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

Appeal Number: 04A-UI-02961-DT
OC: 01/25/04 R: 03
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.

LAURIE K CREERY
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JIVA LIFESTYLE SALON & SPA INC
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(Administrative Law Judge)

(Decision Dated & Mailed)

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

STATEMENT OF THE CASE:

Laurie K. Creery (claimant) appealed a representative's March 9, 2004 decision (reference 02) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment from Jiva Lifestyle Salon & Spa, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on April 12, 2004. The claimant participated in the hearing, was represented by Kenneth P. Nelson, attorney at law, and presented testimony from two other witnesses, Kara Fox and Syria Hayes.

The claimant's hearing had been scheduled to be back-to-back with a consolidated hearing involving four other claimants and the employer. The four hearings that were consolidated were

originally scheduled for 8:30 a.m., 9:30 a.m., 10:30 a.m. and 11:30 a.m. on April 12 (04A-UI-03077-DT, 04A-UI-03078-DT, 04A-UI-03079-DT, and 04A-UI-03088-DT.) By prior order of the administrative law judge, those hearings were consolidated to begin at 8:30 a.m.; there was no assurance or contemplation that the consolidated hearing would be done before 11:00 a.m., the scheduled time for the hearing in this appeal. Two of the claimants from the consolidated hearings were Ms. Fox and Ms. Hayes. The hearing in this matter was scheduled so that it could immediately follow the consolidated hearing. In the consolidated hearing, Paula Hill, the employer's president, participated on behalf of the employer. Rather than running as late as 11:00 a.m. as contemplated was possible, the consolidated hearing was closed at 9:36 a.m. At the close of that hearing, Ms. Hill voiced some concern about proceeding immediately into the hearing in this appeal, as she had an employee meeting scheduled for 10:00 a.m. The administrative law judge denied the employer's request to delay the hearing until 11:00 a.m., as all of the parties were present and the scheduled times for the other hearings had not expired; Ms. Hill's scheduling of a 10:00 a.m. meeting could have already conflicted with the previously scheduled hearings. However, the administrative law judge did agree to allow Ms. Hill until 10:00 a.m. to make necessary calls to put off her other 10:00 a.m. meeting. Immediately prior to the adjournment of the consolidated hearing, Ms. Hill agreed that she would clear her schedule and be available to proceed with the appeal hearing in this matter at 10:00 a.m.

However, when at 10:00 a.m. the administrative law judge called the number at which Ms. Hill had been reached to participate in the consolidated hearing, Ms. Hill was not available. Although the administrative law judge left a message on Ms. Hill's answering system, Ms. Hill did not again call the Appeals Bureau to participate in the hearing. Therefore, the employer did not participate in the hearing. The hearing record was closed at 10:43 a.m. After the close of the hearing, the administrative law judge learned from Agency staff that a fax had been received from Ms. Hill at 10:02 a.m. with a cover note that stated in part, "I apologize for any misunderstanding in times. I have an employee meeting that cannot be changed. . . ." Attached to the cover note were two pages of notes the employer wished to have considered in lieu of its participation in the hearing. Good cause was not established for the employer's failure to participate in the hearing and offer the information directly, and the materials received by the administrative law judge after the hearing are not considered as part of the record except as to show that the employer had made a deliberate decision not to participate. The cover page is therefore admitted to the record as Agency Exhibit One; the two pages that followed are marked as proposed Employer's Exhibit One but are not admitted.

During the hearing, Claimant's Exhibits A through E were entered into evidence. Based on the evidence, the arguments of the claimant, 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 May 12, 2003. Since June 30, 2003, she worked full time as spa director. Her last day of work was December 10, 2003.

On November 13, 2003, the claimant, having become aware that Ms. Hill was contemplating selling the salon, expressed interest to Ms. Hill of her interest in purchasing the salon, and

Ms. Hill reciprocated with an interest in selling to the claimant. Negotiations began between the parties' attorneys. On December 10 the employer, having become uncomfortable with the claimant continuing to work in the salon while the negotiations proceeded, directed the claimant to take a two-week leave of absence. In a memorandum signed by the parties on that day, it was indicated that the parties understood that at the end of the two weeks, the claimant would either own the salon, or Ms. Hill would retain the salon and business would proceed as usual. (Claimant's Exhibit E.)

Despite the December 10 memorandum, the negotiations between the parties had not concluded by December 24, as the salon financial records had not been turned over for review as had been agreed. Negotiations did continue after December 24. The claimant was already scheduled to take vacation from December 26, 2003 through January 10, 2004. She understood that she would be returning to work as usual on January 12. On January 12, the employer's attorney contacted the claimant's attorney regarding information necessary for the claimant's preparation of a letter of intent/purchase proposal; in that letter, however, the employer's attorney indicated that "Paula [(Hill)] Kabance prefers that Laurie not return to work until they have completed their negotiations in this matter." (Claimant's Exhibit A.)

On January 13, 2004, Ms. Hill held an employee meeting in which she announced the formation of a "new management team" excluding the claimant. When asked by staff as to the claimant's status, Ms. Hill indicated that the claimant would not be returning. On January 27, the claimant terminated the negotiations to purchase the salon.

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. The claimant was consistent in expressing her wish to return to work with the employer. 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 claimant did not exhibit the intent to quit and did not act to carry it out. The claimant did not have the intent to sever the employment relationship necessary to treat the separation as a "voluntary quit" for unemployment insurance purposes. 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 next issue in this case is 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 in effect the difficulties that arose regarding the negotiations to purchase the business. 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 March 9, 2004 decision (reference 02) 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 she is otherwise eligible.

ld/kjf