IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

JILL MARTIN Claimant **DANCING BEARS LLC** Employer	**APPEAL 19A-UI-06105-S1-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 09/30/18** **Claimant: Appellant (4)**

Section 96.5-2-a – Discharge for Misconduct
Section 96.4-3 – Able and Available

STATEMENT OF THE CASE:

Jill Martin (claimant) appealed a representative's July 25, 2019, decision (reference 02) that concluded she was not eligible to receive unemployment insurance benefits after her separation from work with Dancing Bears (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on August 30, 2019. The claimant participated personally and through her husband, Alexander Martin. The employer participated by Elaine Hargrove, Owner, and Argos Marinoctis, Store Manager. The administrative law judge took official notice of the administrative record. The claimant offered and Exhibit A was received into evidence. The employer offered and Exhibits 1, 2, and 3 were received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason and whether the claimant is able and available for work.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on June 11, 2019, as a part-time sales associate in training. She signed for receipt of the employer's handbook on June 11, 2019. The owner was located in Florida and never met or talked to the claimant. She oversaw the business through the store manager.

The store policies indicated that employees must report absences by making contact with a store lead. "Contact REQUIRES a phone call unless otherwise stated". (Exhibit 1, page 1). The employer policy on breaks was, "One break of 15 minutes for eating of smoking are allowed for each 8 hour shift without clocking out, and you have the option of taking up to (3) 5-minute breaks during each 8 hour shift instead of the single 15 minute break. You cannot be out of the store more than 5 minutes regardless of the type of break taken." (Exhibit 1, page 4).

The store manager trained the claimant and did not require a phone call when reporting absences. Texts were allowed without incident. Also, he allowed employees to leave the premise to collect food. Often those times took longer than five minutes. Employees left the premises for longer than five minutes to smoke/vape.

On the evening of June 17, 2019, the claimant sent a text to the store manager. She had been awake for many hours and at hospice with her friend, who just died. The claimant told the store manager she would be absent from the one-hour mandatory team meeting on June 18, 2019, because she needed rest. The store manager had been told about the claimant's friend. He responded to the claimant's text by texting "K".

On June 20, 2019, the store manager was absent because his child was born on June 20, 2019. The claimant may have taken turns with another employee to retrieve food from a nearby restaurant while the store manager was gone. This was the usual custom. On June 21, 2019, the store manager stopped by the store when it first opened. Again, the claimant and the other employee may have followed the usual protocol and taken turns stepping out for take-out food and returning to eat. She may have been gone ten minutes to retrieve food. Other employees took ten-minute breaks to smoke or vape throughout the day.

On June 22, 2019, the store manager told the claimant that the store had overestimated its staffing needs. The business needed a full-time employee. Even though the claimant was a lovely person, the store manager had to let the claimant go. The two parted amicably.

The claimant was unable to work full-time because she had two other jobs. She worked at Colorpoint, Inc., as a seasonal part-time employee until August 2, 2019. She also cared for her granddaughter twenty-five to thirty hours per week.

The claimant filed for unemployment insurance benefits with an effective date of September 30, 2018. She filed an additional claim on July 14, 2019, and reopened her claim on July 21, 2019. The claimant and the employer had a fact-finding interview on July 23, 2019. At the fact-finding interview the employer stated it issued her a written warning that the claimant and the store manager signed on June 15, 2019. The warning was for "discussion of illegal activities with a customer". The first time the claimant heard of the June 15, 2019 warning, was at the July 23, 2019, interview. The employer terminated the claimant for leaving the store for more than five minutes on June 21, 2019 without notifying her supervisor.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

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(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 Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). An employer may discharge an employee for any number of reasons or no reason at all, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, the employer incurs potential liability for unemployment insurance benefits related to that separation. The employer did not provide any proof of the time the claimant left work on June 20 or 21, 2019. It was unsure of the amount of time she was gone. The employer was unable to prove a final incident of misconduct.

Moreover, the employer had not previously warned the claimant about any of the issues leading to the separation. The employer has not met the burden of proof to establish the claimant acted deliberately or negligently in violation of company policy, procedure, or prior warning. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. The employer did not provide sufficient evidence of job-related misconduct. It did not meet its burden of proof to show misconduct.

For the following reasons the administrative law judge finds the claimant is not able and available for work.

871 IAC 24.23(8) provides:

> Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.
> (8) Where availability for work is unduly limited because of not having made adequate arrangements for child care

The claimant has the burden of proof in establishing his ability and availability for work. *Davoren v. Iowa Employment Security Commission*, 277 N.W.2d 602 (Iowa 1979). When an employee is spending working hours caring for children, she is considered to be unavailable for work. The claimant is devoting a major portion of her week and her time and efforts to caring for her grandchild. She is currently considered to be unavailable for work.

DECISION:

The representative's July 25, 2019, decision (reference 02) is modified in favor of the appellant. The claimant was discharged. Misconduct has not been established. The claimant is not able and available for work. Benefits are denied.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/rvs