IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

DAWN L MAJESKI Claimant **ABRH LLC** Employer	**APPEAL 18A-UI-04767-DB-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 03/25/18** **Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.3(7) – Overpayment of Benefits
Iowa Admin. Code r. 871-24(10) – Employer participation at Fact-finding Interview

STATEMENT OF THE CASE:

The employer/appellant filed an appeal from the April 13, 2018 (reference 01) unemployment insurance decision that allowed benefits based upon claimant's discharge from employment. The parties were properly notified of the hearing. A telephone hearing was held on May 11, 2018. The claimant, Dawn L. Majeski, participated personally. The employer, ABRH LLC, was represented by Thomas Kuiper and participated through witnesses Freddie Grant, Ioanna Efstathiou, and Doug Akers. The administrative law judge took official notice of the claimant's unemployment insurance benefits records.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Did claimant voluntarily quit the employment with good cause attributable to employer?
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can any 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:

Claimant was employed as a server in the employer's restaurant. She worked between 25 and 40 hours per week. Claimant was employed from March 29, 2017 until March 16, 2018, when she was discharged from employment. Claimant's job duties included but were not limited to serving food, waiting on customers, cleaning tables, rolling silverware, and stocking condiments on tables. Ms. Grant is the general manager of the restaurant. Ms. Efstathiou is the assistant general manager. Doug Akers was a manager in training on March 14, 2018.

On March 14, 2018, claimant switched shifts with another co-worker so that she could work from 11:00 a.m. to 7:00 p.m. because she had a personal meeting at 8:00 p.m. that day. When

Ms. Efstathiou came to work, claimant told her that she needed to leave between 7:00 p.m. to 7:30 p.m. because she had to be somewhere at 8:00 p.m. Even though claimant's shift was scheduled to end at 7:00 p.m., she was required to be available after 7:00 p.m., based upon the employer's business needs. Management would cut the servers off the floor when the customer flow slowed down and then the claimant would be responsible for completing her side work prior to leaving their shift. Employees are also required to check out and clock out prior to leaving their shift. Checking out requires the employee to make sure their checks are correct and they receive their tips. Clocking out allows them to note the time they are leaving their shift. Employees are required to have a manager complete this task for them because a manager's card must be used to access the computer system.

During her shift on March 14, 2018, claimant complained to several co-workers about not being cut off the floor so that she could leave in time for her personal meeting. At approximately 6:00 p.m. claimant spoke to Mr. Akers about this and he told her they would re-visit the issue at 7:00 p.m. Claimant spoke to another co-worker named Ashley during this time and commented that, "if this is how she was going to be treated she might as well not even show up on Friday". Mr. Akers overheard this comment and asked claimant if he needed to cover her shift on Friday, March 16, 2018. Claimant did not answer Mr. Akers' question. At approximately 7:15 p.m., customer flow slowed down and Ms. Efstathiou cut claimant off the floor. Claimant then completed her side work. At 7:46 p.m. claimant checked out and clocked out with Steve Snow, the front-end manager and she left.

Claimant's next shift was scheduled for Friday, March 16, 2018. She arrived for her shift on time, but saw another server named Rose going into the restaurant. Claimant was confused why Rose was there and Rose agreed to go in to check to see if claimant was crossed off the schedule. Rose then texted claimant that Ms. Grant had reported to her claimant had quit. At this time, claimant went into the office to speak to Ms. Grant and Mr. Akers. During this conversation, Ms. Grant told claimant that she believed that claimant had quit. Claimant stated that she had not quit and was there on that day to work. Ms. Grant then stated to the claimant that, "you are not happy here and we are not happy with you so it is best that we part ways." Claimant then left the premises.

Claimant received benefits of $1,188.00 for the six weeks between March 25, 2018 and May 5, 2018. 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 discharged for no disqualifying reason. Benefits are allowed.

First, it must be determined whether claimant quit or was discharged from employment. A voluntary quitting means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer and requires an intention to terminate the employment. *Wills v. Emp't Appeal Bd.*, 447 N.W. 2d 137, 138 (Iowa 1989). 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). Where a claimant walked off the job without permission before the end of his shift saying he wanted a meeting with management the next day, the Iowa Court of Appeals ruled this was not a voluntary quit because the claimant's expressed desire to meet with management was evidence that he wished to maintain the employment relationship. Such cases must be analyzed as a discharge from employment. *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438 (Iowa Ct. App. 1992).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id*. After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the Administrative Law Judge finds that claimant's testimony is more credible than the employer's testimony. Mr. Akers' and Ms. Grant's inconsistent testimony of whether claimant had made statements on March 16, 2018 that she said she was quitting as a joke lends more credibility to the claimant's testimony.

In this case, claimant completed her shift on March 14, 2018 by properly checking out and clocking out. She then returned for her next shift on March 16, 2018 ready to work. Claimant clearly had no intention to quit and was discharged from employment by Ms. Grant.

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). 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). The focus of the administrative code definition of misconduct is 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.* 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). Further, 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 law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000).

In this case, claimant's actions in complaining to co-workers and making a comment about not showing up at her next shift to a co-worker were not misconduct. They were an isolated incident of poor judgment and claimant is guilty of no more than "good faith errors in judgment." 871 IAC 24.32(1)(a). Instances of poor judgment are not misconduct. *Richers v. Iowa Dept. of Job Services*, 479 N.W.2d 308 (Iowa 1991); *Kelly v. IDJS*, 386 N.W.2d 552, 555 (Iowa App. 1986). Her actions were not an intentional and substantial disregard of the employer's interest which rises to the level of willful misconduct. As such, benefits are allowed. Because benefits are allowed, the issue of overpayment of benefits is moot. The employer's account may be charged for benefits paid.

DECISION:

The April 13, 2018 (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

_____
Dawn Boucher
Administrative Law Judge

_____
Decision Dated and Mailed

db/rvs