IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

DANIEL E SCHLUP Claimant **COUNTRY VIEW MANOR INC** Employer	**APPEAL 18A-UI-07829-H2T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 06/17/18** **Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

The employer filed an appeal from the July 11, 2018, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on August 28, 2018. Claimant participated. Employer participated through Laura Preheim, Administrator; (representative) Marilyn Poppen, Board President; and Pam DeBoom, Board Treasurer. Employer's Exhibit 1 was admitted into the record.

ISSUE:

Did the claimant voluntarily quit the employment without good cause attributable to the employer or was he discharged for reasons related to job misconduct sufficient to warrant a denial of unemployment benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as the Administrator beginning in April 2015 through February 27, 2018, when he voluntarily quit in lieu of being discharged.

From the time of his hire in 2015, the claimant had worked under an annual contract. In July 2017, the board of directors communicated to the claimant that they were not happy with his job performance by only renewing his contract for six months, or until January 2018.

In December 2018, a number of employees and past employees met with the board of directors to complain about the claimant. One employee alleged that the claimant told her he was watching her "*ss." Another former employee said that she heard the claimant yell at the head housekeeper. None of the employees who made those allegations to the board testified at the hearing.

When the board received that information they did not confront the claimant with it to obtain his side of the story or to see if the allegations were true. By that time, the board had already made up their mind to end the claimant's employment. They were not happy that the resident status was low and that the claimant was not 'taking care of business.'

In July, the claimant had been told specifically that he was not to allow any resident admission to the facility unless they paid before entering. That is sometimes impossible with a Medicare or Medicaid patient as the federal government simply will not pre-pay the facility for services. The employer did not provide any evidence of instances where the claimant allowed a resident admission to the facility after July 2017 unless the resident first paid. The claimant had no control over whether the resident wrote a bad check to the facility.

The board was also unhappy that the claimant was not cutting staff hours prior to July 2017. After July of 2017, Ms. DeBoom would send the claimant a schedule of where she wanted hours cut and the claimant would make those cuts. There is no evidence that the claimant failed to cut employee hours when instructed to do so after July 2017.

The claimant was never given any specific warnings for any behavior prior to having his job terminated. By the fall of 2017, the board determined not to warn the claimant as they had already made up their mind not to renew his contract when it expired.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant did not quit but was discharged from employment for no disqualifying reason.

Iowa Admin. Code r. 871-24.26(21) provides:

> Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:
>
> (21) The claimant was compelled to resign when given the choice of resigning or being discharged. This shall not be considered a voluntary leaving.

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 claimant did not voluntarily quit. He only signed the resignation form as he was told if he did not do so he would be discharged. Under these circumstances the claimant's separation is properly classified as a discharge, not a voluntary quit.

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).

871 IAC 24.32(8) provides: 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 upon such past act or acts. The termination of employment must be based upon 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." *Greene v. EAB*, 426 N.W.2d 659 (Iowa 1988).

The employer made up their mind to discharge claimant in the fall of 2017. Thus, the acts for which he was discharged, took place months prior to his actual discharge. The employer's evidence does not establish deliberate willful misconduct after July 2017.

The claimant denies swearing at employees, or making suggestive comments to female employees. The claimant was never confronted by the employer with the accusations made against him, nor were any of his accusers present at the hearing to offer testimony. Under these circumstances the employer has not met their burden of proof to establish that the allegations ever took place.

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. Inasmuch as claimant complied with all board requests after July 2017, and the employer has not proven any allegations of mistreatment of employees, employer has not met the burden of proof to establish that claimant engaged in misconduct. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The July 11, 2018, (reference 01) decision is affirmed. Claimant did not quit but was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible.

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Teresa K. Hillary
Administrative Law Judge

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Decision Dated and Mailed

tkh/rvs