

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

LORETTA CLARY
Claimant

CARE INITIATIVES
Employer

APPEAL 16A-UI-10596-SC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 08/28/16
Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

Care Initiatives (employer) filed an appeal from the September 19, 2016, (reference 01) unemployment insurance decision that allowed benefits based upon the determination Loretta Clary (claimant) voluntarily quit her employment due to a change in her contract of hire which is a good cause reason attributable to the employer. The parties were properly notified about the hearing. A telephone hearing was held on October 12, 2016. The claimant participated personally. The employer participated through Director of Nursing Judi Jenkins and Administrator Tina Wendt. It was represented by David Williams of Equifax.

ISSUES:

Did the claimant voluntarily leave the employment with good cause attributable to the employer or did the employer discharge the claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?

Has the claimant been overpaid unemployment insurance benefits?

Can the repayment of those benefits to the agency be waived?

Can charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a Certified Nursing Assistant (CNA) beginning on March 17, 1999, and was separated from employment on August 31, 2016. The claimant reported to Director of Nursing Judi Jenkins during the last six years of her employment. She was scheduled approximately 30 hours a week and earned \$16.45 an hour.

Jenkins noticed defects in the way the claimant performed her work. For at least the last three years of her employment, the claimant moved too slow and did not share the workload equally with the other employees. Jenkins felt the claimant did not adequately chart her cares as she might not document her cares for three to four hours after the cares were provided. The claimant was talked to about these issues in each of her annual performance evaluations. She did not receive any other warnings related to job performance.

In May 2016, Jenkins again spoke with the claimant about her performance. When they met in June to follow up on the discussion, Jenkins told the claimant she had observed marked improvement in the claimant's job performance. At no time was the claimant told that her job was in jeopardy or a failure to maintain her job performance would result in the end of her employment. On August 3 and 9, 2016, Jenkins did a random audit of the claimant's paperwork and found it lacking. She shared this information with Administrator Tina Wendt.

On August 17, 2016, Wendt and Jenkins met with the claimant. They told the claimant that she could no longer be employed as a CNA. They gave her the option of remaining employed in a position in Laundry or Housekeeping. She would be scheduled fewer than 20 hours a week and would only earn \$12.00 an hour. The claimant initially accepted; however, when her last day as a CNA arrived, she told Wendt she could not accept the lower paying position. The claimant left and did not return for her scheduled shift.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$2,130.00, since filing a claim with an effective date of August 28, 2016, for the seven weeks ending October 15, 2016. The administrative record also establishes that the employer did participate in the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was not discharged but voluntarily quit the employment with good cause attributable to the employer. Benefits are allowed.

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 from receiving benefits. 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 her employment. *Irving v. Empl. App. Bd.*, 15-0104, 2016 WL 3125854, (Iowa June 3, 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 claimant in this case made the decision to end her employment. She expressed her intent to Wendt and then did not return. As she voluntarily quit, she then has the burden of proving that the voluntary leaving was for good cause attributable to the employer. Iowa Code § 96.6(2). "Good cause" for leaving employment must be that which is reasonable to the average person, not the overly sensitive individual or the claimant in particular. *Uniweld Products v. Indus. Relations Comm'n*, 277 So.2d 827 (Fla. Dist. Ct. App. 1973).

Employees who voluntarily quit due to a change in the contract of hire including the work hours or pay are considered to have quit with good cause attributable to the employer. Iowa Admin Code r. 871-24.26(1). In general, a substantial pay reduction of 25 to 35 percent or a similar reduction of working hours creates good cause attributable to the employer for a resignation. *Dehmel v. Emp't Appeal Bd.*, 433 N.W.2d 700 (Iowa 1988). In this case, the claimant's pay was to be reduced by over 25 percent an hour and the hours available to her would be reduced by at least 33 percent each week. The claimant has established that there was a change in her contract of hire.

The employer has argued the claimant engaged in misconduct which led to the decision to demote her. Iowa regulations define misconduct:

"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.

Iowa Admin. Code r. 871-24.32(1)a. 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).

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). If an employee is unable to perform the job to the employer's standards it is not considered willful or deliberate misconduct. Iowa Admin. Code r. 871-24.32(5). Failure in job performance due to inability or incapacity is not considered misconduct because the actions were not volitional. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

In this case, the employer allowed the claimant's conduct to go on for three years without disciplining her for her conduct or putting her on notice that continued poor performance would result in the end of her employment. The claimant could not have engaged in volitional misconduct as she did not know her conduct was unacceptable. The claimant did not engage in disqualifying misconduct.

Inasmuch as the claimant would suffer an indefinite demotion in title combined with at least a 25 percent reduction in pay, and the employer has not established misconduct as a reason for the effective demotion, the change of the original terms of hire is considered substantial. Thus, the separation was with good cause attributable to the employer. Benefits are allowed.

As benefits are allowed, the issues of overpayment, repayment, and the chargeability of the employer's account are moot.

DECISION:

The September 19, 2016, (reference 01) unemployment insurance decision is affirmed. The claimant voluntarily quit the employment with good cause attributable to the employer. Benefits are allowed, provided she is otherwise eligible. The issues of overpayment, repayment, and the chargeability of the employer's account are moot.

Stephanie R. Callahan
Administrative Law Judge

Decision Dated and Mailed

src