

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

LISA L HISE
Claimant

GATEWAY FOUNDATIONS
Employer

APPEAL 17A-UI-06717-JP-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 05/28/17
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the June 19, 2017, (reference 02) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on July 20, 2017. Claimant participated. Employer participated through human resource business partner Alex Macias and director Jerry Peters. Employer Exhibits 1 and 2 were admitted into evidence with no objection. Employer Exhibit 3 was offered into evidence. Claimant objected to the Employer Exhibit 3 because she disagreed with some of the statements in Employer Exhibit 3. Claimant's objection was overruled and Employer Exhibit 3 was admitted into evidence.

ISSUE:

Did claimant voluntarily quit the employment with good cause attributable to employer?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a counselor I from November 21, 2016, and was separated from employment on May 30, 2017, when she was discharged.

The employer has a written policy that requires employees to "recognize and maintain boundaries that establish appropriate limits to relationships with clients." Employer Exhibit 1. Claimant was aware of the employer's policies. Employer Exhibit 1. Claimant was also provided with the State of Missouri, Department of Corrections, Employee Do's and Don'ts policy. Employer Exhibit 2. The policy requires employees to "[b]e alert of movement and behavior around [them], including both staff and offenders." Employer Exhibit 2. The policy prohibits employees from giving offenders their phone number. Employer Exhibit 2. Claimant received training on working with offenders and she also observed other staff working with offenders.

The final incidents that resulted in discharge occurred on May 25, 2017. On May 25, 2017, claimant was assigned to conduct an education group with offenders. Employer Exhibit 2. The classroom was being observed by Denise Reynolds, the clinical director for the department of corrections. Employer Exhibit 2. When Ms. Reynolds entered the room, she observed

“numerous offenders up walking around, everyone talking amongst themselves and several surrounding Ms. Hise’s desk.” Employer Exhibit 2. Claimant denied having offenders standing around her desk. Ms. Reynolds later observed, “numerous offenders just walking around or standing at the back of the room.” Employer Exhibit 2. Claimant testified she had been advised by another counselor that offenders could stand in the back of the room to stay awake if they were drowsy. Ms. Reynolds also observed a couple offenders sign out for the bathroom, “but some just left the classroom and never came back.” Employer Exhibit 2. Claimant admitted that offenders did leave the classroom; however, if they were not going to the bathroom, they had already shown claimant paperwork that they were to leave a certain time for other appointments. When offenders would leave to go to the bathroom, they had to sign out on the board, but claimant also kept track on a piece of paper that recorded when the offender left and returned. Claimant was aware that because she was at a correctional facility, it was important to know where the offenders are located at all times. Later, Ms. Reynolds observed that claimant had been called out of the classroom. During claimant’s absence, an offender began facilitating the class, but when claimant returned, she allowed the offender to continue to facilitate the class. Employer Exhibit 2. Claimant admitted to allowing the offender to continue to facilitate the class, but she testified she also helped the offender facilitate the class. Claimant had observed this practice in other classrooms. Ms. Reynolds also observed claimant dismiss the offenders ten minutes early. Employer Exhibit 2. Claimant admitted to letting the class out early, but she let them out early because the other classes were getting out at that time. Ms. Reynolds then notified Mr. Peters about what she observed on May 25, 2017. Employer Exhibit 2.

From May 25, 2017 to May 30, 2017, the employer discussed what happened in claimant’s classroom on May 25, 2017. Claimant was not interviewed about what happened on May 25, 2017. On May 30, 2017, the employer made the decision to discharge claimant. On May 30, 2017, the employer informed claimant she was discharged. The employer discharged claimant because her behavior was not changing and she failed to show that she was able to maintain a safe and secure environment. Claimant continued to struggle to complete the tasks she was assigned within the time frames given, even after the employer provided her with accommodations. The employer did not believe claimant’s job performance would improve. Mr. Peters testified that claimant did not have a sustained period of success performing her job duties to the employer’s satisfaction. Mr. Peters did not believe claimant willfully failed to perform her job duties successfully. The department of corrections has a strict need for security and Mr. Peters does not believe claimant was suited for this type of an environment with high security requirements. Mr. Peters testified he believes claimant was trying to perform her job duties. Claimant testified she was performing her job duties to the best of her abilities. Claimant admitted to struggling to maintain control of the larger classes.

On April 17, 2017, claimant was suspended from April 17, 2017 to May 3, 2017. Employer Exhibit 2. Claimant was suspended after she was observed “disclosing [her] private telephone number in the presence of a client[.]” Employer Exhibit 2. The employer also observed “[o]ffenders reading personal books, passing contraband, poking each other with pens or pencils, re-arranging chairs and blatantly doing whatever they wished” without being held accountable by claimant. Employer Exhibit 2. Claimant struggled to complete the tasks she was assigned within the time frames given by the employer. Claimant requested an accommodation of more time from the employer because of a learning disability, but she continued struggle after the accommodation was granted. As a result of claimant’s suspension, her initial ninety day probationary period was extended an additional sixty days. Employer Exhibit 2. Claimant was warned her job was in jeopardy.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

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).

Iowa Admin. Code r. 871-24.32(5) provides:

Discharge for misconduct.

(5) Trial period. A dismissal, because of being physically unable to do the work, being not capable of doing the work assigned, not meeting the employer's standards, or having been hired on a trial period of employment and not being able to do the work shall not be issues of misconduct.

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).

In an at-will employment environment 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, it incurs potential liability for unemployment insurance benefits related to that separation. A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

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). Discharge within a probationary period, without more, is not disqualifying. Failure in job performance due to inability or incapacity is not considered misconduct because the actions were not volitional. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979). Where an individual is discharged due to a failure in job performance, proof of that individual's ability to do the job is required to justify disqualification, rather than accepting the employer's subjective view. To do so is to impermissibly shift the burden of proof to the claimant. *Kelly v. Iowa Dep't of Job Serv.*, 386 N.W.2d 552 (Iowa Ct. App. 1986). In *Kelly*, the hearing officer had "accepted as substantive proof the subjective conclusion of the superintendent, Jensen, that since Kelly was a capable worker he must be guilty of misconduct when he failed to perform to Jensen's satisfaction." *Kelly v. Iowa Dep't of Job Serv.*, 386 N.W.2d 552, 555 (Iowa Ct. App. 1986). However, the Iowa Court of Appeals stated: "[t]he superintendent's subjective conclusion, if accepted as substantial proof, would eviscerate the employment security act. Every employer could defeat an unemployment claim by merely testifying that an employee was capable, didn't do the job to the employer's satisfaction, and was therefore guilty of misconduct." *Kelly v. Iowa Dep't of Job Serv.*, 386 N.W.2d 552, 555 (Iowa Ct. App. 1986). The Court of Appeals found "[t]he employer's subjective judgment is proof of dissatisfaction but, without more, is not proof of misconduct." *Kelly v. Iowa Dep't of Job Serv.*, 386 N.W.2d 552, 555 (Iowa Ct. App. 1986).

Mr. Peters credibly testified that claimant did not have a sustained period of success performing her job duties to the employer's satisfaction. Although claimant was unable to perform her job to the employer's satisfaction, she credibly testified that she was performing her job duties to the best of her ability. Claimant's testimony was corroborated by Mr. Peters's testimony that he did not believe claimant willfully failed to perform her job duties successfully.

Since the employer agreed that claimant had never had a sustained period of time during which she performed her job duties to employer's satisfaction and inasmuch as she did attempt to perform the job to the best of her ability but was unable to meet its expectations, no intentional misconduct has been established, as is the employer's burden of proof. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). Like in *Kelly*, although claimant had a prior suspension regarding her job performance, the employer did not present any evidence that claimant "demonstrated a wrongful intent[.]" *Kelly v. Iowa Dep't of Job Serv.*, 386 N.W.2d 552 (Iowa Ct. App. 1986). The employer has failed to meet its burden of proof in establishing disqualifying job misconduct. Benefits are allowed.

DECISION:

The June 19, 2017, (reference 02) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

jp/rvs

NOTE TO EMPLOYER:

If you wish to change the address of record, please access your account at:

<https://www.myiowaui.org/UITIPTaxWeb/>.

Helpful information about using this site may be found at:

<http://www.iowaworkforce.org/ui/uiemployers.htm> and

<http://www.youtube.com/watch?v= mpCM8FGQoY>