**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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| **ALICIA A STEINMETZ**<br>Claimant<br><br>**BBMG MILLS CIVIC PARKWAY LLC**<br>Employer | **APPEAL 16A-UI-12264-JP-T**<br><br>**ADMINISTRATIVE LAW JUDGE DECISION**<br><br>**OC: 10/16/16**<br>**Claimant: Appellant (2)** |

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

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the November 1, 2016, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on December 12, 2016. Claimant participated. Attorney Tyler Johnston participated on claimant's behalf. Attorney Jamie Schroeder registered for the hearing on behalf of claimant, but did not attend the hearing. Employer participated through general manager Nick Fogle.

**ISSUE:**

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

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a beverage manager from July 2015, and was separated from employment on October 11, 2016.

On September 17, 2016, Mr. Fogle sent claimant a text message that stated "WTF why is bar two $100 short". Mr. Fogle was not aware that claimant was not the closing manager. Claimant responded to Mr. Fogle that she was not the closing manager and asked if the checkout had been done on bar two. Mr. Fogle replied, "I don't know you are the f**king bar manager, you should know". Claimant replied that Mr. Fogle did not need to use profanity.

On September 22, 2016, at 12:04 a.m., claimant sent Mr. Fogle a text message regarding a new hire she had been training and that she (claimant) was struggling with her mental health and needed to see her doctor on September 22, 2016. Claimant told Mr. Fogle she would send him a message after her appointment. On September 22, 2016, claimant dropped off her doctor's note that stated she needed to take Family and Medical Leave Act (FMLA) leave and she would be back on October 10, 2016. Mr. Fogle responded ok, but asked who would be covering

claimant's already scheduled shifts. Claimant responded she was not sure and it was not her responsibility. Mr. Fogle responded, so I need to fill your bar shifts too. Claimant responded her FMLA leave started that day and it was his responsibility. On September 25, 2016 at 11:15 p.m., Mr. Fogle sent claimant a text message to be at the store at 10:00 a.m. to sign her FMLA paperwork. Claimant responded that she could be there at 2:00 p.m. Mr. Fogle responded that he was unavailable until 4:00 p.m. When claimant came into sign the paperwork, Mr. Fogle asked why she was taking FMLA leave. Claimant responded she did not have to tell him. Mr. Fogle stated that he did not have to grant her FMLA leave. Claimant told Mr. Fogle she was requesting FMLA leave because of her past stress and the stress of the restaurant. Mr. Fogle told claimant the employer would pay her vacation and she had to check in weekly. Claimant checked in weekly with the employer, except for one week.

Claimant was on FMLA leave from September 22, 2016 through October 10, 2016. The employer was aware of claimant's Post-traumatic Stress Disorder (PTSD), since she was hired. During claimant's FMLA leave, her therapist advised her to think about the workplace environment and how it affected her PTSD, but the therapist did not advise her to quit.

On October 11, 2016, claimant had a phone conversation with Mr. Fogle. The phone call was to discuss claimant's return to work because of the conclusion of her FMLA leave. Mr. Fogle told claimant that because she could not fulfill her job duties because of her PTSD that it would be best if she would just be done. The employer wanted a beverage manager that could handle all of the hours requested and handle the stress.

**REASONING AND CONCLUSIONS OF LAW:**

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

It is the duty of an administrative law judge and 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, as the finder of fact, 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. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). 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 evidence you believe; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. This administrative law judge finds claimant's version of events to be more credible than the employer's recollection of those events.

Iowa Code § 96.5-1 provides:

> An individual shall be disqualified for benefits:
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> 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.

The employer has the burden to establish the separation was a voluntary quit rather than a discharge. Iowa Code § 96.6(2). If the employer establishes that the separation was voluntary quit, then claimant has the burden of proving that the voluntary leaving was for good cause attributable to the employer. Iowa Code § 96.6(2). 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).

On October 11, 2016, Mr. Fogle and claimant had a phone conversation to discuss claimant returning to work because her FMLA leave had ended. During this phone conversation, instead of setting a return to work date, claimant was separated from employment. The employer has failed to establish that during this phone conversation claimant expressed her intention to terminate the employment relationship. Claimant credibly testified that Mr. Folge told her that the employer wanted a beverage manager that could handle all of the hours and the stress from the job. Claimant also credibly testified that Mr. Fogle told her that because she could not fulfill her job duties due to her PTSD, it would be best if she was done with the employer. Claimant interpreted Mr. Fogle's statements as she was being discharged. Since most members of management are considerably more experienced in personnel issues and operate from a position of authority over a subordinate employee, it is reasonably implied that the ability to communicate clearly is extended to discussions about employment status. Therefore, claimant's interpretation of the conversation as a discharge was reasonable and the burden of proof falls to the employer.

Iowa Code § 96.5-2-a provides:

> An individual shall be disqualified for benefits:
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> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
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> 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.
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> 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 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.

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). 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).

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. FMLA provisions were enacted to protect an individual's employment, not to be used as a weapon by an employer against its employee. Likewise, an employee bears responsibility for compliance with FMLA terms and cooperative communication with the employer. The employer was aware of claimant's PTSD when she was hired, yet on September 17, 2016, Mr. Fogle texted her "I don't know you are the f**king bar manager, you should know". On September 22, 2016, claimant went on FMLA leave. While claimant was on FMLA leave, the employer required her to call in every week, which claimant did except for one week. At the end of her FMLA leave, the employer told claimant it would be best if she did not come back, because the employer needed a beverage manager that could handle the stress, which claimant reasonably interpreted that she was discharged. Inasmuch as the employer discharged claimant after her FMLA leave ended, the employer has not met the burden of proof to establish that claimant engaged in misconduct. Benefits are allowed.

**DECISION:**

The November 1, 2016, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

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Jeremy Peterson
Administrative Law Judge

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Decision Dated and Mailed

jp/rvs