

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MONICA K HAYES
Claimant

APPEAL NO: 10A-UI-13769-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARMELITE SISTERS FOR THE AGED
Employer

OC: 08/29/10

Claimant: Appellant (4)

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

STATEMENT OF THE CASE:

Monica K. Hayes (claimant) appealed a representative's September 23, 2010 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits effective September 4, 2010 after a separation from employment from Carmelite Sisters for the Aged (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on November 15, 2010. The claimant participated in the hearing. Heather Warren appeared on the employer's behalf with one other witness, Laura Williams. Based on the evidence, the arguments of the parties, 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 November 10, 2003. She had worked as a medications aide until May 3, 2010. From May 3 on she worked full time as a scheduler in the employer's long-term care nursing facility. On August 19, she tendered her resignation. Her last day would have been September 2. She gave her notice because she had not been allowed to return to the medications aide position as had been promised to her.

The claimant had originally been offered the scheduler position but declined. The director of nursing had reapproached her about the position, and made an agreement with the claimant that if the claimant accepted the position but then was not happy in the position, she would be returned to the medications aide position. On that basis the claimant accepted the scheduler position effective May 3. In August the claimant concluded that she was not happy in the scheduler position; she requested on three occasions, August 4, August 9, and August 18, to be returned to her medications position as agreed. The employer declined to return her to the position at that time, as the employer felt the claimant had not given the position enough of a

chance. When the employer continued to refuse the claimant's request, she determined on August 19 that she could not stay in the employment, and tendered her resignation.

On August 27 the employer discharged the claimant. The stated basis for the discharge was that the claimant had been displaying a negative attitude in conversations with coworkers and in Facebook remarks. The claimant denied making any negative comments with coworkers; no first-hand evidence was provided to the contrary. The claimant acknowledged that she had a Facebook exchange with one or more friends, including a former employee of the facility, in which she announced her departure from the employer and there was general discussion expressing unhappiness in the direction administration of the facility had been taking; the claimant did not make any specific disparaging or vulgar comments about the facility or the administration. As a result of the concern about the claimant's feelings about the employer, the employer determined to end the employment prior to the announced September 2 resignation date.

REASONING AND CONCLUSIONS OF LAW:

If the claimant voluntarily quit, she would be disqualified unless it was for good cause attributable to the employer. If the employer discharged the claimant, she would be disqualified only if it was for work-connected misconduct.

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.

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 did express her intent not to return to work with the employer. A voluntary leaving of employment requires an intention to terminate the employment relationship. Bartelt v. Employment Appeal Board, 494 N.W.2d 684 (Iowa 1993). The claimant did exhibit the intent to quit and did act to carry it out. The claimant would be disqualified for unemployment insurance benefits unless she voluntarily quit for good cause. An employer's willful breach of a contract of hire is a non-disqualifying reason for quitting. 871 IAC 24.26(1). A "contract of hire" is merely the terms of employment agreed to between an employee and an employer, either explicitly or implicitly; for purposes of unemployment insurance benefit eligibility, a formal or written employment agreement is not necessary for a "contract of hire" to exist. When the employer did not return the claimant to her prior medication aide position upon her request as had been agreed when she accepted the scheduler position on that condition, the employer breached its employment agreement with the claimant.

"Good cause attributable to the employer" does not require fault, negligence, wrongdoing or bad faith by the employer, but may be attributable to the employment itself. Dehmel v. Employment Appeal Board, 433 N.W.2d 700 (Iowa 1988); Raffety v. Iowa Employment Security Commission, 76 N.W.2d 787 (Iowa 1956). While the employer may have had a good business reason for not returning the claimant to her medications aide position, particularly because this had been an explicit condition, the employer's failure to honor that agreement was a substantial breach of the

claimant's contract of hire, and is therefore good cause for her quitting. Dehmel, supra. Benefits are allowed if she is otherwise eligible.

The next issue in this case is whether, for the time prior to the effective date of the claimant's quit, 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 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 § 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).

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.

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.

The sole reason cited by the employer for discharging the claimant is the belief she made disparaging remarks to one or more coworkers and evidenced a negative attitude regarding the

employer on her Facebook comments. Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant in fact made disparaging comments to any coworkers. Under the circumstances of this case, the claimant's comments on Facebook were at worst the result of inefficiency, unsatisfactory conduct, inadvertence or ordinary negligence in an isolated instance, or was a good faith error in judgment or discretion. 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 September 23, 2010 decision (reference 01) is modified in favor of the claimant. The claimant voluntarily quit with good cause attributable to the employer effective September 2, 2010. The employer's discharge of the claimant prior to the effective date of the quit was not for disqualifying reasons. Benefits are allowed, if the claimant is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/css