

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JACKLYN KAPSCH
Claimant

GRAPETREE MEDICAL STAFFING INC
Employer

APPEAL 20A-UI-05497-HP-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 03/15/20
Claimant: Appellant (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

Claimant Jacklyn Kapsch filed an appeal from an April 10, 2020 (reference 02) unemployment insurance decision that denied benefits based upon her discharge from employment. Notices of hearing were mailed to the parties' last known addresses of record for a telephone hearing scheduled for July 7, 2020. Kapsch appeared and testified. Zachary Myer appeared and testified on behalf of Grapetree Medical Staffing Inc. ("Grapetree"). Exhibit 1 was admitted into the record. I took administrative notice of Kapsch's unemployment insurance benefits records maintained by Iowa Workforce Development.

ISSUES:

Was the appeal timely?
Was the Claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Kapsch commenced her employment as a part-time, on-call certified nursing assistant with Grapetree on September 1, 2019. Kapsch worked between zero and twenty hours per week. Her point of contact with Grapetree was Jonathan Wubben.

During her employment, Kapsch received verbal and written warnings for attendance. The Grapetree Field Staff Guide provides, in part:

5.7 No Call No Show/Late Cancellation/Self Cancellation

A no call no-show or self cancellation is a very serious offense. Not only does it jeopardize our contractual agreement with the Client, it also places patient's safety at risk.

Three (3) unexcused no call no shows within a twelve (12) month rolling period will be considered voluntary termination.

More than two (2) unexcused self-cancellations or absences within a twelve (12) month rolling period will result in disciplinary action. Six (6) unexcused self-cancellations or absences will result in involuntary termination.

(Exhibit 1, page 5)

Kapsch worked for Grapetree on February 5, 2020. On February 6, 2020, Kapsch sent Grapetree an e-mail stating she was going to be absent. On February 6, 2020, Grapetree sent Kapsch an e-mail stating she had failed to fulfill her shift requirement on February 6, 2020, and that she was on disciplinary action. (Ex. 1, p. 8) The notice informed Kapsch the absence could be excused if she provided medical documentation or an obituary validating her absence within three days. (Ex. 1, p. 8) The notice also informed Kapsch that if she failed to provide the documentation her attendance infraction would result in termination. (Ex. 1, p. 8) Kapsch did not provide any documentation validating her absence. Kapsch testified she knew her job was in jeopardy and that she had received the notice.

Kapsch testified on February 7, 2020, she called her point of contact and notified him she was quitting. Myer did not have documentation of the call.

On February 12, 2020, Grapetree terminated Kapsch's employment. (Ex. 1, p. 10) The termination notice provided Kapsch had self-cancelled on September 9, 2019, September 17, 2019, January 2, 2020, January 12, 2020, January 25, 2020, and February 6, 2020. (Ex. 1, p. 10) Kapsch did not provide medical documentation or an obituary validating her absences on these dates and her absences were unexcused. (Ex. 1, p. 10) The notice also provided Kapsch had received a verbal warning for attendance on January 13, 2020, and a written warning on January 27, 2020 for attendance. (Ex. 1, p. 10) Myer testified when Kapsch was hired she signed an acceptance of the attendance policy and she received a verbal and written warning for attendance and that he believed Kapsch was aware her job was in jeopardy. Kapsch testified she knew her job was in jeopardy for violating the attendance policy.

Kapsch testified she was having difficulties with her mail. She was going through a divorce and her now ex-husband received her mail and she did not receive the decision dated April 10, 2020, (reference 02), denying benefits.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.6(2) provides:

A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. . . . Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision. . . .

The ten calendar days for appeal begins running on the mailing date. The "decision date" found in the upper right-hand portion of the representative's decision is presumptive evidence of the date of mailing, unless otherwise corrected immediately below that entry. *Gaskins v. Unemployment Compensation Bd. of Rev.*, 429 A.2d 138 (Pa. Comm. 1981); *Johnson v. Bd. of Adjustment*, 239 N.W.2d 873 (Iowa 1976). Kapsch testified she did not receive the decision in this case. Kapsch reported she was having problems receiving her mail and that her now ex-husband received her mail for a period of time. I find her appeal was timely under the facts of this case.

Under Iowa Code section 96.5(2)a,

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

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.

871 Iowa Administrative Code 24.31(1)a, defines the term "misconduct" 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 Iowa Legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 558 (Iowa 1979).

871 Iowa Administrative Code 24.32(4) also provides,

Report required. The claimant's statement and 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.

And 871 Iowa Administrative Code 24.32(8) provides:

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.

Unemployment statutes should be interpreted liberally to achieve the legislative goal of minimizing the burden of involuntary unemployment. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6, 10 (Iowa 1982). The employer bears the burden of proving the employee engaged in disqualifying misconduct. *Id.* at 11. 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, 264 (Iowa Ct. App. 1984)

Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits; such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806, 808 (Iowa Ct. App. 1984) The definition of misconduct in the administrative rule focuses on deliberate, intentional, or culpable acts by the employee. *Id.* When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* at 808-09. Negligence does not constitute misconduct unless it is recurrent in nature; a single act is not disqualifying unless it is indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731, 735 (Iowa Ct. App. 1986) Additionally, poor work performance is not misconduct in the absence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211, 213 (Iowa Ct. App. 1988). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 666-69 (Iowa 2000) What constitutes misconduct justifying termination of an employee and what misconduct warrants a denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679, 680 (Iowa Ct. App. 1988) Instances of poor judgment are not misconduct. *Richers v. Iowa Dep't of Job Serv.*, 479 N.W.2d 308, 312 (Iowa 1991); *Kelly v. Iowa Dep't of Job Serv.*, 386 N.W.2d 552, 555 (Iowa Ct. App. 1986)

871 Iowa Administrative Code 24.32(7), provides, "[e]xcessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer." The Supreme Court has held 871 Iowa Administrative Code 24.32(7) accurately states the law. *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 190, n. 1 (Iowa 1984)

Excessive absences are not considered misconduct unless unexcused. *Cosper*, 321 N.W.2d at 10. Absences due to properly reported illness cannot constitute work-connected misconduct since they are not volitional, even if the employer was fully within its rights to assess points or impose discipline up to and including discharge for the absence under its attendance policy. *Gaborit v. Emp't Appeal Bd.*, 743 N.W.2d 554, 558 (Iowa Ct. App. 2007)

The determination of whether unexcused absenteeism is excessive requires consideration of past acts and warnings. *Higgins*, 350 N.W.2d at 192. The absences must also be unexcused. *Cosper*, 321 N.W.2d at 10. An absence can be unexcused if it did not constitute reasonable grounds or if it was not properly reported. *Id.*; *Higgins*, 350 N.W.2d at 191. Excused absences are those with "appropriate notice." *Cosper*, 321 N.W.2d at 10. Absences in good faith, for good cause, and with appropriate notice are not misconduct. *Id.* Such absences may be grounds for discharge,

but not for disqualification of benefits because substantial disregard for the employer's interest has not be shown and this is essential for a finding of misconduct. *Id.*

Grapetree has an attendance policy that provides an employee will be terminated if the employee absent without a valid excuse six times within a twelve-month rolling period. Kapsch was absent six times within a twelve-month rolling period and Grapetree terminated her employment. Kapsch was aware of the policy and that her job was in jeopardy when she reported she would be absent on February 6, 2020, the sixth occurrence. Grapetree offered Kapsch the opportunity to provide medical documentation or an obituary to validate her absence. Kapsch did not provide any documentation and Grapetree terminated her employment on February 12, 2020. Grapetree has established Kapsch engaged in work-connected misconduct under the unemployment insurance laws and benefits are denied.

DECISION:


Regular Unemployment Insurance Benefits Under State Law

The April 10, 2020 (reference 02) unemployment insurance decision denying unemployment insurance benefits is affirmed. The employer has established the claimant was discharged for misconduct for a disqualifying reason. Unemployment insurance benefits are denied until the claimant has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

Pandemic Unemployment Assistance (“PUA”) Under the Federal CARES Act

Even though the 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 CARES Act. Section 2102 of the CARES Act creates a new temporary federal program called Pandemic Unemployment Assistance (“PUA”) that may provide up to 39 weeks of unemployment benefits. An individual receiving PUA benefits may also receive an additional \$600 weekly benefit amount under the Federal Pandemic Unemployment Compensation program if the individual is eligible for PUA benefits for the week claimed. This decision does not address whether the claimant is eligible for PUA. If the claimant wishes to receive PUA benefits, the claimant must apply for PUA, as noted in the instructions provided in the “Note to Claimant” below:

Note to Claimant: If this decision determines you are not eligible for regular unemployment insurance benefits and 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>.** This decision denies benefits. If this decision becomes final or if you are not eligible for PUA, you may have an overpayment of benefits.



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July 16, 2020
Decision Dated and Mailed

hlp/scn