IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

ELYSE M SCHLOEMER Claimant **ABCM CORPORATION** Employer	**APPEAL 18A-UI-06031-SC-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 05/06/18** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

Elyse M. Schloemer (claimant) filed an appeal from the May 25, 2018, reference 01, unemployment insurance decision that denied benefits based upon the determination ABCM Corporation (employer) discharged her for violation of a known company policy. The parties were properly notified about the hearing. A telephone hearing was held on June 22, 2018. The claimant participated and was represented by Attorney Kara E. Morel. The employer participated through Administrator Mari Banse and HR Coordinator Lisa VerHelst. No exhibits were offered into the record.

ISSUE:

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: The claimant was employed full-time as a Certified Nursing Assistant (CNA) beginning on January 2, 2008. The claimant held multiple positions throughout her tenure and, most recently, she worked as the Assisted Living Manager of the North Spring Center. In October 2017, the claimant began reporting to Administrator Mari Banse. The claimant was separated from employment on May 10, 2018, when she was discharged.

As part of her job duties, the claimant was required to submit the monthly billing on the first of every month. She was also an on-call employee and would regularly field questions from other staff members while home sick or during time she was not scheduled to work. The employer has a policy that forbids working off the clock and states any infractions may result in discharge. In November 2017, Banse sent out an email to all staff advising them that if they were going to miss work they needed to report directly to their immediate supervisor. She also reminded staff of this policy in subsequent staff meetings.

On April 30, 2018, the claimant reported to Banse that she was sick and would not be at work until Thursday, May 3, per her doctor's orders. The claimant told Banse she had most of her job

duties covered. The claimant did not tell Banse that she believed there was no one else who was able to submit the monthly billings.

On May 1, 2018, the claimant contacted her co-worker, HR Coordinator Lisa VerHelst, to tell her that she was going to pick up her computer so she could submit the monthly billings that day. VerHelst asked the claimant if there was anyone else who could cover the job duty and the claimant responded in the negative. VerHelst did not tell the claimant that she could not take the computer or inform her that she needed permission from Banse in order to take the computer.

The claimant took the computer home and submitted the monthly billings at 9:00 a.m. in her bedroom with no family members present. The claimant used a secure program maintained by the employer and her secure internet connection to complete the task. The claimant feared if this task was not completed her job would be in jeopardy.

On May 2, Banse notified the claimant that she would assign some of her tasks to the consultant who was capable of completing the billing. Banse then discovered the claimant had submitted the monthly billings on the day she was out of the office. Banse reviewed the claimant's time sheet and realized she had not yet submitted a time correction for the 15 minutes of work she completed on May 1. The employer's pay period runs from the first through the 15th of any given month and the claimant had until May 15 to report her time worked on May 1.

After reviewing the information, Banse determined the claimant had worked off the clock, taken work and her computer home without prior authorization, and there was a potential HIPAA breach as the claimant did not seek permission to take the resident information home. Banse also determined that the claimant was acting in good faith but made a bad decision. On May 10, Banse discharged the claimant for her conduct. The claimant had not received any prior warnings.

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. Benefits are allowed.

Iowa law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id*. Iowa Administrative Code rule 871-24.32(1)a provides:

> "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).

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. 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." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). 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). 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

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*.

The findings of fact show how the disputed factual issues were resolved. After assessing the credibility of the witnesses who testified during the hearing, the reliability of the evidence submitted, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge attributes more weight to the claimant's version of events. Banse, the employer's primary witness, provided conflicting statements about dates and events; whereas, the claimant's testimony remained consistent throughout.

The conduct for which the claimant was discharged was an isolated incident of poor judgment. As the 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. Benefits are allowed.

DECISION:

The May 25, 2018, 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. Any benefits claimed and withheld on this basis shall be paid.

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Stephanie R. Callahan
Administrative Law Judge

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Decision Dated and Mailed

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