

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

MARY T SMITH
Claimant

ABCM CORPORATION
Employer

APPEAL 21A-UI-22929-DH-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 08/29/21
Claimant: Appellant (1)

Iowa Code § 96.5(1) - Voluntary Quit
Iowa Code § 96.5(2)a - Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(1)a - Discharge for Misconduct
Iowa Admin. Code r. 871-24.1(113)c - Discharge for Violation of Rules

STATEMENT OF THE CASE:

Claimant, Mary Smith, filed an appeal on October 15, 2021 from the October 5, 2021, (reference 01) unemployment insurance decision that denied benefits based upon claimant being discharged from work. The parties were properly notified of the hearing. A telephone hearing was held on December 8, 2021. Claimant participated. Employer, ABCM Corporation, participated through Lisa Verhelst, human resources coordinator, and Amy Willert, RN and assistant director of nursing (don). Judicial notice was taken of the administrative file.

ISSUE:

Was the separation a layoff, discharge for misconduct or voluntary quit without good cause?

FINDINGS OF FACT:

Having heard the testimony and reviewed the evidence in the record, the administrative law judge finds claimant's first day of employment was October 16, 2000 and her last day worked was August 27, 2021. Claimant was a full-time charge nurse on first shift (6am-2pm) with the days working the shift varying from week to week. Claimant was discharged from work on August 30, 2021, during a phone call from the employer to claimant that involved Kirsten Fisher, the administrator at the time, Ms. Verhelst and Ms. Smith. The reasons for termination told to Ms. Smith were failing to: perform her job duties as outlined in her job description; follow CDC guidelines regarding COVID-19 and follow duties per professional code of conduct per state law. Claimant responded by asking if this was a way to get rid of her for some other reasons. Claimant was discharged for performance issues only.

The performance issues are: claimant failed to follow facility policy and procedure regarding CDC/COVID-19; identify changes in status of resident and report the changes; notice abnormal behavior or refusal to provide treatment; work cooperatively with others; respect the rights of individuals; perform assessments and report the results; perform diagnosis from assessment.

Claimant failed to do these things during her August 27, 2021 shift involving a resident, identified as Resident 1. On August 27, 2021, four individuals came to claimant during her shift to report Resident 1 was coughing, or had an increase in her coughing or had a cough that was not her normal cough. In addition to all four reporting something about Resident 1's cough, claimant was additionally told that Resident 1 was either wheezing or red in the face. Claimant was dismissive of the reports, which came from co-workers and a friend/power of attorney for Resident 1. Claimant did not perform any assessment or diagnosis of Resident 1. There is no record (charting) of Claimant performing any assessment or diagnosis of Resident 1. At the end of claimant's shift, claimant fails to report any of the reported changes in Resident 1. Fifteen minutes into the next shift, Nurse Willert sees Resident 1 who states she is short of breath and Nurse Willert observes coughing. Nurse Willert performed an assessment, a diagnosis, runs a COVID-19 test (per protocol) with results known in 15 minutes, has Resident 1 use her inhaler to no effect, and reports her findings to the doctor, whom prescribed medication for a respiratory infection for Resident 1.

Employer has an employee handbook that contains rules and procedures. There are detailed job descriptions that set forth an employee's job duties. Claimant received the handbook on September 17, 2015 and the job description on October 22, 2000. Claimant was aware of the workplace rules. Claimant received a five day suspension from September 19-24, 2020 for an incident for refusing to assess and document, creating a hostile work environment, COVID-19 rules, failure to use proper barriers in a blood draw, insulin injection matter. This suspension included language that should there fail to be improvement (basically, future violations) can and will lead to termination. By this previous suspension, claimant knew her job was in jeopardy. This incident is similar in that it involves failure to assess, failure to document, failure to follow CDC guidelines regarding COVID-19 and check Resident 1 due to new/increases symptoms.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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 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). The Iowa Court of Appeals found substantial evidence of misconduct in testimony that the claimant worked slower than he was capable of working and would temporarily and briefly improve following oral reprimands. *Sellers v. Emp't Appeal Bd.*, 531 N.W.2d 645 (Iowa Ct. App. 1995). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *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).

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). The focus of the administrative code definition of misconduct is on deliberate, intentional or culpable acts by the employee. *Id.*

When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986).

Further, 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). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000).

Claimant knew of the policies/rules. Claimant failed to follow the policies/rules/procedures. Claimant was previously warned about a similar issue and knew her job was in jeopardy. The danger trying to be prevented is having a resident get no treatment or delayed treatment, which negatively affects their health and potentially the health of other residents, employees, and visitors to the facility. One of the protocols involve COVID-19, which is an infectious disease, which may cause serious illness and death.

Iowa Admin. Code r. 871-24.1(113)c provides:

Definitions.

Unless the context otherwise requires, the terms used in these rules shall have the following meaning. All terms which are defined in Iowa Code chapter 96 shall be construed as they are defined in Iowa Code chapter 96.

(113) *Separations*. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.

c. *Discharge*. A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.

DECISION:

The October 5, 2021, (reference 01) unemployment insurance decision is **AFFIRMED**. The claimant was discharged from employment on August 30, 2021, due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.



Darrin T. Hamilton
Administrative Law Judge

January 10, 2022

Decision Dated and Mailed

dh/kmj