IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

KRISTA MURPHY Claimant **WOBBEKING & TJERNAGEL INSURANCE INC** Employer	**APPEAL 16A-UI-07316-JCT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 06/05/16** **Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting
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 27, 2016, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on July 21, 2016. The claimant participated personally. The employer participated through Wayne Tjernagel. Employer exhibit 1 and claimant exhibit A were admitted into evidence. The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

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: The claimant was employed full-time as an agent and was separated from employment on June 7, 2016, when she was discharged (Employer exhibit 1).

In April 2016, the claimant notified the employer she intended to resign because she was moving to Cedar Rapids. No end date was agreed upon as both parties understood the claimant's final day would coincide with the selling of her condo. In an April 22, 2016 series of text messages, the claimant was asked by Don Tjernagel to commit to a final date, and suggested June 1, 2016 (Claimant exhibit A). The claimant did not agree to June 1 to end employment. According to the employer, the claimant's job performance then declined after she

tendered her resignation, as she refused to help customers, and notably, refused to move her desk from the back of the office to the front, when asked by Wayne Tjernagel on June 2, 2016.

Mr. Tjernagel was upset by the claimant's defiance and called Iowa Workforce Development for guidance. He was advised by an unknown person that the claimant could be discharged after warning, and failure to sign a warning was grounds for discharge and considered misconduct for unemployment benefits purposes. As a result, Mr. Tjernagel prepared a warning for the claimant on June 6, 2016 (Claimant exhibit A). The claimant took the warning to her car, called her husband, and then signed the warning, with the comment "I do not agree with the above statement" (Claimant exhibit A). The warning contained language that stated, "On June 7, 2016, we will meet again to discuss your position (Claimant exhibit A)". The claimant signed the warning around 1:00 or 2:00 p.m. on June 6, 2016 and worked only a few hours after. No other incidents occurred. The claimant asserted during her resignation period that she continued to work to the best of her ability. The next morning, the claimant was off work due to a doctor's appointment, and when she arrived, she was discharged. In the termination letter, the employer stated, "the gross misconduct and primary reason for your termination at Tjernagel Insurance took place on June 2, 2016 (Claimant exhibit A)".

The administrative record reflects that claimant has received unemployment benefits in the amount of $1,580.00, since filing a claim with an effective date of June 5, 2016. The administrative record also establishes that the employer did participate in the fact-finding interview on June 23, 2016 by way of Don Tjernagel, owner/CEO.

REASONINGS AND CONCLUSIONS OF LAW:

Iowa Code § 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.

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(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.

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *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). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000).

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). 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).

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*. Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

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). In this case, the claimant was discharged based on her conduct on June 2, 2016 when she failed to move her desk at Wayne Tjernagel's request could be viewed as insubordination since she failed to follow his directive.

The employer issued the claimant a warning for that conduct in the afternoon of June 6, 2016. Generally, a warning is an employer's good faith attempt to communicate to an employee that their conduct is unacceptable, and continued conduct in that manner could result in additional consequences including termination. Here though, based on the evidence presented, it appears the claimant's warning was intended as a mere formality, and not with the intent to heed off future actions by the claimant that would be contrary to the employer's policies or expectations. The claimant did not refuse to the sign the warning, but rather, took some time to review it, and added the statement of non-agreement before signing it. Then the claimant performed work for a few more hours before returning the next day to learn she was discharged. It cannot be ignored that the timing of the claimant's alleged misconduct is within one day of the time that the employer had requested the claimant quit her employment via text messages (Claimant exhibit A)

In this case, the claimant was warned for her conduct on June 6, 2016 and then discharged for the same conduct the next day, without any other incidents occurring between. Inasmuch as the employer had warned the claimant about the final incident on June 6, 2016, and there were no incidents of alleged misconduct thereafter, it has not met the burden of proof to establish that the 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. While the employer may have been justified in discharging the claimant, work-connected misconduct as defined by the unemployment insurance law has not been established in this case. Accordingly, benefits are allowed.

Nothing in this decision should be interpreted as a condemnation of the employer's right to terminate the claimant for violating its policies and procedures. The employer had a right to follow its policies and procedures. The analysis of unemployment insurance eligibility, however, does not end there. This ruling simply holds that the employer did not meet its burden of proof to establish the claimant's conduct leading separation was misconduct under Iowa law. Since the employer has not met its burden of proof, benefits are allowed.

Since the claimant is eligible for benefits, the issues of recovery of any overpayment and possible relief from charges are moot.

DECISION:

The June 27, 2016, (reference 01) decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. The claimant has not been overpaid benefits. The employer's account is not subject to relief of charges.

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Jennifer L. Beckman
Administrative Law Judge

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Decision Dated and Mailed

jlb/pjs