

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**VIRGINIA M ROCK**  
Claimant

**APPEAL NO: 18A-UI-09161-TN-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**FBG SERVICE CORPORATION**  
Employer

**OC: 09/17/17**

**Claimant: Respondent (2)**

Iowa Code § 96.5(2)a – Discharge

**STATEMENT OF THE CASE:**

FBG Service Corporation, the employer, filed a timely appeal from a representative's unemployment insurance decision dated August 22, 2018, (reference 07) which held claimant eligible to receive unemployment insurance benefits, finding the claimant was dismissed from work on July 27, 2018 because the claimant was not performing work to the employer's satisfaction during the trial period of employment. After due notice was provided, a telephone hearing was held on September 20, 2018. Although duly notified, there was no participation by the claimant. Employer participated by Mr. Ted Valencia, Hearing Representative and witnesses Ms. Pam Kinkaid, Human Resource Manager and Ms. Kay Volz, Cedar Rapids Market Manager. Employer's Exhibits A and B were admitted into the hearing record.

**ISSUE:**

The issues are whether the claimant was discharged for work-connected misconduct sufficient to warrant the denial of unemployment insurance benefits.

Whether the claimant was discharged because she was not able to meet the employer's standards because she was not able to do the work.

**FINDINGS OF FACT:**

Having considered all of the evidence in the record, the administrative law judge finds: Virginia Rock began employment with FBG Service Corporation on July 3, 2018. Ms. Rock was hired to work full-time as a cleaning specialist working 1:00 p.m. until 9:30 p.m. Monday through Friday. Claimant was paid by the hour. Her immediate supervisor was Ms. Kay Bolz. Ms. Rock was assigned cleaning assignments at specified FBG Service Corporation client locations.

At the time of hire, Ms. Rock was informed of the company's attendance policy and was informed that if an employee accrued three or more occurrences of unexcused absence during the first 90 days of employment, the employee would be subject to termination. The claimant as further informed that failure to report to work without providing the required notification to the employer would result in termination from employment. A decision was made to terminate Ms. Rock from her employment with the company after Ms. Rock had failed to report for scheduled work on July 12, and July 24, 2018 without providing a required notice to the employer. On those occasions, the claimant had indicated that she had a court appearance or was scheduled

to be with her attorney and would be absent from work. Upon being further questioned by her manager, the claimant agreed that she would report to work at 5:00 p.m. on each of those evenings and complete the remainder of her work shifts. On both occasions, the employer and/or the company's clients expected Ms. Rock to report as agreed, however the claimant did not come to work as promised and provided no notice to the employer that she would be absent or why.

When the claimant provided no reasonable explanation as to why she had not reported for the partial shift or provided the required notification, a decision was made to terminate Ms. Rock from her employment. The client location had specifically requested the claimant be removed from the assignment.

Ms. Rock did not report for scheduled work the next day, July 26, 2018, and provided no notice to the employer that she would be absent. When the claimant next reported to work on July 27, 2018, she was informed that she had been discharged effective July 25, 2018 for failing to report and failing to provide required notification to the employer on two occasions.

Although informed that she had been discharged based upon her failure to report or provide notification effective July 25, 2018, claimant nonetheless attempted to explain her absence on July 26, 2018.

Ms. Rock asserted that she must have been hit by an automobile in a parking lot and woke up in her car at approximately midnight in her car, too late to call in. Although the claimant alleged that she had been struck by an automobile and that she was unconscious until around midnight, the claimant did file a police report and did not see a doctor.

It is the employer's position that the claimant was not discharged due to poor performance or lack of ability during the probationary period, but solely because she had been absent from work on two occasions with little or no advanced notice to the employer but for a portion of her shift, and had not reported for the remainder of the shift as promised without further notice to the company.

#### **REASONING AND CONCLUSIONS OF LAW:**

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).

Iowa Admin. Code r. 871-24.32(5) provides:

Discharge for misconduct.

(5) Trial period. A dismissal, because of being physically unable to do the work, being not capable of doing the work assigned, not meeting the employer's standards, or having been hired on a trial period of employment and not being able to do the work shall not be issues of misconduct.

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). 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 Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). The focus is on deliberate, intentional, or culpable acts by the employee. The limits disqualifying misconduct to willful wrong doing or repeated carelessness or negligence that equals willful misconduct in culpability. See *Lee v. Employment Appeal Board*, 616 N.W.2d 661,665 (Iowa 2000).

In the case at hand, Ms. Rock was not discharged during her 90-day probationary period because she was not able to do the work or not meeting the employer's performance standards, she was discharged for promising to come work for a partial shift on two occasions, but failing to do so, without providing any additional notification to the employer as required. The claimant was aware of the employer's expectation that she would report for scheduled work, or in the alternative notify the employer if she were to be absent and was aware that failure to do so could cause her to lose her employment. The claimant was discharged effective July 25, 2018 after she failed to report to work for a partial shift that day and provided no notification to the employer. The claimant was not informed of her discharge until July 27, 2018 because the claimant had failed to report for work on July 26, 2018 asserting at that time that had been knocked out by a car in the parking lot and was unconscious for several hours but did not call the police or visit a physician.

The administrative law judge concludes the claimant was discharged effective July 25, 2018 for failing to report for the remainder of her shift on two occasions without providing any additional notice to the employer. This conduct was within the claimant's control and showed a willful disregard of the employer's interest and standards of behavior that the employer had a right to expect of employees under the provisions of Iowa Employment Security law and constitutes work-connected misconduct sufficient to warrant the denial of unemployment insurance benefits.

Accordingly, the claimant is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount and is otherwise eligible.

Because the claimant's separation was disqualifying, benefits were paid to which she was not entitled. The administrative record reflects that the claimant has received unemployment benefits in the amount of \$2,509.00 since filing a claim with an effective date of September 17, 2017 for the benefit week ending dates July 28, 2018 through September 8, 2018. The administrative record also establishes that the employer did participate in the fact-finding interview.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code section 96.3(7)a, b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid benefits.

Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment and the employer will not be charged for benefits paid.

**DECISION:**

The representative's unemployment insurance decision dated August 22, 2018, reference 07, is reversed. Claimant was discharged for work-connected misconduct. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times her weekly benefit amount and is otherwise eligible. Claimant has been overpaid unemployment insurance benefits in the amount of \$2,509.00 and is liable to repay this amount. The employer's account will not be charged based upon the employer's participation in the fact-finding interview.

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Terry P. Nice  
Administrative Law Judge

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Decision Dated and Mailed

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