IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

68-0157 (9-06) - 3091078 - EI

KRISTA L HOLMES
Claimant

BEST WEST HOLIDAY LODGE
CLEAR LAKE
Employer

APPEAL NO. 08A-UI-00957-LT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 12/30/07 R: 02
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge/Misconduct
Iowa Code § 96.5(1) – Voluntary Leaving

STATEMENT OF THE CASE:

The employer filed a timely appeal from the January 18, 2008, reference 01, decision that allowed benefits. After due notice was issued, a telephone conference hearing was held on February 13, 2008. Claimant participated. Employer participated through Teria Troutner, Matt Clement, Lori Faught and Brad Willman and was represented by Jerry Sander of Unemployment Services LLC.

ISSUE:

The issue is whether claimant quit the employment without good cause attributable to the employer claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant was employed as a full time banquet cook at Bennigans from August 9, 2006 until January 7, 2008 when she was discharged. On December 24, employees were supposed to get an extra paycheck and claimant discovered hers was not directly deposited to her account. She took the matter up with Troutner, assistant to general manager Faught. Troutner was not willing to help and claimant became upset and left the office. Claimant worked without incident until December 31 when she went to the office to cancel her benefits and Faught told her that the check mistake was not employer's fault. Claimant rolled her eyes and disagreed. Faught pressed on and claimant asked her to stop revisiting the issue since she was becoming upset. She turned to leave and Faught told her, "That's it, you're done. You are out the door." Claimant called her supervisor Clement and told him what happened with Faught. He said he would talk to Faught and try for a suspension but would have to get back to her. He did not contact her thereafter to tell her if she was suspended or fired or if she would be expected back at work until January 5 when he called to say she had missed three shifts and was terminated. Her call to Willman about placing an order and then withdrawing the

request because she would be in the next day to cook for Rotary occurred on December 26, not January 2.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant did not quit but was discharged from employment for no disqualifying reason.

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.

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.

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.

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).

Claimant was understandably upset when she did not get her paycheck as promised the day before Christmas, as was her frustration with Faught at raising the issue again on December 31.

Her attempt to remove herself from further conflict was not an indication she quit. Nor was her request to cancel a benefit as there are many reasons why a person might want to cancel a benefit other than leaving the employment. As for the alleged unreported absences, since employer never specifically reported back to her about the status of her employment or that she would be expected back to work on a certain date, claimant's belief she was involuntarily separated was reasonable. Thus, the separation was a discharge and not a voluntary leaving of employment.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 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. IDJS*, 364 N.W.2d 262 (Iowa 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. IDJS*, 425 N.W.2d 679 (Iowa 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." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Employment Appeal Board*, 423 N.W.2d 211 (Iowa App. 1988).

Employer witnesses' testimony is not credible for many reasons; primarily because information was withheld early during the testimony about communication with claimant and employer's effort at clear communication with claimant during her employment was miserly. Troutner seemed predisposed to hostility toward claimant after she became upset that Troutner would not help her track down her check on December 24 and also remained employed by Faught who was a primary instigator of issues with claimant on December 31. Furthermore, employer initially indicated the separation date as December 29, then December 31 and finally as January 5.

An employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job-related misconduct as the reason for the separation, employer incurs potential liability for unemployment insurance benefits related to that separation. Even had events transpired as employer claims, her argumentative conduct on December 31 did not rise to the level of disqualifying misconduct. Furthermore, since employer (Clement, and Faught) failed to reasonably or clearly communicate with claimant either verbally or in writing about her specific employment status or when she was expected to work, her unreported absences on days after she was given the impression she either was fired or not scheduled to return to work are excused. Thus, employer has not met the burden of proof to establish that claimant engaged in misconduct. Benefits are allowed.

DECISION:

The January 18, 2008, reference 01, decision is affirmed. Claimant did not quit but was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

dml/css