrative law judge concludes the employer has not established any misconduct on the part of the claimant. Thus, no disqualification is imposed. Benefits are allowed.

DECISION:

The February 27, 2019, (reference 01) decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/rvs