

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

JANICE L SCHWARTZ
Claimant

APPEAL NO: 19A-UI-01128-JE-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

MARSDEN BLDG MAINTENANCE LLC
Employer

OC: 12/23/18
Claimant: Appellant 2)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the February 6, 2019, reference 07, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on February 22, 2019. The claimant participated in the hearing with her mother/witness Francis Morrison. The employer did not respond to the hearing notice and did not participate in the hearing.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a part-time general cleaner for Marsden Building Maintenance from October 8, 2018 to November 6, 2018. She was discharged for attendance.

On Wednesday, November 7, 2018, the claimant left a message for the employer explaining she had a death in her family and would not be in that day. On Thursday, November 8, 2018, the claimant called her supervisor after the memorial service for her family member and was told she was suspended. The claimant asked if she could return to work Friday or Monday and her supervisor said, "Right now you're suspended and you have to call Marguerite." On Friday, November 9, 2018, the claimant, who does not drive, asked her Mom to take her to the employer but she was unable to give the claimant a ride that day. On Monday, November 12, 2018, the claimant's Mom took her over to the employer and the claimant explained to Marguerite what happened. Marguerite stated she was sorry for the claimant's loss but she was suspended. Marguerite said she needed to talk to her boss before she could determine the claimant's job status. On Wednesday, November 14, 2018, the claimant's Mom took her to the employer and was told she was still suspended. Marguerite also told the claimant the employer had replaced her. On Friday, November 16, 2018, the claimant received her check because it was payday and her pay was not docked for her work shirts so she assumed she was still employed. She called to speak to Marguerite but was told by the woman who answered the phone that Marguerite was busy so the claimant left her a message. On Monday,

November 19, 2018, she called Marguerite again and was told she was not available. On Tuesday, November 20, 2018, the claimant called and spoke to Marguerite who said the employer determined the claimant voluntarily quit her job. The claimant disagreed with the employer's assessment of the separation.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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).

The employer has the burden of proving disqualifying misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 665 (Iowa 2000).

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). The claimant was absent November 7, 2018, due to a death in her family and left a message for the employer. There is no evidence establishing the claimant intended to quit her job. She contacted the employer either in person or by phone six times between November 8 and November 19, 2018, asking about her job status. Those are not the actions of an individual who has quit her job. The evidence shows the claimant's employment was effectively terminated.

With misconduct cases, it is incumbent upon the employer to present evidence in support of its allegations. Allegations of misconduct without additional evidence shall not be sufficient to result in disqualification. 871 IAC 24.32(4). The employer did not participate in the hearing and failed to provide any evidence. The evidence provided by the claimant does not rise to the level of disqualifying job misconduct as that term is defined by Iowa law. The employer has not met its burden of proof. Therefore, benefits must be allowed.

DECISION:

The February 6, 2019, reference 07, decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/scn