

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

KAMELA S. JENSEN
Claimant

APPEAL 20A-UI-06654-BH-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

EAR, NOSE & THROAT CONSULTANTS
Employer

OC: 03/29/20
Claimant: Appellant (2)

Iowa Code section 96.5(2)(a) – Discharge for Misconduct
Iowa Admin. Code rule 871-24.32(1)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

Kamela S. Jensen appealed the June 10, 2020 (reference 01) unemployment insurance decision that denied benefits. The agency properly notified the parties of the hearing. The undersigned presided over a telephone hearing on July 27, 2020. Jensen participated personally and testified. Ear, Nose & Throat Consultants (ENT Consultants) participated through Ashley Mosak and Jill Kearney.

ISSUES:

Was Jensen's separation from employment with ENT Consultants a layoff, discharge for misconduct, or voluntary quit without good cause attributable to the employer?
Did ENT Consultants discharge Jensen for job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the undersigned finds the following facts. ENT Consultants hired Jensen on September 12, 2011. Jensen worked full time as a licensed practical nurse (LPN). Her immediate supervisor was Jessica Bowman. ENT Consultants discharged Jensen on May 20, 2020.

A coworker informed management that the coworker believed Jensen was clocking in at a time earlier than that which she arrived at work when she was tardy. Management observed Jensen arriving at 8:01 a.m. on the day in question even though she had clocked in at 7:56 a.m.

ENT Consultants chose not to act on the incident in question because it was based in part on coworker hearsay. Instead, ENT Consultants decided to investigate Jensen moving forward.

Management discussed the situation with their information technology (IT) workers. IT explained that they can track where an employee logs in at using the IP address. IT did so with Jensen's log in on the time card and concluded that she was not using an ENT Consultants IP address because it was with CenturyLink, an internet service provided other than FiberCom, which is the provider ENT Consultants used. IT also informed management Jensen had logged in by VPN, a

virtual network that allows employees to access their work desktop and systems from other computers.

Jensen disputes ever logging into ENT Consultants using a VPN. Further, according to Jensen, she never had VPN set up on her home computer, so it is impossible for her to log into the ENT Consultants' system using a VPN. Jensen states she does not think it is possible to log into ENT Consultants' system via the internet and, even if it is possible, she has never done so to clock in before she arrived at work.

According to ENT Consultants, it is possible for an employee to log into the business's VPN without having anything installed on the employee's computer. An employee such as Jensen may do so using a web-based portal. Logging into the web-based portal gives an employee access to everything from the system for clocking in and out to patient records.

On May 15, 2020, Jensen clocked in at 7:56 a.m. on the system and walked into the building at 8:01 a.m., according to security footage. On May 18, IT pulled records showing Jensen clocked in at an IP address associated with somewhere other than ENT Consultants; however, the security footage was inconclusive as to her arrival time.

On May 20, 2020, management discussed the matter with the ENT Consultants physician board, which is made up of the four doctors who own the practice. ENT Consultants decided to discharge Jensen for falsifying her time card by logging in at home, clocking in, and then arriving at work late.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes ENT Consultants discharged Jensen from employment for no disqualifying reason.

Under Iowa Code section 96.5(2)(a), an individual is disqualified for benefits if the employer discharges the individual for misconduct in connection with the individual's employment. The statute does not define "misconduct." But Iowa Administrative Code rule 871-24.32(1)(a) does:

"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 Iowa Supreme Court has ruled this definition accurately reflects 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). 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).

As the employer, ENT Consultants has the burden of proving Jensen engaged in disqualifying misconduct. ENT Consultants contends Jensen logged into its system remotely using a VPN to clock in before she actually arrived at work. At hearing, no one with firsthand knowledge of how the ENT Consultants' system testified. Instead, ENT Consultants relied on hearsay with respect to what is possible when it comes to logging into the ENT Consultants' system. Given ENT Consultants' responsibility to keep patient records confidential, the hearsay evidence regarding the ability to log into its system is not credible. Jensen's testimony regarding her actions, of which she has firsthand knowledge, was more credible.

For these reasons, the evidence shows ENT Consultants discharged Jensen for no disqualifying reason. She is therefore entitled to benefits, provided she is otherwise eligible under the law.

DECISION:

The June 10, 2020 (reference 01) unemployment insurance decision is reversed. ENT Consultants discharged Jensen from employment for no disqualifying reason. Benefits are allowed, provided Jensen is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.



Ben Humphrey
Administrative Law Judge

August 31, 2020
Decision Dated and Mailed

bh/scn