IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

OLYMPIA GENUS Claimant **IOWA CITY COMMUNITY SCHOOL DIST** Employer	**APPEAL NO. 21A-UI-08372-JTT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 12/20/20** **Claimant: Appellant (5)**

Iowa Code Section 96.5(1) – Voluntary Quit
Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant, Olympia Genus, filed a timely appeal from the March 16, 2021, reference 01, decision that disqualified her for benefits and that held the employer's account would not be charged for benefits, based on the deputy's conclusion that the claimant voluntarily quit on October 14, 2020 by failing to report for work for three consecutive work days and not notifying the employer of the reason for the absence. After due notice was issued, a hearing was held on June 7, 2021. Claimant participated. Lyndsee Detra represented the employer.

ISSUE:

Whether the claimant voluntary quit without good cause attributable to the employer, was laid off, or was discharged for misconduct in connection with the employment.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant, Olympia Genus, was employed by the Iowa City Community School District as a para-educator. The claimant began the employment in January 2020 as a part-time employee. In September 2020, the claimant became a full-time employee. At that point, the claimant's work day started at 8:00 or 8:15 a.m. and concluded at 2:00 or 2:15 p.m. each school day.

The claimant last reported for work on Monday, September 24, 2020. On that day, the school nurse directed the claimant to leave to commence a period of quarantine, because the claimant had presented with symptoms consistent with COVID-19. After the claimant went off work due to the COVID-19 concern, the school nurse attempted several times to contact the claimant. The claimant did not answer and did not respond to the calls.

On Monday, October 5, 2020, the claimant commenced a period of approved bereavement leave in connection with the passing of a family member. On October 4, 2020, the claimant traveled to Detroit, Michigan for an aunt's funeral. The claimant's anticipated return-to-work date was Monday, October 12, 2020.

The claimant did not return to work on October 12, 2020. The claimant was not keeping track of when she was supposed to return. The claimant was a no-call/no-show for her shifts on October 12 and 13. Under the para-educator agreement that applied to the claimant, the employer deemed two consecutive days of no-call/no-show absence to be a voluntary resignation from the employment.

The claimant did not report for work on October 14, 2020. After 10:00 a.m., the claimant called and left a voicemail message asking when she was supposed to return to work following the COVID-19 quarantine. However, the claimant's most recent period of time off was based on eh bereavement leave, not based on the COVID-19 quarantine. On October 14, 2020, the employer mailed the claimant a letter that referenced the absences on October 12 and 13 and that stated the employer had processed the claimant's resignation from the employment.

REASONING AND CONCLUSIONS OF LAW:

Iowa Administrative Code rule 871-24.1(113) characterizes the different types of employment separations as follows:

> Separations. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.
>
> a. Layoffs. A layoff is a suspension from pay status initiated by the employer without prejudice to the worker for such reasons as: lack of orders, model changeover, termination of seasonal or temporary employment, inventory–taking, introduction of laborsaving devices, plant breakdown, shortage of materials; including temporarily furloughed employees and employees placed on unpaid vacations.
>
> b. Quits. A quit is a termination of employment initiated by the employee for any reason except mandatory retirement or transfer to another establishment of the same firm, or for service in the armed forces.
>
> c. Discharge. A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.
>
> d. Other separations. Terminations of employment for military duty lasting or expected to last more than 30 calendar days, retirement, permanent disability, and failure to meet the physical standards required.

In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. *See Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 698, 612 (Iowa 1980) and *Peck v. EAB*, 492 N.W.2d 438 (Iowa App. 1992). In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer. See Iowa Administrative Code rule 871-24.25.

This matter may be analyzed as a quit or as a discharge, with the same outcome. The administrative law judge will first address the quit analysis.

Iowa Code section 96.5(1) provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

Where a claimant was absent for three consecutive days without giving notice to the employer in violation of company rule, the claimant is presumed to have voluntarily quit without good cause attributable to the employer. Iowa Admin. Code r. 871-24.25(4). The employer's policy of deeming two consecutive no-call/no-shows a resignation is inconsistent with the Administrative Code rule.

Iowa Admin. Code r. 871-24.22(2)j(1)(2)(3) provides:

> Benefit eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.
>
> j. Leave of absence. A leave of absence negotiated with the consent of both parties, employer and employee, is deemed a period of voluntary unemployment for the employee-individual, and the individual is considered ineligible for benefits for the period.
>
> (1) If at the end of a period or term of negotiated leave of absence the employer fails to reemploy the employee-individual, the individual is considered laid off and eligible for benefits.
>
> (2) If the employee-individual fails to return at the end of the leave of absence and subsequently becomes unemployed the individual is considered as having voluntarily quit and therefore is ineligible for benefits.
>
> (3) The period or term of a leave of absence may be extended, but only if there is evidence that both parties have voluntarily agreed.

In this instance, the claimant's no-call/no-show absences on October 12 and 13, 2020 were preceded by a week-long leave of absence with an agreed-upon October 12, 2020 return-to-work date. The claimant failed to return at the end of the leave period. There was not agreement to extend the leave period. The claimant failed to return for three days in a row before the employer sent the letter memorializing what the employer deemed a voluntary quit. Because the claimant failed to return to work at the end of the leave of absence, the claimant is deemed to have voluntarily quit without good cause attributable to the employer and is disqualified for benefits.

The administrative law judge will now analyze the matter, in the alternative, as a discharge for attendance.

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 a discharge matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See *Lee v. Employment Appeal Board,* 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also *Greene v. EAB*, 426 N.W.2d 659, 662 (Iowa App. 1988).

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. See Iowa Administrative Code rule 871-24.32(4).

In order for a claimant's absences to constitute misconduct that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant's *unexcused* absences were excessive. See Iowa Administrative Code rule 871-24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the evidence must first establish that the most recent absence that prompted the decision to discharge the employee was unexcused. See Iowa Administrative Code rule 871-24.32(8). Absences related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On the other

hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness is a form of absence. See *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984). Employers may not graft on additional requirements to what is an excused absence under the law. See *Gaborit v. Employment Appeal Board*, 743 N.W.2d 554 (Iowa Ct. App. 2007). For example, an employee's failure to provide a doctor's note in connection with an absence that was due to illness properly reported to the employer will not alter the fact that such an illness would be an excused absence under the law. *Gaborit*, 743 N.W.2d at 557.

The evidence in the record establishes a discharge for misconduct in connection with the employment. The evidence establishes three consecutive unexcused absences on October 12, 13 and 14, 2020. The first two in the series were no-call/no-shows. The third in a the series was absence without reasonable or proper notice to the employer. Instead the claimant waited to contact the employer until about two hours into her scheduled shift. There was no reasonable basis for the claimant's failure to report for work, or her failure to make timely contact with the employer, on any of the three consecutive days. The three consecutive unexcused absences were sufficient to indicate an intentional and substantial disregard of the employer's interests in maintaining appropriate staffing and to establish excessive unexcused absences.

The claimant is disqualified for benefits until the claimant has worked in and been paid wages for insured work equal to 10 times the claimant's weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

DECISION:

The March 16, 2021, reference 01, decision is modified as follows without change to the determination of the claimant's eligibility or the employer's liability for benefits. The claimant voluntarily quit the employment without good cause attributable to the employer by failing to return to work at the end of a leave of absence. In the alternative, the claimant was discharged for misconduct in connection with the employment, based on excessive unexcused absences. The claimant is disqualified for benefits until she has worked in and been paid wages for insured work equal to 10 times her weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged.

James E. Timberland
Administrative Law Judge

September 22, 2021
Decision Dated and Mailed

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