IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

VIVIAN S HOFFMAN
Claimant

LINNHAVEN INC
Employer

APPEAL NO. 10A-UI-09233-L

ADMINISTRATIVE LAW JUDGE DECISION

OC: 05/16/10
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Leaving
Iowa Code § 96.5(3)a – Work Refusal

STATEMENT OF THE CASE:

The employer filed a timely appeal from the June 18, 2010 (reference 01) decision that allowed benefits. After due notice was issued, a hearing was held on October 18 and 19, 2010 in Cedar Rapids, Iowa. Claimant Vivian "Sue" Hoffman participated and was represented by Robert Legislador, Attorney at Law. Employer participated through Executive Director Elaine Sweet, Associate Director and Direct Care Staff supervisor Mike Loney, Human Resources Specialist Tracy Boczkowski, Compliance Facilitator Cindy Loney, Service Facilitator Kristie Werning, and Direct Care Specialist Kris Kenney. Employer was represented by Laura Mueller, Attorney at Law. Claimant's Exhibits 1 through 12 were admitted to the record. Employer's Exhibits C through L and Q - V were admitted to the record. Joint Exhibit 1 (the recording of the April 12 and 14, 2010 meetings and transcripts by each party) was received. Employer's statement (Proposed Exhibit A) was accepted as argument rather than an exhibit. Employer's proposed exhibits covering the Iowa Code chapters 22, 24, and 77 and any Agency documents were not admitted but judicial notice was taken of them. Employer withdrew the offers of the 2010 Quality Management Self-Assessment and excerpts from the transcript of the April 12 and 14, 2010 meetings.

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, and if claimant refused a suitable offer of work and if so, whether the refusal was for a good cause reason.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant Vivian "Sue" Hoffman was employed as a full-time property manager on May 11, 1992 and was most recently paid $14.65 per hour for a 40-hour week on day shift with some on-call holidays. She was responsible for maintenance of properties' safety equipment, minor repairs to two administration buildings and 23 houses.

In a Leadership Team meeting on April 12, 2010 employer announced to the staff present that they would be getting a letter of formal notice about the restructure of the organization effective May 16, 2010, and told them "the new positions will be very different than the positions we have now … our current staff will have the opportunity to apply for the new positions, however we are advertising also on the outside and we will be selecting the best candidates for the position … So everyone who will be affected by this reorganization will have the opportunity to apply for the new positions … job descriptions have been rewritten … a number of things that will change with regard to benefits, work hours, the way people are held accountable, reporting relationships, virtually everything will be changing. Anyone who is currently in a position that will be changing … will have the opportunity to apply for the new positions, and will also have the opportunity to go to a Direct Care position if that's what you choose to do. And we will be working with you … We'll be meeting with you again on Wednesday to give you more details. So you will have options. You can apply for the new positions, if you don't want to apply for them you can transfer to Direct Care right now. If you choose to apply for one of the new positions and you are not offered the position, you may transfer to Direct Care at that point in time. Or if you feel that you want to remove yourself from it, you do have that option. We are asking everyone to give us a letter of intent, and that letter of intent will tell us what you are planning to do. Whether you would like to go back to Direct Care … whether you want to apply for a new position or if you just want to end your employment as of midnight on May 15th or earlier, then this is your opportunity in your letter of intent. We need to know what your intent is because over the next four weeks … we need to be scheduling interviews … All of the positions that we will be hiring are going to be subject to a six month probationary period, so whoever is hired in those positions will automatically be on probation for six months. We are going to allow people to transfer into those positions for the purposes of PTO and benefits. Actually what's happening is, in effect, everyone is being terminated at midnight on May 15th and the new organizational structure will start; but for those of you who are interested in transferring somewhere within the agency, we're going to treat it as a transfer and you are not going to lose seniority because of it. … Everyone who applies internally will be given an interview." (Joint Exhibit 1 – 4/12)

On April 14, 2010 in a team leadership meeting, employer handed out job descriptions and an organizational chart. One of the three options presented was to apply for 13 open "positions" of eight job descriptions: maintenance manager, accounting manager, maintenance facilitator, quality improvement assistant (clerical), service facilitator, compliance facilitator, service manager, and compliance manager. The primary difference between service and compliance facilitators is that the service facilitator would be responsible for dealing with people and compliance facilitator would handle paperwork. The Direct Care position did not change so employer did not provide that job description on April 14, 2010. The direct care position option was a demotion from the claimant's job at the time of separation. The employer told claimants that the interview process would not begin until after May 15, 2010 and wages would not be discussed until then at the earliest but also said the employer was "hoping to have most of [the positions] filled by May 15th…[wanted to] know by noon on Tuesday, April 27 what positions you are interested in or if you choose not to apply for any of those positions, you will have the opportunity to go back to Direct Care. We are not going to tell anyone that we don't have a position for them somewhere in Linnhaven… if you choose not to do either Direct Care or apply for any of these positions then you have the option to voluntarily terminate your employment with Linnhaven. In all three instances though you do need to have a letter to me by noon on April 27th telling me what direction you would like to go. Anyone that is an employee in good standing and follows all the other criteria will be paid out their PTO upon termination… You will be required to submit your letter of resignation by noon on April 27th and all the other requirements of being an employee in good standing and then you will receive whatever PTO

you have accrued on that date. If any of you would like to talk with me individually let me know. We can schedule a time to talk about all this in more detail. … If you've already requested time off we'll try and honor that but we will be limiting PTO during that first six months because it is a trial period and it is important for everybody to be here and everyone to be learning their jobs and doing their best during that time period because at the end of the six months you're either performing well in your position or you're not moved over to a permanent status and that is consistent with all of our new hires. … The [PTO] accrual rates are probably changing throughout the agency but that has not been finalized yet. … For all of the positions we will be doing pre-employment testing. … The Board approved a salary scale last night. … During the interview process, that will be shared with you. … Clearly on call requires weekends and holidays but the intent here is for all the managers, all people in the management levels to understand that management is not an 8 to 4:30 Monday through Friday job. … The next few years we will be seeing a lot of changes. … When we receive your letters of intent we will begin the interviewing and testing process. … We are going to be advertising beginning this weekend and we will also be recruiting from the outside. … specifics about salary or PTO accruals…will be part of the interview process; or if you want to come in and talk with me [Sweet], I can give you more information on that. Salary information is considered confidential." (Joint Exhibit 1 – 4/14)

The April 14, 2010 letter to each claimant states:

> This correspondence will serve as your formal notification that the Board of Directors has made the decision to restructure the Linnhaven agency effective May 15, 2010. The position you hold as a [claimant's job title] will end at midnight on that date. During the next few weeks, Linnhaven will be recruiting and hiring new positions which are highlighted on the attached Table of Organization. Linnhaven staff members who are impacted by this reorganization are encouraged to apply for these new positions. Please submit a letter of intent stating the positions you are applying for and your current resume by noon on Tuesday, April 27, 2010. You will be offered an interview and your application will be considered for all of the open positions for which you apply. If you choose not to apply for an open position, you may transfer to a Direct Care position. Please submit your written request for a Direct Care transfer to my attention no later than noon on Tuesday, April 27, 2010. You may also elect to voluntarily terminate your employment with Linnhaven on May 15, 2010. If you choose this option, please submit your letter of resignation to my attention no later than noon on Tuesday, April 27, 2010. Linnhaven's required 30-day notice of termination will be waived and your accrued PTO will be paid on termination if all other criteria are met, including those stated in this letter. Please feel free to schedule a time to meet with me if you have further questions, or if you would like to discuss these options in more detail.

(Employer's Exhibit E)

Claimants were in receipt of the written job descriptions and knew that following the grievance policy would lead employees back to Sweet or the Board of Directors who developed the restructuring policy and procedure. Claimants were not told that they would be considered to have quit if they did not grieve the restructuring process, related issues, or separation. Employer did not intend to develop job descriptions of special or "carved out" jobs until after it received letters of intent on April 27, 2010. Employer considered any responsive letters submitted by April 27 as a voluntary resignation if the employee requested payment of PTO. Claimants were not offered an opportunity to buy out their PTO. The employer did not ask the claimant to remain employed in any particular capacity. All claimants were concerned that they would have to apply and compete with the general public for the 13 open positions and were not guaranteed a comparable job. The employer required skills testing to show claimants would

meet requirements of the job description so employer could determine how to best meet staffing requirements. None had been required to test in the ACT Work Keys Assessments, National Career Readiness, and/or Personal Skills tests before but they were required for new positions meeting certain threshold levels of proficiency for particular job descriptions. Employer did not offer to work with or train employees if it the proficiency level was not met and did not assure them they would still be hired if they failed the testing.

The second option was to accept a transfer to Direct Care, which was considered a demotion by each claimant as it would have involved more physical duties with more hours, more on-call responsibility, varied shifts, and less pay. Their jobs were in middle management but Direct Care was in the bottom of the organizational chart. Since they are not considered management, there is no participation in leadership meetings. The Direct Care job description lifting requirement is 50 pounds and workers are expected to be able to spend the night on duty at homes. The highest paid direct care worker was paid $10.48 at the time of hearing. Full-time Direct Care employees generally work an average of 120 hours per two week pay period, which is not necessarily evenly split between the weeks. More hour and holiday coverage is expected of Direct Care staff and they often work overnight shifts, alternating weekends, and holidays.

The third and final option was to give notice by noon on April 27, 2010 of an intention to resign effective May 16, 2010. An employee had to follow the steps set out in the letter in order to be eligible for PTO payout.

The new position would be called Service Facilitator. The lifting requirements increased to 75 pounds for the maintenance manager and assistant maintenance manager jobs. In describing the maintenance manager position, employer explained "we aren't going to be contracting things out anymore. It will only be the major projects that are contracted out. … And for this job description the candidate must pass a pre-employment physical performed by an MD of our choice certifying that they are able to do the duties that are described in the job description." (Joint Exhibit 1 – 4/14) Claimant is able to lift 50 pounds but the property manager position does not have a lifting requirement. She quit on April 30, 2010 after having been paid through May 15, 2010 (as were all other claimants) because she did not want to lose PTO worth $3,000.00. She had no work experience in direct care. She submitted a letter of intent on April 27 indicating she was not resigning but acknowledging that her job as Property Manager would end at midnight on May 15, 2010 according to the Board of Directors' restructuring plan and referred to payment of accrued PTO in her final paycheck. (Claimant's Exhibit 2) In a meeting on April 28 after a board meeting on April 27 Sweet told Hoffman it would not be in employer's best interest for her to stay and she would be paid through May 15th with PTO. Sweet told her she was disappointed Hoffman did not talk to her and Hoffman said she did not because she knew she would not get either of the maintenance jobs because of the physical requirements. Sweet said she knew that would be the case because of the weight limit and did not tell her that any exceptions or accommodations would be made. Hoffman did not think she was qualified for any other jobs especially with testing and weight lifting requirements. (Employer's Exhibits H, I, K, and L) She has a high school diploma, and no computer or medical training to read medical charts or prescription information. She went home sick with a headache that got worse so she called in sick on April 29. On April 30 she and her sister Lilly Lattimer spoke with Sweet. They told her it was not fair that they were working when others were not but were being paid through May 15 and said that because of headache and increasing blood pressure she did not want to stay until May 15. Sweet agreed but never told Hoffman she had created a special job for her as a facilitator to run errands for clients, get vans in for basic maintenance, transport clients while working days. Hoffman did not tell Sweet she was resigning or quitting.

The follow up April 30, 2010 letter in response to claimant's letter states in pertinent part:

> My April 14, 2010 letter to you, which discusses Linnhaven's agency-wide reorganization, and clearly states that *the position* you hold as [claimant's job title] will end at midnight on May 15, 2010. My April 14th letter goes on to offer you 3 alternatives:
> 1. You are encouraged to apply for one of the new positions,
> 2. You may transfer to a Direct Care position, or
> 3. You may voluntarily terminate your employment with Linnhaven.
>
> My April 14, 2010 letter clearly states the criteria required for each of these options, and also states that, "Linnhaven's required 30-day notice of termination will be waived and your accrued PTO balance will be paid on termination if all other criteria are met, including those stated in this letter." It is Linnhaven's position that your April 27, 2010 letter does not meet the criteria identified in my April 14, 2010 letter; however in a good faith effort to recognize and respect your tenure with Linnhaven, your PTO balance will be included on your final paycheck. Your voluntary resignation is accepted effective April 30, 2010. You will be paid your normal wages through the payroll ending May 15, 2010.

(Employer's Exhibit F)

The employer does not describe what criteria were not met but the issue at that point becomes moot since the employer agreed to pay PTO. Employer expressed surprise at the claimants' reactions and written responses, but did not call another meeting to find out why and explain and/or call each claimant in for individualized meetings to explain or clarify issues. Even though the employer was obligated to demonstrate to the state that they followed the appropriate processes, it did not tell employees directly and clearly what was happening and why. When asked why the employer could not have simply changed the claimants' job titles and given them the accompanying job duties, Sweet replied, "That's kind of what we did" and said the employer wanted to give claimants choices about their preference such as paperwork or client care, but did not explain that to claimants either verbally or in writing. In spite of employer's argument that the claimants' responsive letters acknowledging termination and requesting PTO payout were premature, employer did not relay that concern to claimants or encourage further communication but considered them to have quit and processed the payroll status reports accordingly.

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).

Employer clearly initiated the communication with claimant to explain that her job was no longer going to exist as of May 15, 2010 because of a board decision to restructure the organization. The rationale behind the restructuring is not relevant to the extent that it does not affect the outcome of the events that followed the April 12, 2010 meeting. Although the employer's April 14, 2010 letter was quite explicit in the three options each claimant had, there was unclear communication from the employer about how each claimant individually might reach the April 27, 2010 deadline and the May 15, 2010 "position" termination and still retain employment when interviews were not going to completed or positions filled by then. Employer argues each claimant's "position" ended as of May 15, 2010 but her "job" or "employment" did not since there were other options. But the options were not fully explained before the "intent" deadline since some information was reserved for the interview process, which was not set to begin until after the April 27, 2010 "letter of intent" deadline. Although employer argues it only asked for a statement of intent and not final decision, the three options of interviewing for new openings,

transferring to direct care, or quitting all had the same April 27, 2010 deadline. No other options were presented if claimant were to preserve her PTO rights, such as going through the interview process and then deciding to quit if she did not like the positions or financial terms that might have been offered after April 27, 2010.

When claimants expressed their written interpretation of the April 14 letter as a termination letter and wrote back accepting the termination and asking for payout of PTO and employer was "shocked." Rather than attempting to meet with claimants again jointly or individually it simply accepted those letters as official notices of resignation. Because there was unclear communication, to say the least, about the interpretation of both parties' communications about the future status of the employment relationship; the issue must be resolved by an examination of witness credibility and burden of proof. Because most members of management are considerably more experienced in personnel issues and operate from a position of authority over a subordinate employee, it is reasonably implied that the ability to communicate clearly is extended to discussions about employment status. Given employer's clear written statements that the claimant's "position" was going to be terminated, there was no clear indication of where the employer anticipated placing the claimant after May 15 because of job title and duty changes, unclear salary changes, testing requirements for job placement, and competition with outside applicants, the claimant was reasonable to interpret the written and verbal communications as requirement of acquiescence to an array of unknown job variables, a demotion to direct care, or a forced resignation, which is an involuntary discharge from employment, and the burden of proof falls to the employer.

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). 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 lost her job due to organizational restructuring, employer has not met the burden of proof to establish that claimant engaged in misconduct.

Since there were no specific job offers made to any claimant either before or during her benefit year, the question then becomes whether the claimant failed to apply for suitable work.

Iowa Code § 96.5-3-a provides:

> An individual shall be disqualified for benefits:
>
> 3. Failure to accept work. If the department finds that an individual has failed, without good cause, either to apply for available, suitable work when directed by the department or to accept suitable work when offered that individual. The department shall, if possible, furnish the individual with the names of employers which are seeking employees. The individual shall apply to and obtain the signatures of the employers designated by the department on forms provided by the department. However, the employers may refuse to sign the forms. The individual's failure to obtain the signatures of designated employers, which have not refused to sign the forms, shall disqualify the individual for benefits until requalified. To requalify for benefits after disqualification under this subsection, the individual shall work in and be paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.
>
> a. In determining whether or not any work is suitable for an individual, the department shall consider the degree of risk involved to the individual's health, safety, and morals,

> the individual's physical fitness, prior training, length of unemployment, and prospects for securing local work in the individual's customary occupation, the distance of the available work from the individual's residence, and any other factor which the department finds bears a reasonable relation to the purposes of this paragraph. Work is suitable if the work meets all the other criteria of this paragraph and if the gross weekly wages for the work equal or exceed the following percentages of the individual's average weekly wage for insured work paid to the individual during that quarter of the individual's base period in which the individual's wages were highest:
>
> (1) One hundred percent, if the work is offered during the first five weeks of unemployment.
>
> (2) Seventy-five percent, if the work is offered during the sixth through the twelfth week of unemployment.
>
> (3) Seventy percent, if the work is offered during the thirteenth through the eighteenth week of unemployment.
>
> (4) Sixty-five percent, if the work is offered after the eighteenth week of unemployment.
>
> However, the provisions of this paragraph shall not require an individual to accept employment below the federal minimum wage.

871 IAC 24.24(8) provides:

> (8) Refusal disqualification jurisdiction. Both the offer of work or the order to apply for work and the claimant's accompanying refusal must occur within the individual's benefit year, as defined in subrule 24.1(21), before the Iowa code subsection 96.5(3) disqualification can be imposed. It is not necessary that the offer, the order, or the refusal occur in a week in which the claimant filed a weekly claim for benefits before the disqualification can be imposed.

Again, the application deadline for the various “positions” was prior to the effective date of the benefit year and the agency has no jurisdiction of the issue. The administrative law judge does not have jurisdiction to evaluate any alleged offers or refusals of work since any related communication occurred outside of the claimant’s benefit year. Benefits are allowed.

DECISION:

The June 18, 2010 (reference 01) decision is affirmed. Claimant did not quit but was discharged from employment for no disqualifying reason. The ALJ does not have jurisdiction of the work offer or refusal issue. Benefits are allowed, provided she is otherwise eligible.

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Dévon M. Lewis
Administrative Law Judge

_____
Decision Dated and Mailed

dml/css