IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

ANGEL A MALLIE Claimant **AMERICAN BAPTIST HOMES OF THE MID** Employer	**APPEAL 20A-UI-12628-DZ-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 07/19/20** **Claimant: Appellant (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quit
Iowa Code § 96.4(3) – Ability to and Availability for work

STATEMENT OF THE CASE:

Angel A Mallie, the claimant/appellant filed an appeal from the October 1, 2020, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified of the hearing. A telephone hearing was held on December 11, 2020. The claimant participated and testified. The employer participated through Angela Bladt, human resources director. Claimant's Exhibits A-F and Employer's Exhibits 1-3 were admitted into evidence.

ISSUES:

Was the claimant laid off, discharged for disqualifying job-related misconduct or voluntarily quit without good cause?
Is the claimant able to and available for work?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for employer on September 30, 2015. She worked as a full-time certified nursing assistant (CNA) on the night shift. Claimant's last day of work was her overnight shift on July 13, 2020 ending the morning of July 14. Claimant was separated from employment on July 24.

The claimant had foot surgery in July 2018 and again in July 2019. The claimant worked in the memory care unit from April 2018 through June 30, 2020. Beginning July 1, 2020, the employer began rotating CNAs between the memory care unit and the skilled cared unit aka "the floor."

On July 1, the claimant worked a shift in the skilled care for the first time since April 2018. After that shift, the claimant told her supervisor that her foot hurt. The claimant continued to work "the floor" until July 9. The claimant complained to her supervisor several times about her food hurting. In response, the supervisor told the claimant to provide a doctor's note to the employer. During her July 13 overnight shift, the claimant posted her doctor's note on her supervisor's door. The note requested that the claimant be allowed to continue working in the memory care unit and not work "the floor." On July 14, the employer contacted the claimant to discuss the

doctor's note. The claimant responded on July 15 and a meeting between the claimant the employer was scheduled for July 16 at 4:00 p.m. Also, on July 15, another employee worked the claimant's shift at her request. The employer's policy requires that employees request a shift swap beforehand. Claimant did not request a shift swap beforehand. The claimant did not attend the July 16 meeting to discuss her doctor's not because she overslept.

The claimant had been scheduled to work July 17, 18 and 21. On July 17 at 8:32 a.m. the employer removed from the claimant from the schedule. That same day, the claimant sent the employer a message through their online system to reschedule the July 16 meeting. The employer did not check the online system and did not respond to the claimant. At that point, the claimant saw that she was not scheduled to work the July 17, 18 and 21 shifts. Also on July 17, the employer sent the claimant an email message asking her to contact the employer. The claimant did not contact the employer. On July 24, the employer again sent the claimant a message asking her to contact the employer. The claimant contacted the employer on July 24. The employer terminated the claimant's employment and told her the reason was because they needed someone to work in all units of the facility and not just in the memory care unit.

During the hearing, the employer testified that they terminated the claimant's employment because she violated company policy by doing a shift swap without prior approval and because she missed the July 16 meeting and then didn't contact the employer or show up for work until July 24.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason but she is not able to work and available for work.

Iowa Code section 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.

871 IAC 24.32(1)a provides:

> Discharge for misconduct.
>
> (1) Definition.
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> 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 Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

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). 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). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). In an at-will employment environment 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, it incurs potential liability for unemployment insurance benefits related to that separation. A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

In this case, the employer offered several reasons for terminating the claimant's employment: 1) because the employer needed someone to work in all units of the facility and not just in the memory care unit, 2) because the claimant violated company policy by doing a shift swap without prior approval, and 3) because the claimant missed the July 16 meeting and then didn't contact the employer or show up for work until July 24. None of the reasons are disqualifying.

The claimant's request to return to working in the memory care unit due to her foot pain is not a disqualifying reason. The claimant's July 15 shift swap was a violation of the employer's Attendance Policy. However, according to the employer's own policy, that violation alone, whether it's considered an absence or a No-Call/No-Show, is not enough to result in termination of the claimant's employment. Missing the July 16 meeting was not a violation of the employer's policy. The fact that the claimant scheduled the meeting and then missed it may have frustrated the employer, however, that conduct is not a violation of the employer's policy and is not misconduct. Finally, when the claimant contacted the employer on July 17 to reschedule the meeting she saw that she was no longer scheduled for July 17, 18 or 21. The claimant not showing up to work when she was not scheduled to work is not misconduct.

The administrative law judge further concludes that the claimant is not able to work and available for work.

Iowa Code section 96.4(3) provides:

> An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

> 3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph (1), or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

Iowa Admin. Code r. 871-24.22(1)a provides:

> Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.
>
> (1) Able to work. An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.
>
> a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

To be able to work, "[a]n individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood." *Sierra v. Employment Appeal Board*, 508 N.W.2d 719, 721 (Iowa 1993); *Geiken v. Lutheran Home for the Aged*, 468 N.W.2d 223 (Iowa 1991); Iowa Admin. Code r. 871-24.22(1). "An evaluation of an individual's ability to work for the purposes of determining that individual's eligibility for unemployment benefits must necessarily take into consideration the economic and legal forces at work in the general labor market in which the individual resides." *Sierra* at 723. The court in *Gilmore v. Empl. Appeal Bd.*, 695 N.W.2d 44 (Iowa Ct. App. 2004) noted that "[i]nsofar as the Employment Security Law is not designed to provide health and disability insurance, only those employees who experience illness-induced separations that can fairly be attributed to the employer are properly eligible for unemployment benefits." *White v. Emp't Appeal Bd.*, 487 N.W.2d 342, 345 (Iowa 1992) (citing *Butts v. Iowa Dep't of Job Serv.*, 328 N.W.2d 515, 517 (Iowa 1983)).

The claimant's July 8 doctor's note, which she gave to her employer on July 13, is prima facie evidence of her inability to perform the work required. Benefits are denied.

Even though claimant is not eligible for regular unemployment insurance benefits under state law, the claimant may be eligible for federally funded unemployment insurance benefits under the Coronavirus Aid, Relief, and Economic Security Act ("Cares Act"), Public Law 116-136. Section 2102 of the CARES Act creates a new temporary federal program called Pandemic Unemployment Assistance (PUA) that in general provides up to 39 weeks of unemployment benefits. An individual receiving PUA benefits may also receive the $600 weekly benefit amount

(WBA) under the Federal Pandemic Unemployment Compensation (FPUC) program if he or she is eligible for such compensation for the week claimed.

DECISION:

The October 1, 2020, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason but she is not able to and available for work. Benefits are denied.

Daniel Zeno
Administrative Law Judge

January 7, 2021
Decision Dated and Mailed

dz/mh

NOTE TO CLAIMANT:

This decision determines you are not eligible for regular unemployment insurance benefits under state law. If you disagree with this decision you may file an appeal to the Employment Appeal Board by following the instructions on the first page of this decision.

If you do not qualify for regular unemployment insurance benefits under state law and are currently unemployed for reasons related to COVID-19, you may qualify for Pandemic Unemployment Assistance (PUA). **You will need to apply for PUA to determine your eligibility under the program.** For more information on how to apply for PUA, go to https://www.iowaworkforcedevelopment.gov/pua-information. **If you do not apply for and are not approved for PUA, you may be required to repay the benefits you've received so far.**