IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

JOLI M JOHNSON Claimant **INSIGHT PARTNERSHIP GROUP LLC** Employer	**APPEAL 17A-UI-01861-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 01/22/17** **Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting
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 filed an appeal from the February 10, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on March 10, 2017. Claimant participated. Employer participated through director for Wapello County services Kim Shaw. Employer Exhibit 1 was admitted into evidence with no objection. Claimant Exhibit A was admitted into evidence with no objection. Claimant Exhibit B was offered into evidence. The employer objected to Claimant Exhibit B because it is hearsay and the author of the exhibit has changed her information. The employer's objection was overruled and Claimant Exhibit B was admitted into evidence.

ISSUES:

Did claimant voluntarily leave the employment with good cause attributable to the employer or did employer discharge the claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?

Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can 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 from May 2, 2016, and was separated from employment on February 3, 2017.

Claimant started with the employer as a site manager. On September 7, 2016, the employer promoted claimant to the coordinator specialist position. As a coordinator specialist, claimant supervised site managers. From September 7, 2016 until January 26, 2017, the employer had

two coachings with claimant. Employer Exhibit 1. Coachings are not disciplinary warnings. A coaching is when the employer meets with the employee and discusses what the employee is doing well and where the employee needs more help. From September 7, 2016 until January 26, 2017, claimant had success in performing her job duties in some areas, but she also had areas where she did not have any success. Employer Exhibit 1. Although claimant expressed to the employer during the January 3, 2017 coaching that she thought she might be discharged, the employer did not give her a disciplinary warning for her job performance. Employer Exhibit 1.

On January 26, 2017, the employer met with claimant and told her she was being demoted because of her subpar job performance. The employer did not believe claimant could handle the coordinator specialist job duties (paperwork and reports). The employer did not believe claimant had the ability to do the job. The employer did not believe claimant was willfully not performing her job duties. Ms. Shaw testified they felt claimant was a valued employee. The employer demoted claimant from coordinator specialist ($18.25 per hour) to life skill specialist (LSS) at $11.75 per hour. A site manager was paid $13.25 per hour. The LLS position was the only open position the employer had at the time. Claimant signed a paper on January 26, 2017 accepting the demotion. The meeting was emotional and claimant was given Friday, January 27, 2017 off. Claimant was told to report to the employer on January 30, 2017 to discuss the schedule with Ms. Shaw.

On January 27, 2017, claimant filed a claim for unemployment insurance benefits because her pay rate was reduced from $18.25 per hour to $11.75 per hour.

On January 30, 2017, claimant came to the office at 11:30 a.m.; however, Ms. Shaw had already left for a meeting. Claimant spoke to the receptionist (Shelby Cain) and asked for her schedule. Ms. Cain stated that claimant did not have a schedule. Claimant then called Ms. Shaw's cellphone and left her a message. Claimant Exhibit A. Claimant sent Ms. Shaw a text message that she came to the office to see Ms. Shaw. Claimant also called Ms. Shaw's office phone and left a message. Ms. Shaw received claimant's text message after her meeting on January 30, 2017, but did not contact claimant on January 30, 2017.

On January 31, 2017, Ms. Shaw called claimant from the office. Ms. Shaw did not get a hold of claimant. Ms. Shaw did not leave claimant a voicemail. Claimant testified she does not recall receiving a missed call from the employer.

On February 1, 2017, the employer received claimant's notice of claim for unemployment insurance benefits. Claimant called Ms. Shaw at the employer's office number on February 1, 3 and 7, 2017. Claimant Exhibit A. Each time claimant called, she was told that Ms. Shaw was not available. Claimant was also told when she called that she was not on the schedule to work. Claimant testified she left Ms. Shaw a voicemail on at least one of the phone calls to the office. Claimant went to the office on either February 1 or 3, 2017 to speak to Ms. Shaw, but Ms. Shaw was not at the office.

Claimant did not have any prior disciplinary warnings.

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.

It is the duty of an administrative law judge and 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, as the finder of fact, 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. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). 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 evidence you believe; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. This administrative law judge reviewed the exhibits submitted by both parties. This administrative law judge finds claimant's version of events to be more credible than the employer's recollection of those events.

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.

The employer has the burden of proof to prove a separation is a quit as a opposed to a discharge. Iowa Code § 96.5; Iowa Admin. Code r. 871-24.25. Iowa unemployment insurance law disqualifies claimants who voluntarily quit employment without good cause attributable to the employer or who are discharged for work-connected misconduct. Iowa Code §§ 96.5(1) and 96.5(2)a. A voluntary quitting of employment requires that an employee exercise a voluntary choice between remaining employed or terminating the employment relationship. *Wills v. Emp't Appeal Bd.*, 447 N.W.2d 137, 138 (Iowa 1989); *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438, 440 (Iowa Ct. App. 1992). 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); *see also* Iowa Admin. Code r. 871-24.25(35). 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).

On January 26, 2017, claimant clearly indicated to the employer she did not intend to quit when she signed a paper accepting her demotion. The employer then told claimant to report to the office on January 30, 2017 to meet with Ms. Shaw to discuss her new schedule. However, when claimant arrived on January 30, 2017, Ms. Shaw had already left for a meeting. Claimant then clearly tried to get in touch with Ms. Shaw on January 30, 2017 to continue her employment. Claimant came to the office, she called Ms. Shaw's cellphone and office phone

(leaving messages), and she sent Ms. Shaw a text message. Ms. Shaw did not follow-up with claimant on January 30, 2017, despite testifying she received claimant's text message. On January 31, 2017, Ms. Shaw testified that she attempted to call claimant, but was unsuccessful. Unlike claimant, Ms. Shaw did not leave claimant a voicemail. Claimant testified she did not recall receiving a missed call from the employer on January 31, 2017. The employer did not attempt to contact claimant again after January 31, 2017. Claimant attempted to call Ms. Shaw on February 1, 3, and 7, 2017 and went to the office on either February 1 or 3, 2017, but was unsuccessful getting in contact with Ms. Shaw.

Because there was unclear communication between claimant and employer about the status of the employment relationship; the issue must be resolved by an examination of witness credibility and burden of proof. It is clear from claimant's follow-up phone calls to the employer after January 30, 2017 that she did not intend to quit. Furthermore, the only time the employer responded to claimant after January 26, 2017, was one phone call on January 31, 2017 and the employer did not to leave a voicemail for claimant. Therefore, claimant's interpretation of the employer's refusal to communicate with her the entire week of January 30, 2017 as a discharge was reasonable and the burden of proof falls to the employer.

Iowa Code § 96.5-2-a provides:

> An individual shall be disqualified for benefits:
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> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
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> 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.
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> (1) Definition.
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> 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(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). 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). 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).

Although claimant had two prior coachings regarding her job performance as a coordinator specialist, the employer did not present any evidence that claimant "demonstrated a wrongful intent on [claimant's] part." *Kelly v. Iowa Dep't of Job Serv.*, 386 N.W.2d 552 (Iowa Ct. App. 1986). Even after claimant was demoted because of subpar job performance, she still attempted to continue her employment with the employer by making multiple phone calls and coming to the office, but the employer did not follow-up with her contact attempts. Claimant even signed a paper on January 26, 2017 accepting her demotion.

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. Since the employer agreed that claimant was not able to perform her job duties to its 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). Furthermore the employer failed to give claimant a work schedule after she was demoted on January 26, 2017, despite her desire to continue employment. Accordingly, no disqualification pursuant to Iowa Code § 96.5(2)a is imposed. The employer has failed to meet its burden of proof in establishing disqualifying job misconduct. Benefits are allowed.

As benefits are allowed, the issues of overpayment, repayment, and the chargeability of the employer's account are moot.

DECISION:

The February 10, 2017, (reference 01) unemployment insurance decision is affirmed. Claimant did not quit but was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed and withheld shall be paid to claimant.

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Jeremy Peterson
Administrative Law Judge

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Decision Dated and Mailed

jp/rvs