

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

KAYLA M STACE
Claimant

CHI LIVING COMMUNITIES
Employer

APPEAL NO. 20A-UI-12491-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 06/28/20
Claimant: Appellant (2)

Iowa Code Section 96.5(2)(a) – Discharge

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the October 2, 2020, reference 01, decision that disqualified the claimant for benefits and that relieved the employer's account of liability for benefits, based on the deputy's conclusion that the claimant was discharged on June 29, 2020 for failure to follow instructions in the performance of her job. After due notice was issued, a hearing was held on December 9, 2020. Claimant participated personally and was represented by attorney Katie Ervin Carlson. Attorney Kate Gallen represented the employer and presented testimony through Carey Boysen. Exhibits 1, 2, 5, 18, 19 and A through H were received into evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time administrative assistant at Bishop Drumm Retirement Center from February 2019 until June 29, 2020, when the employer discharged her from the employment. CHI Living Communities owns and operates Bishop Drumm. The claimant's work hours were 8:30 a.m. to 5:00 p.m., Monday through Friday. The claimant's essential duties were set forth in the job description the employer provided to the claimant at the start of the employment and were as follows:

- Provides administrative support to facility staff and residents.
- Greets everyone who enters the facility and residents
- Answers incoming calls.
- Responds to door alarms and redirects residents as appropriate.
- Maintains effective (verbal and written communication with residents, family members, physicians, staff and vendors.
- Distributes mail.
- Handles cash and checks, runs credit card machine.

Utilizes Electronic Medical Record system to enter and view information.
Assist with mass mailings.
Assist with code invoices.

At the start of the employment, the employer provided the claimant with a list of job requirements. These included a requirement that the claimant walk and stand "consistently." However, much of the claimant's duties were sedentary or required only that the claimant travel minimal distance from her work station. The retirement center residents included residents with dementia. The retirement center included a two-alarm system designed to alert staff in the event of a potential resident elopement. The first alarm would sound as the resident was in the hall leading to the entrance. A second alarm would sound as the resident neared the front desk. The claimant's work station was located at the retirement center's main entrance. Six additional staff had offices located in the vicinity of the main entrance. As part of the claimant's duty to respond to door alarms and redirect residents, the claimant was expected to promptly arise from her work station, make contact with the resident, and physically guide the resident away from the entry and back to where the resident needed to be to ensure the resident's safety. Rarely would the claimant be the only person responded to such alarms. Usually, nursing staff would respond to the entry area when the first alarm sounded.

On December 19, 2019, the claimant suffered injury to her left ankle in an off-duty incident wherein she tripped and fell. The claimant sought medical evaluation at an emergency room. Medical staff suspected the injury was a bad sprain. The claimant was fitted with a walking/CAM (controlled ankle motion) boot, was released to return to work, and was referred to her primary care provider. The claimant returned to work with the CAM boot and with crutches. The claimant used the crutches to get to and from her vehicle. The claimant used the crutches intermittently as needed in the course of performing her work duties. When the condition of the claimant's ankle did not improve, the claimant's primary care provider referred the claimant to a podiatrist. The podiatrist determined that the claimant required a surgical procedure to address an absence of cartilage in the claimant's ankle.

The claimant last performed work for the employer on March 11, 2020. Immediately thereafter, the claimant commenced an approved leave of absence so that she could undergo and recover from the surgical procedure to repair her ankle. The claimant and the podiatrist completed a Certification of Health Care Provider for Employees Serious Health Condition (Family and Medical Leave Act). The podiatrist indicated that the claimant would undergo surgery on March 12, 2020 and that the podiatrist expected the claimant to remain incapacitated through April 17, 2020. The podiatrist indicated that claimant would be referred to physical therapy. The employer approved an FMLA leave of absence with March 12, 2020 being the start of the leave period.

On April 24, 2020, the podiatrist released the claimant to return to work with restriction effective April 27, 2020. The medical release stated as follows:

The above patient was seen at Broadlawns Medical Center. The patient will return to work on 4/27/2020. She will have to be partial weight bearing in a CAM boot with the use of crutches. She will slowly transition to full weight in the CAM boot. Please allow the patient to elevate the left lower extremity at her desk. We will reassess in 3 weeks.

The claimant promptly provided the medical release to the employer and requested to return to work. The employer declined to allow the claimant to return to work with the medical restrictions set forth in the medical release. The employer elected instead to have the claimant remain off work and characterized the additional time away from work as a continuation of the FMLA leave.

The claimant continued to provide updates concerning her recovery. The claimant continued off work through June 4, 2020, at which time the employer deemed the 12 weeks of FMLA leave to be exhausted.

On June 5, 2020, Carey Boysen, Human Resources Manager at Bishop Drumm Retirement Sent an email message to Joan Longhin Howard, Vice President of Human Resources for CHI Living Communities. Ms. Boysen requested permission to terminate the claimant's employment in light of the fact that the claimant had exhausted FMLA, still required use of two crutches, and had not been released to return to work without restrictions. Ms. Boysen advised Ms. Longhin Howard that the claimant's manager had concerns with the claimant's performance that the manager intended to address with the claimant upon her return to the employment. Ms. Longhin Howard provided guidance and urged caution to avoid the appearance of retaliatory behavior while the claimant was on a leave of absence. The claimant continued off work, based on the employer's refusal to allow the claimant to return to work unless she returned without restrictions and despite the claimant's request and desire to return to the employment with reasonable accommodation of her medical restrictions.

On June 12, 2020, the claimant provided the employer with a progress note from her physical therapist. The note, dated June 11, 2020, includes the following:

Kayla continues to improve with therapy. She reports less soreness on this date compared to previous sessions. Continues to be limited primarily by her pain with weight bearing activities. She continues to wear TED hose to combat increased L LE edema. She is using one axillary crutch at home, but two when out in public. Encouraged patient to attempt some ambulation activities with use of walking sticks to encourage proper heel strike and toe off phases of gait with less performing UE [upper extremity] support. She continues to have difficulty and pain with prolonged weight bearing activities, which is limiting her from performing household tasks and return to full work duty.

The physical therapists' Assessment/Diagnosis adds the following:

Kayla continues to improve with therapy following her status post L ankle cartilage repair and subchondroplasty performed on March 12th, 2020. Patient was able to progress to marching with walking poles, weight shifting and increased weight with sled pushes/pulls to simulate potential job tasks, but with increased pain noted. She continues to lack endurance and proper strength for full weight bearing activities at this time without use of crutches. In addition, she continues to demonstrate lateral trunk lean with use of single axillary crutch due to decreased weight bearing tolerance. Due to her increased swelling, impaired gait pattern, decreased strength and increased pain levels, she would continue to benefit from ongoing use of crutches until she tolerates increased weight bearing activities. Although it is difficult to say at this time, I predict patient would continue to benefit from the use of axillary crutches (eight double or single as patient tolerates) for an additional 1-3 weeks depending on patient's ability to tolerate increased weight bearing through her L ankle. However, I did recommend patient begin to utilize walking sticks/poles intermittently at home to promote proper gait pattern while weaning off upper extremity support. Although she may be able to start ambulating without use of crutches in the upcoming few weeks, her endurance and pain levels continue to be her limiting factor. She may benefit from intermittent ambulation without crutches with seated breaks to reduce prolonged weight bearing to avoid compensatory edema and pain. Patient will continue to benefit from partial weight bearing status with use of

crutches in order to promote cartilage repair healing and gradually improve her ambulation ability with proper form.

The physical therapist's note concludes with the following:

Patient will benefit from ongoing skilled therapy 1-2 times per week for an additional 8 weeks to address her current functional deficits in order to return to her prior level of function, including return to work and completing household [sic] tasks efficiently and without pain.

On June 23, 2020, at the employer's request, the claimant provided the employer with the podiatrist's updated statement regarding her work restrictions. The note, dated June 23, 2020, stated:

The above patient was seen at Broadlawns Medical Center. The patient may now return to work but is still restricted to desk work only. We are currently working on discontinuing crutches. We will continue to update restrictions as the patient progresses.

On June 26, 2020, Ms. Boysen sent a follow up email to Ms. Longhin Howard. Ms. Boysen referenced the note from the physical therapist and from the doctor. Ms. Boysen told Ms. Longhin Howard that since the doctor's note did not provide a date certain by which the claimant could return to work without restrictions, Ms. Boysen and the claimant's manager were ready to terminate the claimant's employment. Ms. Boysen requested Ms. Longhin Howard's approval. In the email exchange that followed, Ms. Longhin Howard asked whether the claimant had requested to return to work with restrictions. Ms. Boysen falsely responded that the claimant had not requested to return to work with restrictions. Ms. Longhin Howard replied, "...if she has not requested to return, you can let her know that her FMLA is exhausted and her position cannot be held any longer."

On June 29, 2020, the employer notified the claimant that the employer was terminating the employment. The employer referenced the claimant's medical restrictions as the basis for ending the employment. The employer did not reference performance issues as a factor in terminating the employment.

On July 10, 2020, the podiatrist released the claimant to work without restrictions.

REASONING AND CONCLUSIONS OF LAW:

Iowa Administrative Code rule 871-24.1(113) characterizes the different types of employment separations as follows:

Separations. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.

a. Layoffs. A layoff is a suspension from pay status initiated by the employer without prejudice to the worker for such reasons as: lack of orders, model changeover, termination of seasonal or temporary employment, inventory-taking, introduction of laborsaving devices, plant breakdown, shortage of materials; including temporarily furloughed employees and employees placed on unpaid vacations.

b. Quits. A quit is a termination of employment initiated by the employee for any reason except mandatory retirement or transfer to another establishment of the same firm, or for service in the armed forces.

c. Discharge. A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.

d. Other separations. Terminations of employment for military duty lasting or expected to last more than 30 calendar days, retirement, permanent disability, and failure to meet the physical standards required.

In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 698, 612 (Iowa 1980) and *Peck v. EAB*, 492 N.W.2d 438 (Iowa App. 1992). In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer. See Iowa Administrative Code rule 871-24.25.

In *Prairie Ridge Addiction Treatment Servs. v. Jackson and Emp't Appeal Bd.*, 810 N.W.2d 532 (Iowa Ct. App. 2012), the claimant, who had been injured in a non-work related automobile accident had requested a leave of absence so that she could recover from her injury. The employer approved the initial request. The employer also approved an extension of the leave of absence. The employment ended when the employer decided to terminate the employment, rather than grant an additional extension of the leave of absence. The claimant had not yet been released to return to work at the time the employer deemed the employment terminated. The Iowa Court of Appeals held that Ms. Jackson had not voluntarily quit the employment. The Iowa Court of Appeals further held that since Ms. Jackson had not voluntarily quit, she was not obligated to return to the employer upon her recovery to offer her services in order to be eligible for unemployment insurance benefits. The effect of the court's decision was to treat the separation as a discharge from the employment.

Iowa Code section 96.5(2)(a) provides:

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.

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).

The employer has the burden of proof in a discharge matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See *Lee v. Employment Appeal Board*, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See Iowa Admin. Code r. 871-24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also *Greene v. EAB*, 426 N.W.2d 659, 662 (Iowa App. 1988).

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. See Iowa Admin. Code r. 871-24.32(4).

The evidence in the record establishes that the claimant was discharged on June 29, 2020 for no disqualifying reason. The *Prairie Ridge* case is largely on point with the present matter. The difference in the present case is that this claimant was released to return to work with restrictions, requested to return to work with reasonable accommodation of her medical restrictions, and the employer declined to allow the claimant to return to work unless and until she could do so without restrictions. An employer has an obligation to provide an employee with reasonable accommodations that enable the employee to continue in the employment. See *Sierra v. Employment Appeal Board*, 508 N.W. 2d 719 (Iowa 1993). In this instance, the employer declined to engage in an interactive process to determine what reasonable accommodations were needed in order for the claimant to continue in the employment and what reasonable accommodations could be provided without undue hardship to the employer. The weight of the evidence indicates that much of the claimant's work duties were in fact sedentary in nature and could have been performed from her desk. The claimant would need assistance in responding to door alarms, but such assistance was already part of the standard response to door alarms. The weight of evidence establishes that the employer had the ability to provide reasonable accommodations without undue hardship. The employer elected to provide no accommodation beyond begrudgingly extending the leave to June 29, 2020. It is noteworthy that Ms. Boysen intentionally misled her superior in order to obtain approval to end the employment.

As in *Prairie Ridge*, this claimant needed a reasonable amount of time to recover from her surgery. Because the employer declined to allow the claimant to return to work with restrictions, the claimant continued on an FMLA leave of absence until June 4, 2020. Ms. Boysen was ready to discharge the claimant at that time. The employer begrudgingly allowed the claimant to continue on an informal leave for an additional three weeks. The weight of the evidence indicates that the claimant was making progress in her recovery and was going to be in a position to return to work without restrictions within a reasonable time. The employer elected to discharge the claimant from the employment instead, rather than grant a reasonable extension of the leave.

The employer failed to present sufficient evidence to establish misconduct in connection with the employment based on the alleged, unspecified performance issues. The employer witness could not speak to the particulars of the alleged issues.

Because the claimant was discharged, the claimant was under no obligation to return to the employer to offer her services upon release to work without restrictions.

The claimant is eligible for benefits, provided she meets all other eligibility requirements. The employers account may be charged.

DECISION:

The October 2, 2020, reference 01, decision is reversed. The claimant was discharged on June 29, 2020 for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.



James E. Timberland
Administrative Law Judge

January 22, 2021
Decision Dated and Mailed

jet/kmj