IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

STEPHANIE R WALKER Claimant **SUPERIOR SENIOR CARE INC** Employer	**APPEAL 17A-UI-09350-SC** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 07/30/17** **Claimant: Respondent (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

Superior Senior Care, Inc. (employer) filed an appeal from the August 23, 2017, reference 01, unemployment insurance decision that allowed benefits based upon the determination Stephanie R. Walker (claimant) was not discharged for willful or deliberate misconduct. The parties were properly notified about the hearing. A hearing was held in Cedar Rapids, Iowa at 1:00 p.m. on October 18, 2017. The claimant participated personally and was represented by Attorney Elizabeth Norris. The employer participated through Owner Susan Young and Human Resources Manager Cecily Gabel. Claimant's Exhibits A through D were admitted. Employer's Exhibits 1 and 2 were admitted. The employer offered a summary of events that was created by the two witnesses in preparation for the hearing and was not admitted as an exhibit.

ISSUES:

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

Has the claimant been overpaid unemployment insurance benefits and, if so, can the repayment of those benefits to the agency be waived?

Can charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time beginning on February 2, 2015, and was separated from employment on July 29, 2017. The claimant was promoted to Director of Client Care in January 2017 and was primarily responsible for Respite House (RH). She reported directly to Owner Susan Young and those two, along with Human Resources Manager Cecily Gabel, comprised the management team.

The employer was rather informal with regard to rules and scheduling. A schedule was posted monthly but there were regular last minute changes. As a part of the management team, the claimant was expected to regularly cover shifts. Additionally, most communication was done via text message or telephone call.

The claimant had ongoing attendance and insubordination issues. In March 2017, the claimant had requested time off over Spring Break stating she would return on Monday, March 20. The claimant did not return until Friday, March 24. She asked Young that morning if anyone would be working with her. Young responded that someone would be there at 11:00 a.m. and admonished the claimant that she had to be at RH by herself due to the claimant's extended and unplanned vacation. The claimant then submitted her two-week notice as she felt she was being punished. The claimant later rescinded the notice which the employer allowed.

In April 2017, the claimant covered an overnight shift and was scheduled to work the following day. She demanded relief be provided by 11:00 a.m. or Young could remove her from the schedule for that week. Young explained that any more threats like that and the claimant would be removed from the schedule indefinitely. She explained the only reason the claimant was allowed to remain employed was that Gabel convinced her that the claimant was just overly tired.

On April 27, 2017, the claimant notified Young she could not be at work until 9:30 or 10. Young stated she could have another employee stay late, but told the claimant that she needed to be at work at 9:45. The claimant did not report to work until 11:00 a.m. and explained to Young that she had fallen back to sleep. She went on to state she was not feeling well, but reported to work anyway. Young responded that everyone has those days and she cannot take a hard line with other employees' attendance issues if the claimant continued to be late. She stated she was going to institute a strict attendance policy. The claimant countered that she did call in and recommended Young hire someone to fill in for solely these types of situations. Young reminded the claimant that she covered her for the time she asked due to illness, but did not have the ability to hire someone just to cover in case an employee just falls back to sleep. Young proposed four sick days per employee each year. The claimant disagreed with the number Young proposed. Young stated she would double check the average employees were running and what the corporate arena considered reasonable. The claimant reiterated she did not feel good but indicated she was glad she had showed up to work and apologized for being unreliable.

On Friday, May 15, 2017, the claimant had to leave work early to take her daughter to a doctor's appointment at 1:45 p.m. Young told the claimant that she was expected to return to work after the appointment. The claimant said she did not want to have to take her daughter back to daycare. Young arranged for her daughter to babysit the claimant's daughter. The claimant told Young that she did not want to return to work for an hour. Young told the claimant that she was going to write her up and two more issues would result in her discharge. The claimant proceeded to tell Young that she did not like working for her and felt disrespected. However, she did agree to return to work after the appointment.

At the end of May, the claimant continued to have last minute absences. She also continued to be dismissive of Young's counseling about her attendance and attitude. She was a no-call/no-show for one shift and Young ended the claimant's employment. Gabel talked Young into keeping the claimant. Gabel told the claimant that she had talked Young into keeping her but that the claimant needed to improve and prove herself as an employee. The claimant told Gabel, "I don't know [sic] y I['m] just not sure I want to go back to working for her I'm sure she

feels the same because I've become unreliable[.] And she has become vindictive [sic] towards me I think but I just need to think a bit[.]" (Employer's Exhibit 1, page 28.)

During the month of July 2017, the employer was creating an employee handbook. Gabel asked the claimant for suggestions for additions and later asked her to proofread the handbook. The handbook was issued on July 28, 2017 with a policy stating one no-call/no-show would be considered a voluntary quit.

After the July 2017 schedule had been posted, she requested to have off the same week as her sister Kristina. Kristina had requested and been approved to be off work from Monday through Friday beginning July 23 as she was going to work a short-term job cleaning college housing. The claimant also wanted to work the short-term job cleaning college housing, but had neglected to ask for the week off. The employer agreed to work with the claimant and, ultimately, the parties agreed the claimant would work from 8:30 a.m. to noon for the employer each day and then go to the second job. The employer had a shortage of employees and, during that week, the claimant did not get out by noon as agreed but was able to spend some time at the second job.

On Friday, July 28, 2017, at 10:49 a.m., Young directed the claimant to take clients to a family party around 3:30 during her shift the following day. At 12:58 p.m., the claimant responded to Young stating they needed new hires as soon as possible as she was approved for a week off and had not been off all week. Young responded in two messages stating, "DONT [sic] FUCKING tell me how to run my business!! You don't have a clue. Maybe desire a CAREER instead of this cleaning bullshit. I'm DONE with people that whine and don't want to be there. EVERYONE is busting there [sic] ass!!" (Claimant's Exhibit D, page 007.) The same day, a staff meeting was held and the handbook was passed out to all employees. Later that evening, the claimant contacted Young asking if she was scheduled to work the following day with her normal client as she planned on working a shorter shift with a different client instead.

The claimant was separated on July 29, 2017 due to insubordination. That day, at 9:26 a.m., Young again reminded the claimant to take clients to a party at 3:30 p.m. The claimant responded that she was not working with those clients as she had not heard back from Young the day before. The claimant stated it was her last day off. Young stated neither she nor Gabel had given the claimant the day off and it was the claimant's Saturday shift. The claimant denied receiving the text the day before about working with the other clients. Young then stated, "It's YOUR JOB TO KNOW schedule!! You need to get there. You have NO request for today off[.]" (Emphasis in original. Employer's Exhibit 1, page 41.) The claimant argued back that she did have the day off and refused to report as directed. Young asked for a photo of the approved request. The claimant stated she handed it to her but then stated Kristina had given it to Young. The claimant continued stating, "…I'm sorry that you can't keep a hold of your paperwork." (Employer's Exhibit 1, page 42.) Young responded that the claimant needed to find another job as her insubordination was unacceptable. She went on to state that the claimant requested the same days off as Kristina and Kristina's request was through July 28.

The administrative record reflects that claimant has received unemployment benefits in the amount of $2,893.00, since filing a claim with an effective date of July 30, 2017, for the 12 weeks ending October 21, 2017. The administrative record also establishes that the employer did participate in the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant did not voluntarily quit but was discharged from employment due to job-related misconduct. Benefits are denied.

Iowa unemployment insurance law disqualifies claimants who voluntarily quit employment without good cause attributable to the employer or who are discharged for work-connected misconduct. Iowa Code §§ 96.5(1) and 96.5(2)a. The burden of proof rests with the employer to show that the claimant voluntarily left her employment. *Irving v. Emp't Appeal Bd.*, 883 N.W.2d 179 (Iowa 2016). A voluntary quitting of employment requires that an employee exercise a voluntary choice between remaining employed or terminating the employment relationship. *Wills v. Emp't Appeal Bd.*, 447 N.W.2d 137, 138 (Iowa 1989); *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438, 440 (Iowa Ct. App. 1992). It 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 there is no expressed intention or act to sever the relationship, the case must be analyzed as a discharge from employment. *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438 (Iowa Ct. App. 1992).

If an individual who misses work without notice to the employer for three consecutive days and the employer has a policy prohibiting such conduct stating it will be considered job abandonment, the individual will be presumed to voluntarily quit without good cause attributable to the employer. Iowa Admin. Code r. 871-24.25(4). In this case, the claimant was not a no-call/no-show. She still reported to work on July 29, just not to the client with which the employer had scheduled her. Additionally, the claimant did not have three consecutive no-call/no-show absences as required by the rule in order to consider the separation job abandonment, the separation was a discharge and not a quit.

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). Iowa Administrative Code rule 871-24.32(1)a provides:

> "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). 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). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). The Iowa Court of Appeals found substantial evidence of misconduct in testimony that the claimant worked slower than he was capable of working and would temporarily and briefly improve following oral reprimands. *Sellers v. Emp't Appeal Bd.*, 531 N.W.2d 645 (Iowa Ct. App. 1995).

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 neither party entirely credible. The majority of the findings of facts were ascertained from the text messages and exhibits provided. However, where there was a fact issue that was not determinable from the documents, the employer's testimony was given more weight. The claimant provided testimony contradicted by the evidence and was not found to be credible. One such example is the claimant's denial that she was involved in creating the employee handbook when the documents specifically support the employer's contention that she had been involved in the creation of the handbook. Additionally, during her testimony, the claimant would deny an incident had occurred, but then within a few minutes, it would become apparent that the incident had occurred.

The employer has presented substantial and credible evidence that claimant was insubordinate after having been warned. This is disqualifying misconduct. The claimant was scheduled to work with one client on Saturday, July 29, 2017. She was told to report to that client by the employer. The claimant refused and argued with Young about whether she had the day off. The claimant had previous issues with the employer of a similar nature and had been discharged for a handful of days at the end of May. However, the employer rescinded the discharge and Gabel notified the claimant at that time that she needed to improve her conduct. A reasonable employee would know that if similar conduct resulted in discharge once, the conduct could again result in discharge. The employer has established that the claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. Benefits are denied.

Because the claimant's separation was disqualifying, benefits were paid to which she was not entitled. The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. Iowa Code § 96.7. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. Iowa Admin. Code r. 871-24.10(1). The employer will not be charged for benefits if it is determined that they

did participate in the fact-finding interview. Iowa Code § 96.3(7), Iowa Admin. Code r. 871-24.10. In this case, the claimant has received benefits but was not eligible for those benefits. Since the employer did participate in the fact-finding interview the claimant is obligated to repay to the agency the benefits she received and the employer's account shall not be charged.

DECISION:

The August 23, 2017, reference 01, unemployment insurance decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

The claimant has been overpaid unemployment insurance benefits in the amount of $2,893.00 and is obligated to repay the agency those benefits. The employer did participate in the fact-finding interview and its account shall not be charged.

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Stephanie R. Callahan
Administrative Law Judge

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Decision Dated and Mailed

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