

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

CHASITY L DUNKIN

Claimant

APPEAL 16A-UI-07261-SC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

CROTHALL HEALTHCARE INC

Employer

OC: 05/29/16

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:

Crothall Healthcare, Inc. (employer) filed an appeal from the June 20, 2016, (reference 01) unemployment insurance decision that allowed benefits based upon the determination it failed to furnish sufficient evidence to show it discharged Chasity L. Dunkin (claimant) for disqualifying misconduct. The parties were properly notified about the hearing. A telephone hearing was held on July 20, 2016. The claimant participated personally. The employer participated through Retail Manager Terri Dove, Director of Food Gina Griep, and Human Resources Manager Christina Govek. Employer's Exhibit 1 was received. Official notice was taken of the administrative record, specifically the fact-finding documents.

ISSUES:

Did the claimant voluntarily leave the employment with good cause attributable to the employer or did the employer discharge the claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?

Has the claimant been overpaid unemployment insurance benefits?

Can the repayment of those benefits to the agency be waived?

Can 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 in Food Service beginning on January 1, 2015, and was separated from employment on May 20, 2016. The claimant reported to Retail Manager Terri Dove. The claimant and Dove did not always get along.

On May 19, 2016, the claimant overheard Dove telling a co-worker about something that the claimant had not completed the evening before. The claimant joined the conversation and said that something else had not been done by another employee the night before. Dove and the claimant began to argue. The argument concluded when Dove told the claimant that if she did not like it then she could go home. The claimant took off her gloves and told Dove that she could explain to Director of Food Gina Griep why she was not at work that day. After the claimant left, Dove reported to Griep that the claimant had said she did not need to stay at work and she would expect Griep's write-up the following day.

The claimant left the department, but not the campus. She spoke with her husband and then called Griep to discuss the situation. Griep told her to come back to discuss the situation. Griep contacted Human Resources Manager Christina Govek and they decided to suspend the claimant for that day. When the claimant arrived in Griep's office she told her to go home and report to work the following day. Griep did not ask the claimant at that time about what occurred between her and Dove.

On May 20, 2016, the claimant reported to work at her normal start time, dressed for her shift. The employer told the claimant at that time she was being discharged for leaving work early the day before. The claimant had received a previous warning on December 10, 2015 for leaving work early without notifying management or having a reasonable excuse. On that occasion, she had told her manager the day of her absence that she was leaving early because she had to take her husband to the airport.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$2,256.00, since filing a claim with an effective date of May 29, 2016, for the eight weeks ending July 23, 2016. The administrative record also establishes that the employer did not participate in the fact-finding interview, make a first-hand witness available for rebuttal, or provide written documentation that, without rebuttal, would have resulted in disqualification.

REASONING AND CONCLUSIONS OF LAW:

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

Iowa Code §96.5(1) provides:

An individual shall be disqualified for benefits:

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.

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. 871-23.55(1) provides:

Burden of proof.

(1) The burden of proof in all employer liability cases shall rest with the employer.

Iowa unemployment insurance law disqualifies claimants who voluntarily quit employment without good cause attributable to the employer or who are discharged for work-connected misconduct. Iowa Code §§ 96.5(1) and 96.5(2)a. The burden of proof rests with the employer to show that the claimant voluntarily left her employment. *Irving v. Empl. App. Bd.*, 15-0104, 2016 WL 3125854, (Iowa June 3, 2016). A voluntary quitting of employment requires that an employee exercise a voluntary choice between remaining employed or terminating the employment relationship. *Wills v. Emp't Appeal Bd.*, 447 N.W.2d 137, 138 (Iowa 1989); *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438, 440 (Iowa Ct. App. 1992). A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980). Where there is no expressed intention or act to sever the relationship, the case must be analyzed as a discharge from employment. *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438 (Iowa Ct. App. 1992).

The decision in this case rests, at least in part, upon the credibility of the parties. 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.* After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the claimant's version of events to be more credible.

The employer has not demonstrated that the claimant voluntarily left her position. Dove told the claimant to leave. The claimant then contacted Griep to discuss the situation with Dove and reported to work the following day dressed for work. Those are not the actions of someone who intends to leave her position. Even if Dove's testimony about the events of May 19, 2016 was found to be more credible than the claimant's testimony, the claimant still told Dove that she expected Griep's write-up the following day which is a statement that is in direct contradiction to an intention to end her employment. Finally, contrary to the testimony offered by the employer's witnesses, they clearly indicated on the Progressive Discipline Counseling dated May 20, 2016 that the type of corrective action being taken was "Termination." The claimant did not voluntarily quit her position, but was discharged.

The next issue is whether the claimant was discharged for disqualifying misconduct. 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. 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).

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). 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 Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). 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.

The claimant in this case was careless, but the carelessness does not indicate "such degree of recurrence as to manifest equal culpability, wrongful intent or evil design" such that it could accurately be called misconduct. Iowa Admin. Code r. 871-24.32(1)(a); *Greenwell v. Emp't Appeal Bd.*, No. 15-0154 (Iowa Ct. App. Mar. 23, 2016). The previous incident for which she was disciplined involved leaving early to take her husband to the airport. She left work that day. In this case, she remained on the employer's premises but was having an argument with her supervisor. She calmed down and then contacted Griep, who supervised Dove, which was what Griep expected her to do in this situation.

While the claimant's better choice of action would have been go directly to Griep rather than leave the department, the conduct for which she was discharged was an isolated incident of poor judgment and inasmuch as the employer had not previously warned the claimant about the issue leading to the separation, it has not met the burden of proof to establish that the claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. 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. Accordingly, benefits are allowed.

As benefits are allowed, the issues of overpayment, repayment, and the chargeability of the employer's account are moot.

DECISION:

The June 20, 2016, (reference 01) unemployment insurance decision is affirmed. The claimant did not quit but was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. The issues of overpayment, repayment, and the chargeability of the employer's account are moot.

Stephanie R. Callahan
Administrative Law Judge

Decision Dated and Mailed

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