

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

AMANDA M GREVE
Claimant

BETHANY HOME
Employer

APPEAL 17A-UI-05976-DB-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 05/14/17
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/appellant filed an appeal from the June 7, 2017 (reference 01) unemployment insurance decision that denied benefits based upon her discharge from work. The parties were properly notified of the hearing. A telephone hearing was held on June 27, 2017. The claimant, Amanda M. Greve, participated personally and was represented by Attorney Cory R. Thein. The employer, Bethany Home, participated through witnesses Susan Westmark, Julie Schromen, and Sherry Buxton.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Did claimant voluntarily quit the employment with good cause attributable to employer?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a housekeeper from December 28, 2015 until May 18, 2017. This employer operates a retirement home. Claimant's job duties included cleaning resident rooms and dining areas.

The employer's written handbook provides that certain actions could lead to discipline, including "sending or posting messages or material that could damage the organizations image or reputation." The policy goes on to provide that "[i]f you use the internet in a way that violates the law or Bethany Home policies you will be subject to disciplinary action, up to and including termination of employment. You also will be held personally liable for violating this policy." The claimant signed an acknowledgement that she reviewed this policy on March 10, 2016 and the policy has not changed since that date.

On May 5, 2017 the claimant posted on her personal Facebook page "any good places hiring" and "I cannot take the BS anymore". Claimant's Facebook profile page identified her as an employee of Bethany Home. This matter came to Ms. Westmark's attention when two co-workers reported seeing the posts. Ms. Westmark gave claimant a verbal reprimand on May 5,

2017 and sent claimant home early from her shift as discipline for her Facebook posts. After being sent home early on May 5, 2017, claimant removed the identifying information on her Facebook profile that indicated she was employed at Bethany Home.

On May 15, 2017 claimant posted on her Facebook page "Getting ready to deal with BS happy Monday." In a response to another posting from her Facebook friend, claimant posted "I do, I hope I get this job I hate going into this one." Then, on May 17, 2017, claimant posted a message stating, "When they can't fire you" and included emojis that had smiling faces.

These two posts came to Ms. Westmark's attention from the same two co-workers who reported the previous posts. Claimant was called into a meeting during her May 18, 2017 work shift with Ms. Westmark, Ms. Buxton and Ms. Schromen to discuss the matter. Ms. Westmark did not intend to discharge the claimant during the May 18, 2017 meeting. However, Ms. Westmark asked the claimant to tell her something she liked about her job and claimant was unable to respond with anything she liked about the job. Based on claimant's unresponsiveness, Ms. Westmark decided to discharge the claimant. Claimant was not argumentative during the meeting. Claimant's tone of voice was normal. Claimant did not use profanity or make any threats of violence during the meeting.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

As a preliminary matter, I find that claimant did not quit. She was discharged from employment.

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(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.

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 Admin. Code r. 871-24.32(4) provides:

(4) 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.

Iowa Admin. Code r.871-24.32(8) provides:

(8) 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.

Further, 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). 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 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). 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." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986).

A claimant can be disqualified for benefits when their off duty conduct is a violation of a specific work rule. *Kleidosty v. Emp't Appeal Bd.*, 482 N.W.2d 416 (Iowa 1992). The misconduct must be 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. 871 Iowa Admin. Code r. 24.32(1).

Discharge for misconduct must be *in connection with the individual's employment*. Iowa Code § 96.5(2). The misconduct the employer alleged to have discharged the claimant for was an incident that occurred off company time. This incident did not create any harm to the employer's interests because claimant had removed any identifying information regarding her employment at Bethany Home from her Facebook page on May 5, 2017. There is no evidence that claimant's final Facebook postings caused any disruption in the workplace or that there was any harmful effect on the employer. See *Diggs v. Emp't Appeal Bd.*, 478 N.W.2d 432 (Iowa Ct. App. 1991).

However, Ms. Westmark specifically testified that she did not intend to discharge claimant for the Facebook postings when she began the May 18, 2017 meeting but because claimant could not respond with what she liked about her job, she decided to discharge her. Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

The employer has failed to meet its burden of proof of establishing a current act of disqualifying job-related misconduct. As such, benefits are allowed.

DECISION:

The June 7, 2017 (reference 01) unemployment insurance decision is reversed. 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.

Dawn Boucher
Administrative Law Judge

Decision Dated and Mailed

db/rvs