

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

**ANGELICA GOMEZ REYES**

Claimant

**APPEAL 19A-UI-07103-DB-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OSKALOOSA FOOD PROD CORP**

Employer

**OC: 07/28/19**

**Claimant: Respondent (5R)**

Iowa Code § 96.5(2)a – Discharge for Misconduct

Iowa Code § 96.4(3) – Able to and Available for Work

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:**

The employer/appellant filed an appeal from the August 30, 2019 (reference 01) unemployment insurance decision that allowed benefits because claimant offered to return to work after her injury pursuant to Iowa Code § 96.5(1)d. The parties were properly notified of the hearing. A telephone hearing was held on September 30, 2019. The claimant, Angelica Gomez Reyes, participated personally. Sophia, Spanish Language Interpreter Number 12011, provided language interpreter services for the claimant. The employer, Oskaloosa Food Prod Corp, participated through witness Kate Clark. Claimant's Exhibit A was admitted. The administrative law judge took official notice of the claimant's unemployment insurance benefits records.

**ISSUES:**

Was the claimant discharged for a current act of disqualifying job-related misconduct?

Is the claimant able to and available for work?

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 full-time as a breaking machine operator. Her employment began on June 23, 2015. Her last day physically working on the job was July 29, 2019. Claimant's job duties included working in the production area and cleaning the machine. Claimant's direct supervisor was Jake Carnes.

Claimant suffered work-related injuries on May 11, 2018, October 31, 2018, and January 19, 2019. See Exhibit A. Claimant received work restrictions from the employer's physician and eventually returned back to work. After returning to work, her medical condition was aggravated

by her job duties and claimant sought medical treatment from her own physician. See Exhibit A. Claimant has permanent restrictions of no lifting greater than 25 pounds with both arms, or 10 pounds with the left arm, no lifting greater than 5 pounds over shoulder level with the left arm occasionally, no frequent over shoulder lifting with the left arm, and no frequent reaching with the left arm. See Exhibit A. Claimant presented her new restrictions to the employer. On July 30, 2019, claimant was told that she was not allowed to work due to the new restrictions. The employer does not have any jobs at its facility that involve lifting less than 5 pounds. The employer was unable to accommodate claimant's work restrictions that stemmed from her work-related injuries.

Claimant filed her initial claim for unemployment insurance benefits effective July 28, 2019 and has received benefits of \$2,422.00 for six weeks between July 28, 2019 and September 7, 2019. The employer participated in the fact-finding interview by telephone through witness Kate Clark and provided information about the status of claimant's employment. The claimant is able to work so long as the work is within her restrictions.

Claimant has earned temporary total disability compensation payments due to these work-related injuries beginning July 29, 2019. Claimant received \$1,877.50 in temporary total disability compensation from July 29, 2019 through August 26, 2019. See Exhibit A. Claimant received \$375.50 in temporary total disability compensation from August 27, 2019 through September 2, 2019. See Exhibit A. Claimant received \$375.50 in temporary total disability compensation from September 3, 2019 through September 9, 2019. See Exhibit A.

There has been no initial investigation and determination regarding whether claimant's temporary total disability compensation is deductible from her unemployment insurance benefits. The question of whether the claimant's temporary total disability compensation is deductible from her unemployment insurance benefits will be remanded to the Benefits Bureau of Iowa Workforce Development for an initial investigation and determination. The claimant's group code shall be changed to Group Code "6".

#### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant's separation from work is not disqualifying. Benefits are allowed, provided claimant is otherwise eligible.

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.

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).

In this case, the claimant was instructed that she was not allowed to work due to her work restrictions that stemmed from her work-related injuries. She did not intend to voluntarily quit her employment.

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.

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). 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).

Iowa Code § 96.4(3) provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in § 96.19, subsection 38, paragraph "b", subparagraph 1, or temporarily unemployed as defined in § 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of § 96.5, subsection 3 are waived if the individual is not disqualified for benefits under § 96.5, subsection 1, paragraph "h".

Iowa Admin. Code r. 871-24.22(1)a provides:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(1) *Able to work.* An individual must be physically and mentally **able to work in some gainful employment, not necessarily in the individual's customary occupation**, but which is engaged in by others as a means of livelihood.

*a. Illness, injury or pregnancy.* Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

(emphasis added).

To be able to work, "[a]n individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood." *Sierra v. Employment Appeal Board*, 508 N.W.2d 719, 721 (Iowa 1993); *Geiken v. Lutheran Home for the Aged*, 468 N.W.2d 223 (Iowa 1991); Iowa Admin. Code r. 871-24.22(1). "An evaluation of an individual's ability to work for the purposes of determining that individual's eligibility for unemployment benefits must necessarily take into

consideration the economic and legal forces at work in the general labor market in which the individual resides.” *Sierra* at 723.

Iowa Admin. Code r. 24.22(2) provides:

Available for work. The availability requirement is satisfied when an individual is willing, able, and ready to accept suitable work which the individual does not have good cause to refuse, that is, the individual is genuinely attached to the labor market. Since, under unemployment insurance laws, it is the availability of an individual that is required to be tested, the labor market must be described in terms of the individual. A labor market for an individual means a market for the type of service which the individual offers in the geographical area in which the individual offers the service. Market in that sense does not mean that job vacancies must exist; the purpose of unemployment insurance is to compensate for lack of job vacancies. It means only that the type of services which an individual is offering is generally performed in the geographical area in which the individual is offering the services.

j. Leave of absence. A leave of absence negotiated **with the consent of both parties**, employer and employee, is deemed a period of voluntary unemployment for the employee-individual, and the individual is considered ineligible for benefits for the period.

(1) If at the end of a period or term of negotiated leave of absence the employer fails to reemploy the employee-individual, the individual is considered laid off and eligible for benefits.

(2) If the employee-individual fails to return at the end of the leave of absence and subsequently becomes unemployed the individual is considered as having voluntarily quit and therefore is ineligible for benefits.

(3) The period or term of a leave of absence may be extended, ***but only if there is evidence that both parties have voluntarily agreed.***

(emphasis added).

In this case, the employer did not allow the claimant to return to work with her restrictions. The claimant is able to and available for work and is not on a negotiated leave of absence. There was no leave of absence that was agreed to with consent of both parties. There was no current act of job-related misconduct and without a current act of job-related misconduct, the employer has failed to meet its burden of proof. As such, the separation from employment is not disqualifying and benefits are allowed, provided the claimant is otherwise eligible. The claimant is not overpaid benefits due to the separation from employment. The employer’s account may be charged for benefits paid.

**DECISION:**

The August 30, 2019 (reference 01) unemployment insurance decision is modified with no change in effect. Claimant was discharged from employment on July 30, 2019 for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

**REMAND:**

The deductibility issue regarding temporary total disability payments and a potential overpayment of benefits issue as delineated in the findings of fact is remanded to the Benefits Bureau of Iowa Workforce Development for an initial investigation and determination. The claimant's group code shall be changed to Group Code "6".

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Dawn Boucher  
Administrative Law Judge

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Decision Dated and Mailed

db/rvs