

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

**CONNIE S LEVIT**  
Claimant

**CLINTON AMVETS INC**  
Employer

**APPEAL 16A-UI-02510-DB-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 12/20/15**  
**Claimant: Appellant (2)**

Iowa Code § 96.5(1) – Voluntary Quitting  
Iowa Code § 96.5(2)a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

The claimant/appellant filed an appeal from the February 19, 2016, (reference 02) unemployment insurance decision that denied benefits based upon her being discharged or misconduct. The parties were properly notified of the hearing. A telephone hearing was held on March 24, 2016. The claimant, Connie S. Levit, participated personally and was represented by Dorothy A. O'Brien, Attorney at Law. The employer, Clinton Amvets Inc., participated through Past Commander Edward StremLOW; Past Trustee James Winkel; Member and Past Trustee Bob Markel; Head Trustee Earl Farrell; Current Commander Mike Darrow; and Current Trustee Mike Brokaw. Claimant's Exhibit A was admitted. Employer's Exhibits 1 – 3 were admitted.

**ISSUES:**

Was the claimant discharged for disqualifying job-related misconduct?  
Did claimant voluntarily quit the employment with good cause attributable to employer?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a bartender from July 5, 2005, until her employment ended on January 10, 2016. Her job duties included tending the bar area and facilitating bus trips for members. During the course of her employment her supervisor changed several times. This was due to the fact that new members were elected as trustees on a rotating basis. Most recently Mike Darrow was the current commander. Prior to Mr. Darrow becoming commander, Edward StremLOW was the commander. During Mr. StremLOW's tenure, Dean Wiedernhoff was claimant's direct supervisor until approximately November of 2015.

On or about December 11, 2015 there was an incident where Kevin Kelly and another male friend come into the bar. Exhibit 1. Claimant was bartending at this time. Exhibit 1. During their time there Mr. Kelly puts his coat over a security camera. Exhibit 1. Claimant tells Mr. Kelly to remove the coat and he does. Mr. Kelly's friend then starts to dance in front of the camera. Exhibit 1. Claimant and the other patrons of the bar begin to laugh and clap at his dancing. Exhibit 1. Claimant continues to work at this time and as she leans down to reach

something under the bar Mr. Kelly grabs the camera and appears to twist the camera off of the mount. Exhibit 1. Claimant does not physically stop Mr. Kelly from breaking the camera or tell him to exit the bar for the incident. Exhibit 1. Claimant did not know the camera had been broken.

After learning about this incident and reviewing the video camera, Mr. StremLOW and two other trustees issue claimant a written reprimand about the incident stating that she engaged in negligent behavior for allowing the camera to be broken. Exhibit 2. On the same date the claimant was issued another written reprimand regarding use of a vacation day on December 9, 2015 without prior approval. Exhibit 2. Claimant had not received any other verbal or written warnings during her employment at the bar.

In November of 2015 the claimant had complained about sexual advances Mr. Markel had made September of 2015. This complaint was investigated by the Iowa Department of Amvets in November of 2015.

On January 10, 2016 Mr. Darrow became commander of the post for the reason of remedying the conflict between claimant and Mr. StremLOW. Mr. Farrell, Mr. Darrow and Mr. StremLOW met with State officers to discuss the claimant's harassment complaint and her actions at the bar regarding the video camera. They were told to terminate claimant's employment. On January 11, 2016 when the claimant arrived for her scheduled shift Mr. Darrow told her that she could resign or her employment would be terminated. Claimant slid the bar keys to Mr. Darrow and left the premises.

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

For the reasons that follow, the administrative law judge concludes the claimant was discharged for no disqualifying reason. Benefits are allowed.

As a preliminary matter, I find that the claimant did not quit. Claimant was discharged from employment.

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:

- (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).

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and the employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

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). Claimant was told that if she did not voluntarily resign that she would be discharged. Claimant did not intend to quit. This is not a voluntary quitting by claimant but rather a discharge case.

Further, 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).

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). 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's actions in allowing Mr. Kelly to break the video camera do not rise to the level of "wrongful intent" required to disqualify her from receiving benefits.

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds that the claimant's testimony and Mr. Darrow's testimony is more credible than the employer's other witnesses. Further, Mr. Darrow clearly confirmed in his testimony that he only asked claimant to resign out of courtesy and that she would be discharged had she not left voluntarily.

Claimant received a written reprimand for her actions on the day Mr. Kelly broke the video camera. She also received a written reprimand for her actions in taking a vacation day without notice. When claimant was discharged there was no current act of misconduct.

There must be a current act of misconduct to disqualify the claimant from receiving benefits. In this case, there was none. Mr. Darrow credibly testified that claimant was discharged because of the ongoing conflict between herself and Mr. Stremlow, including the sexual harassment complaints she had made in November of 2015. While Mr. Stremlow complained about claimant's actions about her untimely returning money from bus trips and being rude to customers, he never discussed these concerns with claimant, rather he just took notes about the incidents. Claimant had no previous verbal or written warnings about her conduct in the workplace prior to her December 16, 2015 written reprimands.

Iowa Admin. Code r. 871-24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

Without a current act, the employer failed to meet its burden of proof of establishing disqualifying job misconduct. As such, benefits are allowed.

**DECISION:**

The February 19, 2016, (reference 02) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

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Dawn Boucher  
Administrative Law Judge

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Decision Dated and Mailed

db/pjs