IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

NANCY M RICHARDSON Claimant **APAC CUSTOMER SERVICES INC** Employer	**APPEAL 15A-UI-07324-KC-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 05/31/15** **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 filed an appeal from the June 16, 2015, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on July 14, 2015. The claimant participated and was represented by John Graupmann, paralegal with Iowa Legal Aid. The employer originally planned to be represented and obtain witness testimony through Turkese Newsone, Human Resources Generalist, and witness Melissa Villapanda, supervisor. Although the employer had received documents with Iowa Legal Aid letterhead for this hearing in the matter, Newsone did not notice that the claimant had legal representation. After trying to obtain advice from her legal department at the beginning of the hearing about whether an attorney should participate on behalf of the employer, she elected to withdraw her participation in the hearing and that of Villipanda. Exhibits A and B were admitted into evidence. One page of Exhibit B was not admitted because it was not relevant to this matter. The nine pages of documents from the employer were not admitted into evidence.

ISSUE:

Was the claimant discharged for work-related, disqualifying misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time beginning in 2004. She was a full-time team leader from June 2011 until she was separated from employment on June 3, 2015, when the employer terminated her employment.

Prior to 2015, the claimant understood that part of her responsibilities as a team leader was to keep a copy of all corrective action documents regarding employees, file a copy with the corresponding agent, and give a copy to human resources. In early 2015, a new policy was identified by the employer and communicated with staff via e-mail. She understood that no sensitive information was supposed to be retained on the call floor. The employer provided no training on the new policy. No copy of the policy was offered for the current hearing.

During the period that the new policy regarding document maintenance was issued, union members were discussing an issue of trying to ensure that confidential documents were not retained on the call floor, where the claimant worked. The claimant interpreted the message from those meetings as consistent with employer's new policy regarding team leaders shredding confidential information from their own records.

Maurice Marshall was one of the claimant's supervisees. In February 2015, she provided him with written corrective action materials, entitled "reinforced final written warning," regarding his attendance. Based on her understanding of an email she had received from the employer, she shredded her copy of those documents and filed copies with human resources and the corresponding agent. Graupmann obtained the unemployment documents from Iowa Workforce Development that APAC had submitted in Marshall's claim. Marshall's corrective action document from February 26, 2015 was included in the unemployment record. Marshall's employment was terminated on April 15, 2015. The claimant and Newsone were present at the termination meeting. He did not receive a copy of the corrective action documents on that date because human resources could not find their copy and the claimant had shredded her copy. Newsone was aware that the claimant had shredded her copies earlier. (Exhibits A, B).

On April 15, 2015, the claimant received a verbal warning from her supervisor Villipanda regarding her failure to submit corrective action paperwork to human resources by the close of business on April 15, 2015, in violation of the site policy. Villapanda and Newsone asked if she had her copy of the corrective action documents regarding Marshall who was scheduled to be terminated the same day. The claimant reported that she no longer kept corrective action documents and had shredded all copies of prior corrective action cases due to the new policy. Newsone told her to resume keeping a copy of the corrective action documents regarding employees. The claimant did not think that her job was in jeopardy based on the verbal communication. Most team leaders were unable to complete all the paperwork by 4 p.m. each day. Human resources also locked their doors during business hours for sensitive matters and their offices are at a distant part of the building. Newsone told her to resume keeping a copy of the corrective action documents regarding employees and submit corrective action documents to human resources daily. The claimant did not fail to file corrective action documents on a timely basis after April 15, 2015. Management did not tell her that her job was in jeopardy based on past shredding of documents.

No further discussion with the claimant occurred regarding shredding until May 28, 2015. Newsone talked to the claimant on that date about Marshall's corrective action documents because he was pursuing an unemployment claim. The claimant reminded Newsone that she had given the documents to both human resources and the agent, and had shredded her copies of the documents based on the employer's e-mail about a new policy. Newsone stated that the correct interpretation of the policy was shredding of medically-related documents, not corrective action documents. Newsone answered affirmatively when the claimant asked if she should keep a copy of all corrective action documents in the future. During her communication with the claimant, Newsone did not indicate that an investigation would be done about the shredding. She also did not tell the claimant that she was facing termination for her past behavior in shredding corrective action documents in response to the employer's e-mail. No additional disciplinary actions occurred until the claimant's employment was terminated. The claimant worked as scheduled after May 28, 2015 until the employer terminated her employment.

On June 3, 2015, Newsone told the claimant her employment was terminated due to her previous shredding of corrective action documents. Newsone referred to her communication with the claimant on May 28, 2015 and the claimant's statement that she had shredded

corrective action documents in response to the employer's new policy. Newsone gave no reason for the delay in making the termination decision. The claimant had shredded her copies of the corrective action documents well before May 28, 2015, based on her understanding of the employer's new policy. Newsone knew about the claimant's practice before May 28, 2015. The claimant had worked for the employer for a total of nine years over two periods of employment.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

When the record is composed entirely of hearsay evidence, that evidence must be examined closely in light of the entire record. *Schmitz v. Iowa Dep't Human Servs.*, 461 N.W.2d 603, 607 (Iowa Ct. App. 1990). Both the quality and the quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See, Iowa Code § 17A.14 (1). In making the evaluation, the fact-finder should conduct a common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be fulfilled. *Schmitz*, 461 N.W.2d at 608. 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). Mindful of the ruling in *Crosser*, *id.,* and noting that the claimant presented direct, first-hand testimony while the employer did not participate in the hearing, the administrative law judge concludes that the claimant's recollection of the events is more credible than that of the employer. The claimant provided direct testimony. The employer chose not to participate.

Iowa Code § 96.5-2-a provides:

> An individual shall be disqualified for benefits:
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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 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 the 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.

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.

A lapse of 11 days from the final act until discharge when claimant was notified on the fourth day that his conduct was grounds for dismissal did not make the final act a "past act." Where an employer gives seven days' notice to the employee that it will consider discharging him, the date of that notice is used to measure whether the act complained of is current. *Greene v. Emp't Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct. App. 1988). An unpublished decision held informally that two calendar weeks or up to ten work days from the final incident to the discharge may be considered a current act. *Milligan v. Emp't Appeal Bd.*, No. 10-2098 (Iowa Ct. App. filed June 15, 2011). The claimant shredded documents in early 2015 and was terminated on June 3, 2015. Her warning on April 15, 2015 did not indicate that she would be terminated for past shredding of documents. Newsone discussed the shredding of documents on May 28, 2015, but did not tell the claimant her job was in jeopardy due to prior incidents of shredding. The claimant's prior shredding of documents, well before the warning and termination, is not a current act as defined in Iowa law.

In reviewing past acts as influencing a current act of misconduct, the ALJ should look at the course of conduct in general, not whether each such past act would constitute disqualifying job misconduct in and of itself. *Attwood v. Iowa Dep't of Job Serv.*, No. _-__, (Iowa Ct. App. filed __, 1986). The claimant thought that she was following a new employer policy. She did not intend to create a new system of her own making.

The claimant may have misinterpreted the new policy issued by the employer. A mistake of that nature does not constitute misconduct under the law. The claimant did not ignore a warning about shredding documents. No evidence was submitted that indicated the claimant shredded documents after talking to management. Inasmuch as the employer had warned the claimant on May 28, 2015, about the final incident much earlier in 2015 and there were no incidents of

alleged shredding 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, and, without such, the history of other incidents need not be examined.

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 assess points or impose discipline up to or including discharge for the incident under its policy.

The conduct for which the claimant was discharged was an isolated incident of misunderstanding of a new company policy and inasmuch as employer had not previously warned the claimant about the issue leading to the separation, it has not met the burden of proof to establish that the 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. A warning for failure to timely submit documents to human resources is not similar to shredding documents and the employer's simple accrual of a certain number of warnings counting towards discharge does not establish repeated negligence or deliberation and is not dispositive of the issue of misconduct for the purpose of determining eligibility for unemployment insurance benefits.

The employer has not met its burden of proof to establish a current or final act of misconduct, and, without such, the history of other incidents need not be examined.

Given the serious nature of the proceeding and the employer's allegations resulting in claimant's discharge from employment, the employer's failure to submit a copy of the policy at issue, mindful of the ruling in *Crosser*, *id.,* and noting that the claimant presented direct, first-hand testimony while the employer declined to participate, the administrative law judge concludes that the claimant's recollection of the events is more credible than that of the employer.

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 conduct for which claimant was discharged was merely an isolated incident of mistaken interpretation of a new policy. Furthermore, inasmuch as employer had not previously warned the claimant that her job was in jeopardy about her previous shredding of documents, the issue leading to the separation, the employer 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. Training or general notice to staff about a policy is not considered a disciplinary warning. 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. The basis for the employer's termination was acts prior to discussion about the employer's policy. Despite lack of warning that her prior behavior could result in her termination, she was permitted to continue working until her employment was suddenly terminated about behavior that occurred months earlier. Accordingly, benefits are allowed.

DECISION:

The June 16, 2015, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. The benefits claimed and withheld shall be paid, provided she is otherwise eligible.

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Kristin A. Collinson
Administrative Law Judge

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Decision Dated and Mailed

kac/pjs