IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

KAREN RUIZ Claimant **GMRI INC** Employer	**APPEAL 21A-UI-08874-WG-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 04/05/20** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the March 23, 2021, (reference 01) unemployment insurance decision that denied benefits based upon a finding that claimant voluntarily quit her employment as the result of three days of consecutive no call/no show in violation of the company's policy. The parties were properly notified of the hearing. A telephone hearing was held on May 21, 2021. The claimant participated personally. The employer participated through Jamie Rhodes.

ISSUE:

Whether the claimant voluntarily quit her employment without good cause attributable to the employer or was discharged for misconduct and disqualified from receipt of benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a hostess from March 2019, until this employment ended on June 7, 2020. Claimant left on maternity leave on November 15, 2019. She was subsequently laid-off as the result of the employer closing its seating area in its restaurant during the Covid-19 pandemic.

The employer alleges that it called claimant several times to coordinate and notify her of the need to return to work. Specifically, the employer alleges said calls occurred in December 2019 or January 2020, presumably before the Covid-19 pandemic shut-down of the seating area. Claimant testified that she never received a telephone call from the employer or a voicemail instructing her to return to work.

I find that the employer did not prove it contacted claimant and notified her of the obligation to return to work. The employer called a second-hand witness that could only testify via hearsay that calls were made, voicemails were left, and a conversation was had with claimant in which she reported an intention not to return to work. The employer could have called the witnesses that allegedly made these phone calls and/or had conversations with the claimant. By contrast, claimant testified to her direct observations and experiences.

Claimant testified that she did not intend to quit her employment. Certainly, claimant could have made a much better effort to contact the employer, which remained open in some capacity during the pandemic. She elected to be passive and await instructions from the employer. I am somewhat skeptical as to claimant's motivation and intention to return to work. However, I find that claimant did not quit her employment. Instead, claimant was discharged from her employment.

In this respect, the employer failed to call the individuals that allegedly called claimant. I find that the employer failed to prove that the claimant knew she was supposed to return to work on any date certain. She was receiving unemployment benefits during the pandemic and the employer failed to prove that she knew she was to return to work such that the no call/no show policy of the employer would apply. Ultimately, I find that the employer discharged claimant without good cause or any disqualifying reason.

REASONING AND CONCLUSIONS OF LAW:

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

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.

A voluntary quitting means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer and requires an intention to terminate the employment. *Wills v. Emp't Appeal Bd.*, 447 N.W. 2d 137, 138 (Iowa 1989); *see also* Iowa Admin. Code r. 871-24.25(35). 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).

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).

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."

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, employer incurs potential liability for unemployment insurance benefits related to that separation.

The Iowa Supreme Court has ruled that if a party has the power to produce more explicit and direct evidence than it chooses to present, the administrative law judge may infer that evidence not presented would reveal deficiencies in the party's case. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976). Mindful of the ruling in *Crosser*, and noting that the claimant presented direct, first-hand testimony while the employer relied upon second-hand witnesses, the administrative law judge concludes that the employer has not met its burden of proof. The employer alleged it attempted several calls, left voicemails, and that a member of management spoke with claimant on the telephone. Yet, none of the individuals that allegedly spoke with or called claimant testified and all evidence offered by the employer relied upon hearsay statements. Moreover, the employer's representative conceded the calls were made by someone other than the witness and that she could not state with certainty whether any voicemails were left for claimant. The employer failed to produce the best evidence available and failed to prove that the claimant knew she was required to return to work. Therefore, I conclude the employer failed to prove the claimant was discharged for any disqualifying reason.

Inasmuch as claimant was not aware of the requirement to return to work prior to her discharge, the employer has not met the burden of proof to establish that claimant engaged in misconduct. Benefits are allowed.

DECISION:

The March 23, 2021, (reference 01) decision is reversed. Claimant did not quit but was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. Any benefits withheld shall be paid to claimant.

William H. Grell
Administrative Law Judge

June 3, 2021
Decision Dated and Mailed

whg/scn