

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

VICKY E KUNKLE
2936 WALNUT TRAIL
STUART IA 50250

COMMUNITY CARE CENTER
325 SW 7TH
STUART IA 50250

Appeal Number: 05A-UI-11000-DT
OC: 09/25/05 R: 01
Claimant: Appellant (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge
Section 96.5-1 – Voluntary Leaving

STATEMENT OF THE CASE:

Vicky E. Kunkle (claimant) appealed a representative's October 17, 2005 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment from Community Care Center (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on November 30, 2005. The claimant participated in the hearing. Kristen Canham appeared on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was there a disqualifying separation from employment either through a voluntary quit without good cause attributable to the employer or through a discharge for misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on December 29, 2004. She worked full time on the overnight shift as a certified nursing aide (CNA) in the employer's long-term care nursing facility. Her last day of work was September 21, 2005.

The claimant was scheduled to report for work on September 23, 2005 at 11:00 p.m. At approximately 9:30 a.m. that morning, she called the director of nursing (DON) to see if she could be excused from work that night, as she wanted to attend her children's homecoming dance to take pictures of them and their dates. Her children live about an hour away from the employer's facility in Stuart, and the dance would not be starting until approximately 11:00 p.m. The DON denied the claimant's request unless she could find someone to replace her.

The claimant attempted to call other employees to replace her but was not successful. She called back at approximately 2:30 p.m. to see if someone on the evening shift could stay over for about four hours so that she could come in just for the last four hours of the shift. The DON again denied the request, but did tell the claimant that she could come in one hour late at 12:00 a.m. The claimant did not commit that she could be there by then, and the DON told her that if she were not there by then, she no longer had a job.

The employer was skeptical that the claimant would report for work at all, so they arranged for a CNA from a temporary staffing agency to cover the shift. At about 11:25 p.m., the claimant called the charge nurse on duty to report that she was on her way, that she would not be able to be there by 12:00 a.m., but that she should be there by 12:15 a.m. The charge nurse told the claimant not to worry about coming in, that the shift was covered by the CNA from the temporary staffing agency. Therefore, the claimant did not report for any of her shift that night.

The claimant sought to report for work on September 26, 2005. She attempted to talk to Ms. Canham, the administrator, but Ms. Canham told the claimant there was nothing to talk about, that the claimant's employment had ended. At the hearing, Ms. Canham stated that she understood that the claimant had told the charge nurse the night of September 23 that she was not going to make it at all, and that if the claimant would have reported for work by 12:15 a.m., she would still have had a job.

REASONING AND CONCLUSIONS OF LAW:

The first issue in this case is whether the claimant voluntarily quit.

Iowa Code Section 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 24.25 provides that, 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 from whom the employee has separated. A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. Bartelt v. Employment Appeal Board, 494 N.W.2d 684 (Iowa 1993). The employer asserted that the claimant was not discharged but that she quit by refusing to report for her scheduled shift on September 23, 2005. The administrative law judge concludes that the employer has failed to satisfy its burden that the claimant voluntarily quit. Iowa Code Section 96.6-2. As the separation was not a voluntary quit, it must be treated as a discharge for purposes of unemployment insurance. 871 IAC 24.26(21).

The issue in this case is then whether the employer discharged the claimant for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue is not whether the employer was right or even had any other choice but to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate decisions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988). A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code Section 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982).

The focus of the definition of misconduct is on acts or omissions by a claimant that "rise to the level of being deliberate, intentional or culpable." Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer's interest, such as found in:
 - a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
 - b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:
 - a. Manifest equal culpability, wrongful intent or evil design; or
 - b. Show an intentional and substantial disregard of:
 1. The employer's interest, or
 2. The employee's duties and obligations to the employer.

Iowa Code Section 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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The reason the employer effectively discharged the claimant was her failure to report for her shift the night of September 23, 2005. Critical to this case is the discussion between the claimant and the charge nurse on duty that day. Ms. Canham stated she understood that the claimant told the charge nurse that she would not be in at all that night. However, the claimant stated under oath and subject to cross-examination that she told the charge nurse that she could be there by 12:15 a.m., but that the charge nurse told her not to bother coming in since the shift was covered. The charge nurse was not available as a first-hand witness at the hearing to provide testimony under oath and subject to cross-examination. Without that information being provided first-hand, the administrative law judge is unable to ascertain whether Ms. Canham might have been mistaken in her second-hand understanding of the conversation between the claimant and the charge nurse. Under the circumstances, the administrative law judge finds the claimant's first-hand information more credible. The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's October 17, 2005 decision (reference 01) is reversed. The claimant did not voluntarily quit and the employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

ld/s