IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

TONI M BROOKS Claimant **GENESIS HEALTH SYSTEM** Employer	**APPEAL 14A-UI-10586-LT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 08/17/14** **Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1)d – Voluntary Quitting/Illness or Injury

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the September 18, 2014 (reference 01) unemployment insurance decision that denied benefits based upon not being available for work as of August 17, 2014. The parties were properly notified about the hearing. A telephone hearing was held on November 3, 2014. Claimant participated. Employer participated through Angie Kilmer. Employer's Exhibit One was received.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time (32 hours per week) as an environmental services worker at the west campus and was separated from employment on September 16, 2014. She sustained a work injury on December 24, 2013. On August 31, 2014 her treating physician released her to "moderate" duty on a work-hardening schedule of four hours per day the first week and increasing an hour per day each week over five weeks (through October 4, 2014). Employee health nurse/workers' compensation case manager Lorraine Pacha told her the employer did not have work for her that would fit the restrictions. She instructed claimant to go online and apply for other positions. She did so immediately. Pacha said Rebecca would contact her for an interview for one of these positions. Almost a week later after being offered a housekeeping position at east campus, the supervisor there noticed claimant was covered by workers' compensation so claimant requested for kitchen work. When she called the employer on Monday she was told that if she refused the housekeeping job the refusal would be reported to the workers' compensation insurance carrier so claimant accepted the housekeeping job. Claimant worked four hours per day the first week and told her doctor that she felt "fairly good."

On September 10, 2014 the treating physician released her full duty. There was no reference to the remaining weeks of the work hardening schedule. She worked five hours per day the next week. There was an arrangement between the parties that since claimant had an appointment away from work on Thursday and was not scheduled Friday that she would work eight hours on Sunday, September 14 instead. After that shift she felt "a little tight but pretty good." By bedtime her back was tingling and she awoke at 3:00 a.m. with her arm and back locked and could not move. She was unable to report to work and left a message on the answering machine that her back was "killing" her and she would not be able to do the housekeeping job any longer. She did not say she quit the employment. The east campus administrator Sue called her and asked her to sign a resignation notice. Claimant reported to supervisor Vicki Borzick who told claimant she thought it was "big" of her to sign the resignation notice but did not refer her back to Pacha even though claimant's note included the statement, "My back continues to bother me and I don't want to risk further injury" (Employer's Exhibit One, p. 3). Claimant asked Borzick for additional medical treatment but was told that since she had been released as having reached maximum medical improvement (MMI) on September 10 with the work-hardening schedule, it would not grant her request to see the doctor again. No one told her she should report her recent pain to Pacha or that she must speak to Pacha to see a doctor. She had no medical insurance since she was on her husband's insurance, which was removed during their divorce proceeding.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant did not quit but was discharged from employment for no disqualifying reason.

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.

Iowa Admin. Code r. 871-24.26(21) provides:

> Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:
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> (21) The claimant was compelled to resign when given the choice of resigning or being discharged. This shall not be considered a voluntary leaving.

Iowa Code § 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.

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).

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).

When the record is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. *Schmitz v. Iowa Dep't Human Servs.*, 461 N.W.2d 603, 607 (Iowa App. 1990). Both the quality and the quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See, Iowa Code § 17A.14 (1). In making the evaluation, the fact-finder should conduct a common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be fulfilled. *Schmitz*, 461 N.W.2d at 608. The Iowa Supreme Court has ruled that if a party has the power to produce more explicit and direct evidence than it chooses to present, the administrative law judge may infer that evidence not presented would reveal deficiencies in the party's case. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976). Mindful of the ruling in *Crosser*, and noting that the claimant presented direct, first-hand testimony while the employer relied upon second-hand witnesses, the administrative law judge concludes that the employer has not met its burden of proof.

Although the doctor released claimant from "moderate" to "full" duty, there was no removal of the earlier work-hardening schedule. Claimant should have remained working no more than five hours per day during the week when she worked on Sunday, September 14 and reinjured herself. While claimant called off from work on Tuesday because of that reinjury and said she could not go back to the housekeeping job, it did not mean she quit the employment. Administrator Sue clearly initiated the communication about the separation from the employment with claimant to report and sign a resignation statement. In that statement claimant clearly indicated the separation from the housekeeping job was because of the most recent aggravation of the previous injury. Borzick said and did nothing in response to that red-flag statement. Because there was unclear communication between claimant and employer about the interpretation of both parties' statements about the status of the employment relationship; the issue must be resolved by an examination of witness credibility and burden of proof. Beyond the credibility conclusion cited above, since most members of management are considerably more experienced in personnel issues and operate from a position of authority over a subordinate employee, it is reasonably implied that the ability to communicate clearly is extended to discussions about employment status. Since the employer took claimant's statement of inability to perform the housekeeping duties as a resignation, denied the request to see a doctor, failed to refer her to nurse Sacha, the effect of the course of communication was a discharge from employment as claimant would have continued working in some capacity that would not have risked further injury. Since the separation was involuntary and claimant did not intend to quit the employment, the burden of proof falls to the employer.

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). 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).

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, employer incurs potential liability for unemployment insurance benefits related to that separation. Inasmuch as claimant reinjured herself and was unable to perform the housekeeping duties, the employer has not met the burden of proof to establish that claimant engaged in misconduct. Benefits are allowed.

DECISION:

The September 18, 2014 (reference 01) decision is reversed. 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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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

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