IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

TAMIKA C STUCKEY Claimant **AHF/KENTUCKY-IA** Employer	**APPEAL 15A-UI-13689-JCT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 10/25/15** **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 filed an appeal from the December 1, 2015 (reference 03) unemployment insurance decision that denied benefits based upon separation. The parties were properly notified about the hearing. A telephone hearing was held on January 5, 2016. The claimant participated. The employer participated through Matthew Carpenter, Administrator. Betty Brockway also testified.

ISSUE:

Did the claimant voluntarily leave the employment with good cause attributable to the employer or did the employer discharge the claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full time as a nurse's assistant and was separated from employment on July 1, 2015.

The claimant last performed work on May 27, 2015 and was next scheduled on May 30, 2015. The claimant received notice that she was being evicted from her personal residence effective June 1, 2015 and called off her shift May 30, 2015 because she needed to make housing and moving arrangements. On May 30, 2015, the claimant went to the office and spoke with Amy Peterson about her circumstances. With Ms. Peterson, the claimant discussed possible shelter or housing forms; as well the claimant submitted a PTO form to request payment for missing her shift, to help with her housing costs. Together with Ms. Peterson, the claimant called Russ Milan, her immediate supervisor, who was not working on Saturday. During the call, the claimant informed the employer she needed some time off to arrange for housing. She was told to write everything down and leave the papers under Mr. Milan's door, as well as a copy for Matthew Carpenter, the administrator.

It was the claimant's understanding that the leave of absence had been granted and Mr. Milan told the claimant that when she was ready to return to call him and he'd put her on the schedule. The employer reports that Amy Peterson tried to call the claimant in June but could not reach her and reported such to Mr. Carpenter. The claimant did not receive the calls. The employer also reported that the leave of absence granted to the claimant was intended to be temporary and not indefinite. Neither Mr. Milan nor Ms. Peterson are still employed for the employer and did not testify or offer written statements in lieu of participation.

The claimant was placed in a shelter effective June 29, 2015 and called on approximately July 1, 2015. At that time, she spoke to Betty Brockway, who was new in her position. Ms. Brockway checked with management and informed the claimant she had been terminated and not eligible for rehire. Ms. Brockway was unable to provide a reason why the claimant had been discharged. The employer's records reflect the claimant was discharged from the system effective July 16, 2015; due to administrative delay.

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. A voluntary quitting of employment requires that an employee exercise a voluntary choice between remaining employed and 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 went on a leave of absence, and attempted to return on July 1, 2015. When she called the employer to be placed back on the schedule, she was told she had been terminated. 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 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(4) provides:

> (4) Report required. The claimant's statement and the employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate

> the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. 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).

For unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees or is an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion are not deemed to constitute work-connected misconduct. 871 IAC 24.32(1)(a).

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*. 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 the employer has not satisfied its burden of proof to establish the claimant was discharged for disqualifying misconduct.

Cognizant of the lack of communication between the parties between May 30, 2015 and the separation, the employer has the burden of proof to establish misconduct. In this case, the claimant reasonably believed that she was on an approved leave of absence effective May 30, 2015; until she was able to return to work, per the instructions of Russ Milan, her supervisor. The claimant denied receiving any calls from the employer in the interim about her job status and when the claimant tried to return to work, she was informed she was discharged by Ms. Brockway.

The two people with personal knowledge about the terms of the leave of absence and attempts to communicate with the claimant, were Russ Milan and Amy Peterson, who no longer work for the employer. When the record is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. *Schmitz v. Iowa Dep't Human Servs.*, 461 N.W.2d 603, 607 (Iowa Ct. App. 1990). Both the quality and the quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility,

and accuracy required by a reasonably prudent person in the conduct of serious affairs. See, Iowa Code § 17A.14 (1). In making the evaluation, the fact-finder should conduct a common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be fulfilled. *Schmitz*, 461 N.W.2d at 608. 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). In the absence of credible evidence to refute the claimant's testimony regarding the conversation that took place between Ms. Peterson, Mr. Milan, and the claimant on May 30, 2015, the administrative law judge concludes the claimant reasonably believed she was on a leave of absence until she notified the employer she could return to work. Mindful of the ruling in *Crosser*, *id.,* and noting that the claimant presented direct, first-hand testimony while the employer relied upon second-hand reports, the administrative law judge concludes that the claimant's recollection of the events is more credible than that of the employer. While the employer may have been justified in discharging the claimant, work-connected misconduct as defined by the unemployment insurance law has not been established in this case. Benefits are allowed.

DECISION:

The December 1, 2015 (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. The benefits claimed and withheld shall be paid, provided she is otherwise eligible.

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Jennifer L. Coe
Administrative Law Judge

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Decision Dated and Mailed

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