

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

DAWN M NISSEN
Claimant

GRAPETREE MEDICAL STAFFING INC
Employer

APPEAL 16A-UI-05206-DB-T
ADMINISTRATIVE LAW JUDGE
DECISION

OC: 04/17/16
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 filed an appeal from the May 4, 2016, (reference 01) unemployment insurance decision that denied benefits based upon her voluntarily quitting work without good cause attributable to the employer. The parties were properly notified of the hearing. A telephone hearing was held on May 18, 2016. The claimant, Dawn M. Nissen, participated personally. The employer, Grapetree Medical Staffing Inc., participated through President and Chief Executive Officer Timothy Kinnetz and Vice President of Human Resources Jeanenne Kinnetz. Employer's Exhibits 1 and 2 were admitted.

ISSUES:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as an Accounting Specialist. She began working for this employer on February 8, 2016 and her employment ended on April 15, 2016. Her job duties included entering timesheets for payroll, invoicing, answering the telephone and other miscellaneous office duties.

On April 15, 2016 claimant was scheduled to have her 60-day performance review. Claimant believed that she was performing well in her job duties because her immediate supervisor had never said otherwise. Claimant, Ms. Kinnetz and Mark Gaworski, who was the manager of accounting, attended a meeting in the employer's conference room. Ms. Kinnetz explained to claimant that she was not performing well in her job duties and that she was being placed on a 30-day probation which including putting her on a written improvement plan. See Exhibit 1.

Claimant's performance issues included attendance, taking direction and completing tasks, and professionalism and customer service via phone and email. See Exhibit 1. Claimant was upset about the performance review. She disagreed with the review and raised her tone of voice when speaking during the meeting. During the meeting claimant was taking notes for herself.

As she was taking notes for herself she wrote the word “quit” down in her notebook and circled it. She did not state to either Ms. Kinnetz or Mr. Gaworski during this meeting that she intended to quit. Claimant agreed to the probation and went back to work after this meeting.

Following the meeting Mr. Kinnetz discussed what had happened with Ms. Kinnetz and Mr. Gaworski. The two advised Mr. Kinnetz that claimant had written the word “quit” down in her notebook as they were speaking to her. During this meeting the three decided to part ways with her. See Exhibit 2.

Approximately 10 minutes prior to the end of claimant’s shift she was called into the conference room again. Mr. Kinnetz, Ms. Kinnetz, and Mr. Gaworski all met with her. No one sat down and all of the parties stood around the conference room. Mr. Kinnetz stated to claimant that “it was decided that they were going to part ways”. Claimant believed she was being discharged at this time and replied “fine, whatever, I wasn’t going to come back anyway.” Claimant asked if she could continue the email she was in the process of drafting and Ms. Kinnetz told her no. Ms. Kinnetz then allowed her to gather her personal items and escorted her out of the building.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes as follows:

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.

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).

See also 871 IAC 24.25 and 871 IAC 24.26.

First it must be determined whether claimant quit or was discharged from employment. 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). Where a claimant walked off the job without permission before the end of his shift saying he wanted a meeting with management the next day, the Iowa Court of Appeals ruled this was not a voluntary quit because the claimant's expressed desire to meet with management was evidence that he wished to maintain the employment relationship. Such cases must be analyzed as a discharge from employment. *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438 (Iowa Ct. App. 1992).

The decision in this case rests, at least in part, upon the credibility of the parties. The issue must be resolved by an examination of witness credibility and burden of proof. 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.* Further, since most members of management, especially those in human resources, are considerably more experienced in personnel issues and operate from a position of authority over a subordinate employee, it is reasonably implied that the ability to communicate clearly is extended to discussions about employment status. After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds that the claimant's version of events is more credible.

It was clear from claimant's testimony that she was told that the employer decided to "part ways". This was confirmed by Mr. Gaworski's comments in Exhibit 2 which states that "it was decided to part ways with her. Jeanenne, Tim and I met with Dawn at 4:50 p.m. an informed her of *our decision.*" (emphasis added).

While claimant may have had the intent to quit when she wrote in her notebook the word "quit" there was no overt act by the claimant in carrying out her intention. In fact, quite the opposite, as claimant accepted her probation and went back to work until she was called back into the conference room by management. As such, the burden of proof falls to the employer to establish that claimant was discharged for job-related 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, the employer incurs potential liability for unemployment insurance benefits related to that separation.

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.

Claimant was given a written warning for her instances of tardiness and no further incidents occurred. Further, her job performance issues do not rise to the level of misconduct as she was being put on probation. Misconduct connotes volition. A failure in job performance which results from inability or incapacity is not volitional and therefore not misconduct. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445 (Iowa 1979). Further, Ms. Kinnetz testified that they were going to include claimant's unprofessionalism during the performance review meeting as part of her written improvement plan and probation. As such, claimant's actions in that meeting cannot be considered a current act of misconduct.

The employer failed to meet its' burden of proof to establish a current act of job-related misconduct. As such, benefits are allowed.

DECISION:

The May 4, 2016, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

Dawn Boucher
Administrative Law Judge

Decision Dated and Mailed

db/pjs