

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

**DOUGLAS L FRIEDEN**  
Claimant

**PRN STAFFING INC**  
Employer

**APPEAL 20A-UI-04977-SC-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 03/29/20**  
**Claimant: Appellant (5)**

Iowa Code § 96.19(38) – Total, Partial, and Temporary Unemployment  
Iowa Code § 96.4(3) – Able to and Available for Work  
Iowa Admin. Code r. 871-24.22(2)i – Able & Available – On-Call Worker  
Iowa Code § 96.5(2)a – Discharge for Misconduct  
Iowa Code § 96.5(1) – Voluntary Quitting  
Iowa Code § 96.3(7) – Overpayment of Benefits  
Public Law 116-136 § 2104(b) – Federal Pandemic Unemployment Compensation

**STATEMENT OF THE CASE:**

On May 31, 2020, Douglas L. Frieden (claimant) filed an appeal from the May 22, 2020, reference 01, unemployment insurance decision that denied benefits based upon the determination he voluntarily quit employment with PRN Staffing, Inc. (employer) for personal reasons which is not good cause attributable to the employer. The parties were properly notified about the hearing on the issue of separation. A telephone hearing was held on June 26, 2020. The claimant participated personally. The employer participated through Joni Bergmeier, Director of Operations. The claimant's Exhibits A and B were admitted without objection. The administrative law judge took official notice of the claimant's claim and wage histories. During the hearing, the parties waived notice on the issue of whether the claimant is totally, partially, or temporarily unemployed as an on-call worker.

**ISSUES:**

Did the claimant voluntarily quit employment with good cause attributable to the employer or did the employer discharge the claimant for job-related disqualifying misconduct?  
Is the claimant totally, partially, or temporarily unemployed?  
Is the claimant able to and available for work or is he ineligible for benefits as an on-call worker?  
Has the claimant been overpaid regular unemployment benefits and Federal Pandemic Unemployment Compensation (FPUC)?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed on an as-needed (PRN) basis as a Certified Nursing Assistant (CNA) beginning on October 1, 2010. The employer provides temporary staff to medical facilities. The employees elect to work available shifts at their discretion. The employer's policies only require

that employees cover four shifts a month, complete monthly training, and check-in with the employer every Monday. The claimant did not always adhere to these requirements, but the employer did not discipline or counsel him for non-compliance.

The claimant's last day worked was December 16, 2019 because he injured his hand. He elected not to work any shifts during January 2020, even though Joni Bergmeier, Director of Operations, notified him of available shifts. On January 30, Bergmeier told the claimant, if he did not contact her, she would place him on inactive status. The following day, the claimant responded stating he would be picking up hours in February.

On February 11, Bergmeier sent the claimant available shifts and informed him that he would need to pick up shifts by the end of February to remain active. The claimant did not respond. On February 17, Bergmeier notified the claimant that his employment had ended because his last communication had been January 31, he did not complete the monthly training, and had not been calling the employer on Mondays. She explained he would need to reapply for a position when he was available for work. The claimant had planned on picking up shifts at the end of February and did not know his job was in jeopardy.

The claimant filed his claim for benefits effective March 29, 2020, and his base period includes wage credits earned from October 1, 2018 through September 30, 2019. This employer is the only employer in his base period and all of the wage credits were for on-call work. The claimant's hours varied. He earned \$17.25 an hour and he earned between \$4,238 and \$7,628 each quarter of his base period. The claimant averaged 25.9 hours worked per week during his base period. The claimant has received \$2,317 in regular unemployment benefits and \$4,200 in FPUC for the seven weeks between March 29 and May 16. The claimant has not worked or earned wages after March 29.

## **REASONING AND CONCLUSIONS OF LAW:**

- I. Did the claimant voluntarily quit employment with good cause attributable to the employer or did the employer discharge the claimant for job-related disqualifying misconduct?*

For the reasons that follow, the administrative law judge concludes the claimant did not voluntarily quit but was discharged from employment for no disqualifying reason. Benefits are allowed based on the separation, if the claimant meets all other eligibility requirements.

Iowa Code section 96.5 provides, in relevant part:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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.

...

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 provides, in relevant part:

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).

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. The burden of proof rests with the employer to show that the claimant voluntarily left his employment. *Irving v. Emp't Appeal Bd.*, 883 N.W.2d 179 (Iowa 2016). 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). It 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 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).

The employer has not met the burden of proof to show the claimant voluntarily left his employment. The claimant did not express an intention to leave employment and he did not have the option to continue working after February 17 without reapplying for employment. Therefore, the employer discharged the claimant. The next issue is whether the claimant was discharged for disqualifying misconduct.

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). 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. However, 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.

The issue is not whether the employer made a correct decision in separating the 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." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). 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.

The employer has not established that the claimant engaged in misconduct. Bergmeier told the claimant that he had until the end of February to pick up shifts. However, she discharged him halfway through the month with no warning. Accordingly, benefits based on the separation are allowed, if the claimant meets all other eligibility requirements.

Even if not calling on Mondays and not completing the monthly training were misconduct, benefits on the separation would still be allowed, as the employer has not met the burden of proof to establish that the claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Training or general notice to staff about a policy is not considered a disciplinary warning.

*II. Is the claimant totally, partially, or temporarily unemployed? Is the claimant able to and available for work or is he ineligible for benefits as an on-call worker?*

For the reasons that follow, the administrative law judge concludes the claimant is not totally or partially unemployed because he is an on-call worker. As he is not unemployed within the meaning of Iowa law, benefits are denied.

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 96.1A, subsection 38, paragraph "b", subparagraph (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 Code section 96.19(38) provides:

"Total and partial unemployment".

a. An individual shall be deemed "totally unemployed" in any week with respect to which no wages are payable to the individual and during which the individual performs no services.

b. An individual shall be deemed partially unemployed in any week in which either of the following apply:

(1) While employed at the individual's then regular job, the individual works less than the regular full-time week and in which the individual earns less than the individual's weekly benefit amount plus fifteen dollars.

(2) The individual, having been separated from the individual's regular job, earns at odd jobs less than the individual's weekly benefit amount plus fifteen dollars.

c. An individual shall be deemed temporarily unemployed if for a period, verified by the department, not to exceed four consecutive weeks, the individual is unemployed due to a plant shutdown, vacation, inventory, lack of work or emergency from the individual's regular job or trade in which the individual worked full-time and will again work full-time, if the individual's employment, although temporarily suspended, has not been terminated.

Iowa Admin. Code r. 871-24.22(2)i(3) 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.

(2) Available for work. The availability requirement is satisfied when an individual is willing, able, and ready to accept suitable work which the individual does not have good cause to refuse, that is, the individual is genuinely attached to the labor market....

i. On-call workers.

(3) An individual whose wage credits earned in the base period of the claim consist exclusively of wage credits by performing on-call work, such as a banquet worker, railway worker, substitute school teacher or any other individual whose work is solely on-call work during the base period, is not considered an unemployed individual within the meaning of Iowa Code section 96.19(38)"a" and "b." An individual who is willing to accept only on-call work is not considered to be available for work.

Under Iowa Employment Security Law, an individual must be totally, partially, or temporarily unemployed to be eligible for benefits. Iowa Code § 96.19(38). The claimant has not earned

wages during any of the weeks he has claimed benefits and he was permanently separated from employment. Therefore, he cannot be partially or temporarily unemployed.

Total unemployment is when someone has received no wages and performed no services during any given week. Iowa Code § 96.19(38)(a). The regulations carve out an exception to the definition of total unemployment when an individual's base period consists solely of on-call wages. Iowa Admin. Code r. 871-24.22(2)i(3). In this case, the claimant cannot establish that he meets the definition of totally unemployed because he has only earned on-call wages during his base period. As the claimant is not totally, partially, or temporarily unemployed, he is not eligible for benefits.

*III. Has the claimant been overpaid regular unemployment benefits and Federal Pandemic Unemployment Compensation (FPUC)?*

For the reasons that follow, the administrative law judge concludes the claimant has been overpaid regular unemployment benefits and FPUC.

Iowa Code § 96.3(7) provides, in pertinent part:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

PL116-136, Sec. 2104 provides, in relevant part:

EMERGENCY INCREASE IN UNEMPLOYMENT COMPENSATION BENEFITS.

...

(b) Provisions of Agreement

(1) Federal pandemic unemployment compensation.--Any agreement under this section shall provide that the State agency of the State will make payments of regular compensation to individuals in amounts and to the extent that they would be determined if the State law of the State were applied, with respect to any week for which the individual is (disregarding this section) otherwise entitled under the State law to receive regular compensation, as if such State law had been modified in a manner such that the amount of regular compensation (including dependents' allowances) payable for any week shall be equal to

(A) the amount determined under the State law (before the application of this paragraph), plus

(B) an additional amount of \$600 (in this section referred to as "Federal Pandemic Unemployment Compensation").

...

(f) Fraud and Overpayments

...

(2) Repayment.--In the case of individuals who have received amounts of Federal Pandemic Unemployment Compensation to which they were not entitled, the State shall require such individuals to repay the amounts of such Federal Pandemic Unemployment Compensation to the State agency...

Since the claimant is not eligible for regular unemployment benefits, he was overpaid \$2,317 in regular unemployment benefits and \$4,200 in FPUC from March 29 through May 16. The claimant will be required to repay the benefits received unless this decision is overturned or he is found eligible for Pandemic Unemployment Assistance (PUA).

**DECISION:**

*Regular Unemployment Insurance Benefits Under State Law*

The May 22, 2020, reference 01, unemployment insurance decision is modified with no change in effect. The claimant did not voluntarily quit but was discharged from employment for no disqualifying reason. However, he is not unemployed under Iowa law and is not eligible for benefits. As a result, he was overpaid \$2,317 in regular unemployment benefits and \$4,200 in FPUC from March 29 through May 16.

*Pandemic Unemployment Assistance (PUA) Under the Federal CARES Act*

Even though the claimant is not eligible for regular unemployment insurance benefits under state law, they may be eligible for federally funded unemployment insurance benefits under the CARES Act. 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 in FPUC. This decision does not address whether the claimant is eligible for PUA. For a decision on such eligibility, the claimant must apply for PUA, as noted in the instructions provided in the "Note to Claimant" below.



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Stephanie R. Callahan  
Administrative Law Judge

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July 21, 2020  
Decision Dated and Mailed

src/sam

*Note to Claimant:* This decision determines you are not eligible for regular unemployment insurance benefits. 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. Individuals who do not qualify for regular unemployment insurance benefits, but who are currently unemployed for reasons related to COVID-19 may qualify for Pandemic Unemployment Assistance (PUA). **You will need to apply for PUA to determine your eligibility under the program.** Additional information on how to apply for PUA can be found at <https://www.iowaworkforcedevelopment.gov/pua-information>. If this decision becomes final or if you are not eligible for PUA, you may have an overpayment of benefits.