IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

68-0157 (9-06) - 3091078 - EI

SHARRELL A JONES
Claimant

DIAL SILVERCREST CORP
Employer

APPEAL NO. 08A-UI-11240-LT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/26/08 R: 03
Claimant: Appellant (4)

Iowa Code § 96.5(2)a – Discharge/Misconduct
Iowa Code § 96.5(1) – Voluntary Leaving

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the November 21, 2008, reference 01, decision that denied benefits. After due notice was issued, a telephone conference hearing was held on December 15, 2008. Claimant participated. Employer participated through Janie Havenstrite and Michael Hunter. Claimant's Exhibit A was received.

ISSUE:

The issue is whether claimant quit the employment without good cause attributable to the employer or if she was discharged for reasons related to job misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant most recently worked full time as a CNA and was employed from December 2007 until November 1, 2008 when she was discharged. Claimant met with director of nursing (DON) Havenstrite, LPN and Sue Rower, RN on October 23 about staff complaints of how she "approached" them. She had felt at odds with Havenstrite since she became DON in August 2008 and on October 24 claimant advised Havenstrite that the class work to obtain her certified medication aide (CMA) designation was complete and that she intended to offer her two-week notice of resignation after she completed her ten hours of clinical supervised practice (clinicals) over consecutive days. The deadline for completion was 30 days from the end of the class work. Havenstrite did not have claimant put her intention in writing, did not talk about a separation date, and did not discuss when she would begin clinical hours but told claimant that either she needed to set up clinical hours through her since Rower was her subordinate employee and was only hired to fill in as DON before Havenstrite started working and until she caught up with the work. A RN is required to sign off on clinical hours. Later in the day she spoke to administrator Hunter, who told her there was no point in paying overtime for other CNAs to work for claimant while she was fulfilling her clinicals when she intended to leave at some point. Havenstrite then scheduled claimant's final days of work as a CNA on November 2, 4, and 5 without Rower on the schedule at the same time. On October 27 claimant notified

Havenstrite of her ex-husband's death and took bereavement leave for three days. On October 31 claimant returned to work to pick up her paycheck, found the revised schedule and confronted Havenstrite who said she had accepted claimant's resignation on October 24. Claimant called Hunter on the way home and told him she declined to work the remaining three days on the schedule.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant did not quit but was discharged from employment for no disqualifying reason.

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.

871 IAC 24.26(21) provides:

> Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:
>
> (21) The claimant was compelled to resign when given the choice of resigning or being discharged. This shall not be considered a voluntary leaving.

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.

871 IAC 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.

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).

Because most members of management are considerably more experienced in personnel issues than a lay employee, it is reasonably implied that the ability to communicate clearly is extended to discussions about employment status. Claimant's threat to quit after her clinicals were complete was merely an expression of a future intention about a current frustration and not an actual resignation. Although employer treated the communication as a resignation, she did not confirm it, did not discuss a specific separation date or clinical practice hours or dates and did not have claimant provide a written notice of resignation. Since claimant established her intention to continue working, at least through completion of the clinicals, the burden then falls to employer. Employer's failure to simply clarify these questions with claimant and Havenstrite's alteration of the schedule without notice to claimant or indication the clinical hours would be completed amounted to a discharge, not a voluntary leaving of employment.

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." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Employment Appeal Board*, 423 N.W.2d 211 (Iowa App. 1988).

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, employer incurs potential liability for unemployment insurance benefits related to that separation. Inasmuch as claimant had not actually given her resignation but merely indicated she would do so at sometime within the next 30 days after her clinicals were completed, and employer has not met the burden of proof to establish that claimant engaged in misconduct, benefits are allowed as of November 9, 2008.

DECISION:

The November 21, 2008, reference 01, decision is modified in favor of the appellant. Claimant was discharged from employment for no disqualifying reason effective November 6. Since she did not work through the November 5 schedule, benefits are denied for the two weeks ending November 8, 2008. Benefits are allowed effective November 9, provided she is otherwise

eligible. The benefits withheld effective the week ending November 15, 2008 shall be paid to claimant forthwith.

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Dévon M. Lewis
Administrative Law Judge

_____
Decision Dated and Mailed

dml/css