

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

KARISSA M BERANEK
Claimant

APPEAL NO: 18A-UI-02561-JC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

RECOVER HEALTH SERVICES LLC
Employer

OC: 12/31/17
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant/appellant, Karissa M. Beranek, filed an appeal from the February 5, 2018, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A pre-hearing in lieu of hearing was held and recorded on March 23, 2018, to address outstanding discovery/exhibit issues. The claimant participated personally, and Benjamin Happel appeared for the employer.

A second telephone hearing was scheduled and held on April 12, 2018. The claimant participated personally. The employer participated through Aaron Koenig, regional manager. Cassy Wescott testified for the claimant. Melanie Nesteby and Tiffany Durr were listed as witnesses but unavailable when called.

Claimant Exhibits 1-16 and Employer Exhibits A-P were admitted into evidence. The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Did the claimant voluntarily quit the employment with good cause attributable to employer or was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

The administrative law judge, having considered all of the evidence in the record, finds that: The claimant was hired as a home health aide and homemaker effective February 9, 2016 (Claimant Exhibits 8-12). She was promoted to and worked as a team coordinator beginning April 13, 2016 (Claimant Exhibits 13, 14) until she separated on December 29, 2017. The evidence is disputed as to whether the claimant quit after accepting a demotion or was discharged for “not being a good fit”.

The undisputed evidence is the claimant was told effective December 29, 2017, that she would no longer be the Team Coordinator. At the time, Benjamin Happel, informed the claimant she was not a good fit and had hired her replacement. It is unclear what the final incident was that triggered the claimant's discharge after she was issued a performance improvement plan on November 27, 2017 (Employer Exhibits C, D). The claimant refused to sign the warning. The claimant had prior written warnings also on July 13, 2017 (Employer Exhibits E, F, G, H) and January 2, 2017 (Employer Exhibits, I, J, K, L, M, N, O, P).

The crux of the claimant and employer's conflict involved staffing. According to the claimant, she was not given the proper amount of staff or resources to fill the employer's clients' needs and consequently, she had to leave her administrative duties to fill in and be in the field, rather than her described job duties. Ms. Wescott, a friend of the claimant, corroborated the claimant's assertions of being on duty frequently, as they would be interrupted while spending time together at off hours when the claimant was needed to fill in. The claimant had raised her concerns to Mr. Happel and also Mr. Koenig. The claimant asserted because of the lack of support and resources, she was not able to complete her required job duties.

The employer contended the claimant did not complete her job duties and was not properly staffing, which caused complaints. These concerns triggered the November 27, 2017 warning (Claimant Exhibit 1). No other incidents were provided between November 27, 2017 and the December 29, 2017 meeting in which Mr. Happel informed the claimant she was being removed from her position due to not being a "good fit." The evidence is disputed as to whether the claimant was then offered a demotion as lead home health aide. The claimant stated Mr. Happel referenced it as a possibility but she did not accept the position or any assignment.

For unknown reasons, the claimant was then assigned a home health client on January 2, 2018, which she did not know, and did not attend. The claimant then received a letter from Mr. Happel dated January 8, 2018 indicating she had been a no call/no show to the January 2 assignment (Claimant Exhibit 4). When the claimant called Mr. Happel as directed within the letter, he confirmed to her that she had been terminated on December 29, 2017. Ms. Wescott observed as a witness to the call with the claimant. The claimant asserted she did not accept a position as a lead home health aide because no formal offer was extended to her, and that had she been offered a position, she would have had to sign a job description as she had done for her prior positions (Claimant Exhibits 8-14).

Mr. Happel attended the pre-hearing conference before separating from the employer. He did not attend the hearing or provide a written statement in lieu of participation.

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.

An unemployed person who meets the basic eligibility criteria receives benefits unless they are disqualified for some reason. Iowa Code § 96.4. Generally, disqualification from benefits is based on three provisions of the unemployment insurance law that disqualify claimants until they have been reemployed and they have been reemployed and have been paid wages for insured work equal to ten times their weekly benefit amount. An individual is subject to such a disqualification if the individual (1) "has left work voluntarily without good cause attributable to the individual's employer" Iowa Code § 96.5(1) or (2) is discharged for work –connected misconduct, Iowa Code § 96.5(2) a, or (3) fails to accept suitable work without good cause, Iowa Code § 96.5(3).

The first two disqualifications are premised on the occurrence of a separation of employment. To be disqualified based on the nature of the separation, the claimant must either have been fired for misconduct or have quit but not for good cause attributable to the employer. Generally, the employer bears the burden of proving disqualification of the claimant. Iowa Code § 96.6(2). Where a claimant has quit, however, the claimant has “the burden of proving that a voluntary quit was for good cause attributable to the employer pursuant to Iowa Code section § 96.5(1). Since the employer has the burden of proving disqualification, and the claimant only has the burden of proving the justification for a quit, the employer also has the burden of providing that a particular separation was a quit. The Iowa Supreme Court has thus been explicitly, “the employer has the burden of proving that a claimant’s departure from employment was voluntary.” *Irving v. Employment Appeal Board*, 883, NW 2d 179, 210 (Iowa 2016).

The evidence presented does not support that the claimant voluntarily quit her employment, but rather was discharged by Benjamin Happel on December 29, 2017, when she was informed that she was no longer “a good fit” for the team leader position. While the employer asserted the claimant accepted a demotion and then quit after not showing up to work on January 2, 2018 for an assignment as a lead health aide, the credible evidence does not support that the claimant was extended a formal offer or accepted the demotion.

The claimant denied accepting the position or an assignment after December 29, 2017, and a review of the claimant’s personnel file shows each time the claimant had accepted a position, she was required to sign and date a job description (Claimant Exhibits 8-14). In the absence of a signed job description for the claimant moving to a lead home health aide, coupled with the claimant’s denial, the administrative law judge concludes the evidence does not support the claimant initiated separation by quitting. Accordingly, the separation was involuntary and initiated by the employer as a discharge.

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

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).

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 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." *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

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.* Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

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.

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. 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. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

The most recent incident leading to discharge must be a current act of misconduct in order to disqualify an individual from receiving benefits. This incident must occur within a reasonable period from the discharge date. The issue is when the employer learned of the current act and did it act to terminate the individual within a reasonable period of time. Inasmuch as the employer had warned the claimant on November 27, 2017 and there were no incidents of alleged misconduct thereafter, it has not met the burden of proof to establish that the claimant acted deliberately or negligently after the most recent warning.

Failure in job performance due to inability or incapacity is not considered misconduct because the actions were not volitional. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979). The employer has not established a current or final act of misconduct, and, without such, the history of other incidents need not be examined. Accordingly, benefits are allowed.

Nothing in this decision should be interpreted as a condemnation of the employer's right to terminate the claimant for violating its policies and procedures. The employer had a right to follow its policies and procedures. The analysis of unemployment insurance eligibility, however, does not end there. This ruling simply holds that the employer did not meet its burden of proof to establish the claimant's conduct leading separation was misconduct under Iowa law.

DECISION:

The February 5, 2018, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. The benefits claimed and withheld shall be paid, provided she is otherwise eligible.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/scn