IOWA DEPARTMENT OF INSPECTIONS AND APPEALS
ADMINISTRATIVE HEARINGS DIVISION, UI APPEALS BUREAU

JENNIFER CARRE Claimant **DENNIS M WINTER, D.D.S., P.C.** Employer	**APPEAL 22A-UI-12759-DZ-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 04/17/22** **Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quit
Iowa Code § 96.4(3) – Able to and Available for Work

STATEMENT OF THE CASE:

Jennifer Carre, the claimant/appellant, filed an appeal from the Iowa Workforce Development's (IWD) May 9, 2022 (reference 01) unemployment insurance (UI) decision that denied benefits because of an April 22, 2022 discharge from work. The parties were properly notified of the hearing. A telephone hearing was held on July 21, 2022. Ms. Carre participated personally. The employer participated through Dennis Winter, owner, and Piyusha Patel, office manager.

ISSUE:

Did the employer discharge Ms. Carre from employment for disqualifying, job-related misconduct?
Is Ms. Carre able to and available for work?

FINDINGS OF FACT:

Having reviewed the evidence in the record, the administrative law judge finds: Ms. Carre began working for the employer on April 4, 2022. She worked as a full-time, salaried office manager. Her employment ended on April 22, 2022.

By the end of the first week of her employment, Ms. Carre did not feel that Ms. Patel was training her well. Ms. Carre also felt that Ms. Patel was rude to the office assistant. Ms. Carre told Dr. Winter about her concerns. At one point, Ms. Carre asked Dr. Winter if she could become the office assistant's direct supervisor. Ms. Carre felt that Dr. Winter always took Ms. Patel's side and not hers.

Sometime during Ms. Carre's second week of employment, the office assistant told Ms. Carre that a patient had complained about Ms. Patel and asked what to do. This interaction happened in the breakroom. The dental assistant, who was also in the breakroom, told the office assistant that the office assistant could fill out a complaint form. The office assistant did so and handed the complaint to Ms. Carre. At some point, Dr. Winter came into the breakroom and Ms. Carre handed the complaint to Dr. Winter. At some point, Ms. Patel learned of the complaint. Ms.

Patel called the patient, and the patient denied the allegations in the complaint. Ms. Patel told the office assistant that Ms. Patel would file "defamation charges" against the office assistant. The office assistant told Ms. Carre about the situation. Ms. Carre told the office assistant that the office assistant could call the telephone numbers on the workforce posters in the breakroom if the office assistant felt bullied or mistreated. Ms. Carre also told the office assistant that the office assistant could look for another job. Ms. Patel learned that Ms. Carre had told the office assistant that the office assistant could look for another job. Ms. Patel and Dr. Winter felt that Ms. Carre trying to get the office assistant to quit.

At some point, the employer held a staff meeting. After the staff meeting, the front office staff, including Ms. Carre, Ms. Patel, and the office assistant, had an impromptu meeting. During the impromptu meeting, Ms. Carre told Ms. Patel that another employee was upset because Ms. Patel was mean to that employee. Ms. Carre asked Ms. Patel, in front of the other front office staff, if Ms. Patel had experience managing people. In Ms. Carre's view, she had asked her question politely. In Ms. Patel's view, Ms. Carre's question was mocking.

On April 20, Ms. Carre was checking out a patient. Ms. Carre yelled from the front desk to Ms. Patel and asked Ms. Patel for help. Ms. Patel went to the front desk. When Ms. Patel got to the front desk Ms. Carre and another employee were talking about a different issue. Ms. Patel assumed that Ms. Carre wanted help with the issue Ms. Carre and the other employee were talking about. Ms. Patel told Ms. Carre that Ms. Carre was wasting Ms. Patel's time because Ms. Carre knew how to address the issue. Ms. Carre told Ms. Patel that she needed help with another issue. Ms. Patel felt that Ms. Carre was rude in how she spoke to Ms. Patel. Ms. Patel told Ms. Carre that Ms. Patel was just trying to help. Ms. Patel felt that Ms. Carre continued to be rude, so Ms. Patel left the front desk and returned to her office. This interaction happened in front of the patient Ms. Carre was checking out. Ms. Carre went to Ms. Patel's desk and told Ms. Patel that she was leaving for the day.

The next day, Dr. Winter called Ms. Carre into a meeting. Ms. Patel and the employer's accountant, who attended as a witness, also attended the meeting. Ms. Carre and Ms. Patel both explained to Dr. Winter that they could not work with each other. The meeting was contentious. Dr. Winter told Ms. Carre and Ms. Patel that he would think about things and decide how to address the issue.

At the end of the day on April 22, Dr. Winter called Ms. Carre into a meeting. The employer's accountant attended the meeting as a witness. Dr. Winter told Ms. Carre that her employment was over because she and Ms. Patel could not work together, and because the office assistant told him that Ms. Carre made the office assistant write a false complaint about Ms. Patel. Dr. Winter testified in the hearing that the reason he terminated Ms. Carre's employment was because of her lack of general dentistry knowledge, not wanting to learn, incompatibility with other staff, her lack of truthfulness about being able to work forty hours each week, and because she was not a good fit for the employer.

During her three weeks of employment, the employer never gave Ms. Carre any verbal or written warnings. During the hiring process Ms. Carre told Dr. Winter that she needed to be off work by 5:30 p.m. each day to participate in a fitness challenge. The employer agreed to this term. At some point, the employer was scheduling Ms. Carre for hours after 5:30 p.m. Ms. Carre asked the employer to if she could be paid hourly instead of salary. Ms. Carre's employment ended before the employer made a decision about her request.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the employer discharged Ms. Carre from employment for no disqualifying reason.

On June 16, 2022, Governor Reynolds signed into law House File 2355, which among other things, amended Iowa Code 96.5(2) to redefine misconduct and to list specific acts that constitute misconduct. The bill did not include an effective date and so it took effect on July 1, 2022. *See* Iowa Const. art. III, § 26; Iowa Code § 3.7(1).

There is a strong presumption in U.S. jurisprudence against legislation being applied retroactively. "The principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal." *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J. concurring). This is in part because "elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly...." *Landgraf v. USI Film Prod.,* 511 U.S. 244, 265 (1994).

It would be fundamentally unfair and inconsistent with widely accepted legal principles to apply the amended Iowa Code 96.5(2) to the conduct at issue in this matter, which occurred before HF 2355 went into effect on July 1, 2022. As such, the amended Iowa Code 96.5(2) effective July 1, 2022 should not be applied to the conduct at issue here, and instead Iowa Code 96.5(2) as it existed at the time of the conduct will be applied.

Iowa Code section 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.

871 IAC 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.

The Iowa Supreme Court has held that this definition accurately reflects the intent of the legislature. *Huntoon v. Iowa Department of Job Service*, 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 purpose of this subrule is to assure that an employer does not save up acts of misconduct and spring them on an employee when an independent desire to terminate arises.

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 the claimant from employment, 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). 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).

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 employer's policy or rule 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.

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 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.

In this case, the employer never disciplined Ms. Carre for any reason during her three weeks of employment despite the many issues the employer raised during the hearing. Even assuming the employer had grounds to discipline Ms. Carre, for example for her questioning of Ms. Patel's experience in the impromptu staff meeting, or her yelling to Ms. Patel from the front desk to ask for help, the employer may not save up acts of misconduct and later spring them on an employee when an independent desire to terminate arises. Furthermore, the employer has failed to establish misconduct on the part of Ms. Carre regarding the complaint the office assistant submitted. The employer has not met its burden of proof to establish that Ms. Carre acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning.

The administrative law judge further concludes: Ms. Carre is able to and available for work.

Iowa Code section 96.4(3) provides:

> An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:
>
> 3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph (1), or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

Iowa Admin. Code r. 871-24.22(1) 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.
>
> (1) Able to work. An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.
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> a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.
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> b. Interpretation of ability to work. The law provides that an individual must be able to work to be eligible for benefits. This means that the individual must be physically able to work, not necessarily in the individual's customary occupation, but able to work in some reasonably suitable, comparable, gainful, full-time endeavor, other than self-employment, which is generally available in the labor market in which the individual resides.

To be able to work, "[a]n individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood." *Sierra v. Employment Appeal Board*, 508 N.W.2d 719, 721 (Iowa 1993); *Geiken v. Lutheran Home for the Aged*, 468 N.W.2d 223 (Iowa 1991); Iowa Admin. Code r. 871-24.22(1). "An evaluation of an individual's ability to work for the purposes of determining that individual's eligibility for unemployment benefits must necessarily take into consideration the economic and legal forces at work in the general labor market in which the individual resides." *Sierra* at 723. A person claiming benefits has the burden of proof that she is be able to work, available for work, and earnestly and actively seeking work. Iowa Admin. Code r. 871-24.22.

In this case, Ms. Carre has established that she is able to and available for work. Since the employer has failed to establish misconduct on the part of Ms. Carre, and Ms. Carre is able to and available for work, benefits are allowed.

DECISION:

The May 9, 2022 (reference 01) unemployment insurance decision is REVERSED. The employer discharged Ms. Carre 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.

Daniel Zeno
Administrative Law Judge

September 22, 2022
Decision Dated and Mailed

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APPEAL RIGHTS. If you disagree with this decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
Online: eab.iowa.gov

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

AN APPEAL TO THE BOARD SHALL STATE CLEARLY:

1) The name, address, and social security number of the claimant.
2) A reference to the decision from which the appeal is taken.
3) That an appeal from such decision is being made and such appeal is signed.
4) The grounds upon which such appeal is based.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to **file a petition for judicial review in District Court** within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at https://www.legis.iowa.gov/docs/code/17A.19.pdf or by contacting the District Court Clerk of Court https:///www.iowacourts.gov/iowa-courts/court-directory/.

Note to Parties: YOU MAY REPRESENT yourself in the appeal or obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds.

Note to Claimant: It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:
A true and correct copy of this decision was mailed to each of the parties listed.

DERECHOS DE APELACIÓN. Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
En línea: eab.iowa.gov

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:

1) El nombre, dirección y número de seguro social del reclamante.
2) Una referencia a la decisión de la que se toma la apelación.
3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de **presentar una petición de revisión judicial en el Tribunal de Distrit**o dentro de los treinta (30) días después de que la decisión adquiera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que se encuentra en línea en https://www.legis.iowa.gov/docs/code/17A.19.pdf o comunicándose con el Tribunal de Distrito Secretario del tribunal https:///www.iowacourts.gov/iowa-courts/court-directory/.

Nota para las partes: USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

Nota para el reclamante: es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

SERVICIO DE INFORMACIÓN:
Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.