IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

MERRIDEE M BIRKELAND Claimant **DOLGENCORP LLC** Employer	**APPEAL 19A-UI-08655-JC-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 09/22/19** **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:

The employer/appellant, Dolgencorp LLC., filed an appeal from the October 25, 2019 (reference 01) Iowa Workforce Development ("IWD") unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on November 26, 2019. The claimant participated. The employer participated through Judy Benz, manager.

The administrative law judge took official notice of the administrative records including the fact-finding documents. Employer Exhibit 1 was admitted. 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.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Did the claimant voluntarily quit the employment with good cause attributable to employer?
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can any 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 part-time as a lead associate and was separated from employment on July 25, 2019, when she was discharged by Judy Benz.

When the claimant began employment in 2017, she was not scheduled to work evenings on weekends. This changed in July 2019, when Ms. Benz decided to schedule the claimant for Saturday, July 27, 2019 from 4:00-10:00. Ms. Benz posted the schedule for employees to view

on July 25, 2019, and stated she scheduled the claimant for Saturday night because other employees had complained that the claimant wasn't working weekend nights.

On July 26, 2019, the claimant attempted to contact both her manager, Ms. Benz, and another manager, Jeff, to report that she could not work the evening of July 27, 2019. Management did not respond to her messages and she did not work her shift on July 27, 2019. The employer determined she was a no-call/no-show.

Ms. Benz and the claimant made contact and the claimant was informed not to work her shift on July 28, 2019 and not to return to work until Ms. Benz made contact with the district manager. The claimant did not work her shift on July 28, 2019, or July 29, 2019 based upon Ms. Benz's communications. Ms. Benz interpreted the claimant to have been a no-call/no-show to her shift on July 29, 2019, because she had not specifically told the claimant that she was relieved of her shift on July 29, 2019. Rather, Ms. Benz had only specified July 28, 2019.

Thereafter, the claimant went to the employer and made contact with Ms. Benz. A heated exchange occurred between the parties in which Ms. Benz told the claimant not to return and that she was done "taking her shit". The claimant replied, "have fun talking to my lawyer" and separation ensued.

The administrative record reflects that claimant has received unemployment benefits in the amount of $889.00, since filing a claim with an effective date of September 22, 2019. The administrative record also establishes that the employer did participate in the fact-finding interview or make a witness with direct knowledge available for rebuttal. Jeff Vanvelzen attended.

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.

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. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id*. 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).

In this case, the claimant did not have the option of remaining employed nor did she express intent to terminate the employment relationship. Rather, the claimant was told not to return to work until after Ms. Benz spoke to her manager. When the claimant and Ms. Benz met thereafter, Ms. Benz told the claimant she was done working and that she (Ms.Benz), was "done taking her shit." Clearly, the employer, and not the claimant, initiated separation. 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).

Iowa Administrative Code rule 871-24.32(1)a provides:

> "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 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.

The question of whether the refusal to perform a specific task constitutes misconduct must be determined by evaluating both the reasonableness of the employer's request in light of all circumstances and the employee's reason for noncompliance. *Endicott v. Iowa Dep't of Job Serv.*, 367 N.W.2d 300 (Iowa Ct. App. 1985).

In this case, the claimant had not been required to work weekend evenings since the beginning of her employment in 2018. On July 25, 2019, Ms. Benz posted a schedule for July 27, 2019 requiring the claimant work the evening shift. The claimant made a good faith effort to notify the employer that she was unable to work the shift prior to the shift start. When the claimant did not work her shift, Ms. Benz told her she was not to work her shift on July 28 and not to return until contact was made with the district manager. Consequently, the claimant did not work her shifts on July 28 and 29, 2019. The employer considered the claimant's absences on July 27, 28 and 29 to be no-call/no-shows, but they were not. The claimant notified the employer in advance that she would be unable to work the July 27 shift, and had never worked that shift during her employment. The claimant then relied upon Ms. Benz telling her not to return to work until after the district manager was contacted, which is why she did not work the shifts on July 28 and 29. The claimant has established a good cause reason for her noncompliance with the shift. The employer has failed to establish by a preponderance of the evidence that the claimant engaged in disqualifying job-related misconduct. As such, she is allowed benefits, provided she is otherwise eligible.

Because the claimant is eligible for benefits, the issues of overpayment and employer's relief of charges are moot.

DECISION:

The October 25, 2019 (reference 01) initial decision is affirmed. The claimant was discharged for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

_____

Jennifer L. Beckman
Administrative Law Judge
Unemployment Insurance Appeals Bureau
Iowa Workforce Development
1000 East Grand Avenue
Des Moines, Iowa 50319-0209
Fax 515-478-3528

_____

Decision Dated and Mailed

jlb/scn