

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

**NICOLE C DAVOLT**  
Claimant

**APPEAL NO. 17A-UI-00042-S1-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**HENRY COUNTY SOLDIERS' AND  
SAILORS'**  
Employer

**OC: 11/27/16  
Claimant: Respondent (1)**

10:15Section 96.5-2-a – Discharge for Misconduct  
Section 96.3-7 – Overpayment

**STATEMENT OF THE CASE:**

Henry County Soldiers' and Sailors' (employer) appealed a representative's December 23, 2016, decision (reference 03) that concluded Nicole Davolt (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for January 26, 2017. The claimant participated personally. The employer participated by Michelle Hanson, Administrator, Lynn Humphreys, Human Resources Director. The employer offered and Exhibit 1 was received into evidence. Exhibit 1 was received into evidence.

**ISSUE:**

The issue is whether the claimant was separated from employment for any disqualifying reason.

**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 October 19, 2015, as a part-time certified nurses' aid. The employer has a "PRN Program for Nursing Associates" document that it posts online. The claimant did not sign for receipt of it and was unable to access the document on the computer. The document states that employees must be available twenty-four hours per month, work one weekend per month, request shifts, and offer dates of availability. The claimant suffered a work-related injury in late 2015, and her doctor placed her on restrictions. The employer would not allow her to work unless the restrictions were lifted. The claimant asked that the restrictions be lifted so she could work. The surgeon complied with the claimant's request. The employer allowed her to work. In August 2016, the employer gave the claimant a perfect evaluation. The employer did not issue the claimant any warnings during her employment.

The claimant's father passed away on September 7, 2016. The claimant asked the employer for shifts on September 8, 9, 13, 20, 21, and 22, 2016, to keep her mind busy. On September 21, 2016, the claimant's brother was in the hospital due to desire to harm himself

and dealing with the emotional trauma of his father's passing. The claimant notified the employer she would not be at work on September 21 and 22, 2016.

In the following days, the claimant discovered the administrator was telling the claimant's co-workers that the claimant would not receive the incentive pay she was entitled to receive. The claimant sent a letter to the chief executive officer about the administrator's behavior. The claimant sent a text to the administrator asking her to talk with her. The administrator did not respond. The claimant called and left messages for the administrator three or four times in October 2016. The administrator did not respond. The scheduler told the claimant the administrator would not put the claimant on the schedule until she was released to full duty. The claimant wanted to work but could not reach the administrator. On October 14, 2016, the administrator sent the claimant a text asking her to work. The claimant said she could not because she had her child and was working another job for a few hours. The administrator did not call or contact the claimant after the text exchange to discuss the claimant's concerns or to allow the claimant to provide dates of availability.

On November 14, 2016, the human resources director wrote a letter to the claimant stating it had accepted the claimant's resignation because she did not provide her availability for work, make contact with the employer, and complete requirements. The claimant did not receive the letter. On November 20, 2016, the claimant sent the administrator a text asking for work. The administrator did not respond.

The claimant filed for unemployment insurance benefits with an effective date of November 27, 2016. The employer participated personally at the fact finding interview on December 22, 2016, by Michelle Hanson.

#### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow the administrative law judge concludes the claimant did not voluntarily quit work.

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.

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). The claimant had no intention of resigning as evidenced with her continued contact with the employer. The separation was involuntary.

The administrative law judge finds the claimant was not discharged for misconduct.

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).

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). 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 Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). The employer terminated the claimant for not working shifts according to the PRN Program for Nursing Associates. It is not misconduct when a person does not follow a rule they have not seen. The claimant did not receive the document. In fact, the document provided in Exhibit 1 was prepared on October 11, 2016, after the claimant's last day of work, September 21, 2016. The employer did not provide the administrative law judge with the document that was in effect during the claimant's employment. The employer terminated the claimant for not working in October 2016. The claimant repeatedly called the administrator but the administrator would not communicate with the claimant to assign her shifts after the claimant sent her complaint letter. The employer did not provide any evidence of job-related misconduct. The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

**DECISION:**

The representative's December 23, 2016, decision (reference 03) is affirmed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

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Beth A. Scheetz  
Administrative Law Judge

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Decision Dated and Mailed

bas/rvs