IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

LACEY K WARNICK Claimant **MICHAEL R MILLER** Employer	**APPEAL 18A-UI-02370-NM** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 01/21/18** **Claimant: Appellant (4R)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the February 14, 2018, (reference 01) unemployment insurance decision that found she voluntarily quit without good cause attributable to the employer, but was eligible for benefits based on other wages within her base period. The parties were properly notified of the hearing. An in-person hearing was held on April 26, 2018 in Ottumwa, Iowa. The claimant participated and was represented by attorney Melissa Hasso. The employer participated through attorney Douglas Tindal and business owner Michael Miller. Witness Amos Garrett provided testimony under subpoena, at the claimant's request, and was represented by attorney Kaitlin Gallen. Claimant's Exhibits A through D and employer's Exhibits 1 through 5 were received into evidence.

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 part time as an administrative assistant from September 12, 2017, until this employment ended on October 12, 2017, when she was separated from employment.

When claimant was initially hired, it was made clear to her that, while she would be performing job duties of an administrative assistant, she would also be required to take and pass the insurance licensing test within 30 to 45 days of her hire. (Exhibits 1 and 3). Claimant was given study materials and began studying for the exam approximately two hours every day, both at work and at home. On October 9, 2017, claimant sent Miller a message stating she would not be in to work. (Exhibit A-2). The reason claimant was absent was because she experienced some significant bleeding and went to the doctor's office, where she learned she was pregnant.

On October 10, 2017, claimant went to work at her regularly scheduled time and explained to Miller why she was absent the day before. Claimant testified Miller seemed shocked, but congratulated her and stated he was not sure what to do because he had never had a pregnant employee before. According to claimant she then explained to Miller that the pregnancy was causing her a lot of stress, and asked if she could postpone taking the exam for two additional weeks. Claimant testified the pregnancy was unplanned and she felt an additional two weeks would allow her time to adjust to this information and, hopefully, perform better on the exam. According to claimant Miller did not give her an answer to that request at the time. Miller denied claimant asked for an additional two weeks to study. Rather, he testified she indicated she was not going to take the test at all because the test was causing her too much stress, but that she would still like to work for him. According to Miller, the two then discussed what claimant would need for maternity leave and claimant indicated she would need two weeks. Miller testified he told claimant the job offer was contingent on her getting licensed and she was being paid to study for the test, so he would need to think about how to handle the situation. Miller further testified that getting licensed was of the highest importance to claimant's job.

On October 11, 2017, claimant again came to work as scheduled at 1:00 p.m. According to claimant there was very little discussion about the situation on that day, but Miller asked what she thought he should do and she responded she did not know. Miller testified, when claimant came in to work on October 11, she stated she had spoken to her husband and he said it was okay if she ended up losing her job because she did not want to take the licensing exam. According to Miller claimant again confirmed she would not take the exam and understood if he needed to find someone new. Miller testified he told claimant he was going to reach out to another applicant he had been considering when she was hired and see if she was still interested in the job. Documents were submitted which show Miller actually reached out to the other applicant the previous day, October 10, 2017, at 2:27 p.m. (Exhibit D).

On October 12, 2017, prior to the start of her shift, Miller sent claimant a text message stating the other applicant he was considering when he hired her had accepted the position, indicating he did not need her to come in any longer. Following claimant's separation from employment, Miller was asked by claimant to complete a form confirming she was no longer employed for him. The form gave three reasons for the job ending: quit, fired, or other. Miller did not circle the quit or fired options, but wrote "medical" in a blank next to the "other" option. (Exhibit B). Miller testified he chose this option because he was trying to help claimant.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant did not quit but was discharged from employment for no disqualifying reason.

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.

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).

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:
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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).

The decision in this case rests, at least in part, on the credibility of the witnesses. 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*.

There is a disagreement between the parties as to whether claimant refused to take the licensing exam or requested an additional two weeks to take the exam. Miller testified taking the exam was of the highest importance to the position and claimant clearly refused to take the exam. However, Miller also testified that, after claimant told him she was refusing to take the exam, he discussed what maternity leave for her might look like. It does not follow that one would discuss the details for maternity leave, months in the future, for an employee who is refusing to perform her most critical job duty. Furthermore, Miller testified he did not reach out to the other applicant until October 11, 2017, but Exhibit D shows she first reached out to this individual less than two hours after speaking with claimant on October 10, 2017. Finally, it is perplexing why, if Miller believed claimant had quit, or even if she was discharged for refusing an essential job function, why he would not circle either of those options on the form marked as Exhibit B. After assessing the credibility of the witnesses who testified during the hearing, reviewing the exhibits submitted by the parties, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the claimant's version of events to be more credible than the employer's recollection of those events. As claimant provided credible testimony that she did not voluntarily quit, this separation will be analyzed as a discharge from employment.

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." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). 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).

A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to assess points or impose discipline up to or including discharge for the incident under its policy. 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, employer incurs potential liability for unemployment insurance benefits related to that separation.

Claimant was discharged after she requested more time to take her licensing exam. Claimant was never given a clear answer to her question regarding additional time to take the exam, nor was she advised that if she did not take the exam within the originally agreed upon period that she would be discharged. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given.

Training or general notice to staff about a policy is not considered a disciplinary warning. Inasmuch as employer had not previously warned claimant about the issue leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. Accordingly, this separation was a discharge attributable to the employer and benefits are allowed.

DECISION:

The February 14, 2018, (reference 01) decision is modified in favor of the claimant. Claimant did not quit but was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. Any benefits withheld shall be paid to claimant.

REMAND:

The issue of claimant's maximum and weekly benefit amounts is remanded to the Benefits Bureau of Iowa Workforce Development for redetermination to include wages earned from this employer consistent with this decision.

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Nicole Merrill
Administrative Law Judge

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Decision Dated and Mailed

nm/rvs