IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

DANICA L FORCH Claimant **ABILIT HOLDINGS (LAWTON) LLC** Employer	**APPEAL 21A-UI-09749-AR-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 03/08/20** **Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.4(3) – Ability to and Availability for Work

STATEMENT OF THE CASE:

On April 6, 2021, claimant, Danica L. Forch, filed an appeal from the March 30, 2021, reference 03, unemployment insurance decision that denied benefits based upon the determination that claimant was discharged from her employment with the employer, Abilit Holdings (Lawton), LLC, for conduct not in the best interests of her employer. The parties were properly notified about the hearing held by telephone on June 17, 2021. The claimant participated personally. The employer participated through Community Director Charlys Folk. Employer's Exhibits 1 through 3 were admitted to the record.

ISSUE:

Did the employer discharge the claimant for 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 health care coordinator, registered nurse beginning on April 13, 2020, and was separated from employment on March 2, 2021, when she was discharged.

On February 8, 2021, Folk requested that claimant complete a number of tasks. Specifically, she requested that two urinalyses be done for two different residents because there were concerns about their medical statuses. She also requested that claimant work to develop a new communication strategy with regard to patient health concerns because she felt the current strategy was allowing important information to be overlooked. Claimant told her that she could not think of a new communication strategy, and that the current strategy was working well. Additionally, one of the two residents needing a urinalysis did not have a medical order for that test, and her husband refused it, as well. The resident was also on prophylactic antibiotics for recurrent UTIs. A suspected UTI was the reason Folk requested the urinalysis. Because of the antibiotics, and the resident's frequent UTIs, claimant's assessment of the situation was that the resident did not need the urinalysis. The second resident had a urinalysis sample collected

earlier in the week, but it had been contaminated and unusable. Claimant did not know whether this information had been relayed to Folk.

On February 12, 2021, Folk received concerns from residents' family members regarding the residents' care. One resident had not had his laundry done, because the task had not been entered into the computer. He had been admitted to the facility one week prior, and such tasks are expected to be entered into residents' list of tasks to be done on the day of admission. The task was not part of the resident's health care plan, so claimant was not responsible for identifying it as a task that needed to be done. Usually, that was Folk's task, but she was sick the day of the resident's admission. However, claimant was responsible for entering the task into the computer so the resident assistants would see it and complete it.

The same day, Folk also became aware that a resident had a wound on her toe. When claimant called the resident's daughter to make the resident a podiatry appointment, the daughter informed Folk that claimant told her the toe had an ingrown toenail. At the podiatry appointment, it was discovered that the nail from the next toe over had grown to such an extent that it was rubbing on the wounded toe, creating the wound, which was infected. Folk concluded that claimant had not properly assessed the severity and origin of the wound based on the resident's daughter's report. Claimant notes that podiatry, and specifically nail care, is not a task that can be performed onsite. She assessed the resident's foot, but could do nothing about it without assistance from a podiatrist. She promptly called the resident's daughter and asked that a podiatry appointment be scheduled to address the issue. Furthermore, the resident was competent to self-advocate, and she had not done so.

There were also medication changes that had not been entered into the system. Claimant had been absent part of her final week of employment due to illness, but Folk discovered that there were 12 or 13 medication updates that had not been completed, which spanned the whole week. Medication updates are expected to be done same day the facility receives notice of the change. Folk did not speak with claimant about these medication change issues until her termination.

Finally, claimant was not onsite six days in January and February 2021. Folk alleged that four of those days were no call/no shows. Claimant asserts that she never failed to call in or report for work, and was on-call 24 hours per day. She also worked from home on at least two of the days, and was in the Manning facility on one of the other identified days. When Folk took over as director on February 1, 2021, she and her supervisor ended work from home abilities for claimant. However, the weather was bad and claimant did notify Folk that she intended to work from home. The last time claimant worked from home, Folk said that day was approved as a work-from-home day, but claimant would not be able to work from home anymore after that day.

Claimant was suspended on February 19, 2021, pending an investigation into the issues identified by Folk. On March 2, 2021, Folk met with claimant and terminated her employment. She issued Employer's Exhibit 1 to claimant during the termination meeting.

Claimant had received no prior warnings for similar conduct.

REASONING AND CONCLUSIONS OF LAW:

The first question is whether claimant was discharged for job-related misconduct. For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

Iowa Code § 96.5(2)a provides:

> An individual shall be disqualified for benefits:
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> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
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> 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.
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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.

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 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). 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 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 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. Inasmuch as employer had not previously warned claimant about the issue leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning.

Here, many of the things with which the employer took issue were discretionary on claimant's part. There is no evidence that this discretion was employed recklessly, without regard for residents' well-being. Instead, the decisions Folk would have made were different than those claimant made. However, that does not establish that claimant engaged in disqualifying misconduct. Claimant provided credible explanations for many of the issues identified by the employer. While the medication change issue is inarguably problematic, claimant had not been warned about the issue previously, and apparently had been performing those duties in the past without issue. Thus, she did not have sufficient warning against the conduct to render the incident contributing to her termination disqualifying misconduct, standing alone. Finally, even if claimant worked from home when she should not have in February 2021, these are, at worst, unexcused absences, about which claimant had not been previously warned. Even viewing the circumstances enumerated in the termination notice as a whole, claimant did not engage in disqualifying misconduct.

The second question is whether claimant was able to and available for work effective the week ending March 7, 2021. For the reasons that follow, the administrative law judge concludes that the claimant is able to work and available for work effective the week ending March 7, 2021.

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:
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> 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".

The hearing record establishes that claimant was able to and available for work effective the week ending March 7, 2021. Benefits are allowed.

DECISION:

The March 30, 2021, (reference 03) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Claimant was also able to and available for work. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

Alexis D. Rowe
Administrative Law Judge

July 1, 2021
Decision Dated and Mailed

ar/scn