

**IN THE IOWA ADMINISTRATIVE HEARINGS DIVISION
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

VICTORIA P BERASTAIN
Claimant

XPAC
Employer

APPEAL 23A-UI-07022-S2-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 06/11/23
Claimant: Respondent (1)**

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

The employer filed an appeal from the July 5, 2023, (reference 01) unemployment insurance decision that allowed benefits based upon a determination claimant was discharged with no showing of willful or deliberate misconduct. The parties were properly notified about the hearing. A telephone hearing was scheduled for August 2, 2023. Employer requested a postponement due to witness unavailability. The request was granted. After due notice was issued, a hearing was scheduled for August 22, 2023, at 1:00 p.m. On August 8, 2023, due to an internal conflict, the Appeals Bureau rescheduled the hearing from 1:00 p.m. on August 22, 2023, to 9:00 a.m., on the same day. Notice was sent to both parties on August 8, 2023, to inform them of the new time. The hearing was held at 9:00 a.m. on August 22, 2023. Employer XPAC participated through employee relations specialist Erin Hammond. Claimant did not call in to participate. The record was closed at the conclusion of the hearing.

On August 22, 2023, at approximately 1:00 p.m., claimant called in for the hearing. No decision has been issued yet in the matter. Claimant received the first updated notice of hearing stating the rescheduled date and time for the hearing was August 22, 2023, at 1:00 p.m. She did not receive the notice of hearing which moved the time of the hearing from 1:00 p.m. to 9:00 a.m., so she was unable to participate in the hearing. The administrative law judge treated this as a request to reopen the record and granted the request. The parties were properly notified of the hearing and a hearing was held on September 7, 2023. Claimant Victoria Berastain did not participate. Employer participated through Erin Hammond. Since claimant did not call in to participate, no additional testimony or exhibits were taken, and the record was closed. Employer's Exhibits 1 and 2 were received on August 22, 2023. The administrative law judge took official notice of the administrative record on August 22, 2023, specifically claimant's filing date, amount of benefits received, and the fact-finding documents for the limited purpose of determining whether employer participated in the fact-finding interview. This decision is based on the record taken on August 22, 2023.

ISSUES:

Did claimant voluntarily leave the employment without 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?

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a fork truck operator from October 10, 2022, and was separated from employment on June 6, 2023, when she was separated from employment.

Employer maintains a policy which states that leaving work without notification to the supervisor is considered job abandonment and will be considered a voluntary quit. (Exhibit 2). Employer has a form signed by claimant acknowledging receipt of the employee handbook, which contains this policy. (Exhibit 1).

On June 6, 2023, at approximately 11:15 p.m., claimant's supervisor, Bobby Harms, told claimant to let him know when she was finished with the job she was working on. Mr. Harms could not find claimant later on and discovered she had clocked out and left, although her shift was not finished until 1:30 a.m. She did not notify Mr. Harms when she was finished with the job. Employer considered this as job abandonment since she left her shift without notifying her supervisor.

On June 7, 2023, claimant called the attendance line recording to report she was ill and would not be in for her shift that day. Employer was surprised by this as it considered claimant to have quit the previous day, so human resources staff reached out to claimant to inquire why she left her shift early. Claimant did not call employer back until June 9, 2023. She told human resources she left her shift early because she was finished with her work for the day. Human resources reminded claimant she needed to notify her supervisor if she was going to leave before the end of a scheduled shift. HR told claimant it would investigate the matter further. On June 15, 2023, employer contacted claimant and informed her the separation remained and it considered claimant to have voluntarily quit her job on June 6, 2023, when she left before the end of her scheduled shift.

Claimant had not received a disciplinary warning for attendance during her employment.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$1,356.00, since filing a claim with an effective date of June 11, 2023, for the four weeks ending July 8, 2023. Employer did not participate in the fact-finding interview. (See fact-finding documents).

REASONING AND CONCLUSIONS OF LAW:

As an initial matter, claimant did not quit her employment, but was discharged. For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

Iowa Code section 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.

Claimant has the burden of proving that the voluntary leaving was for good cause attributable to the employer. Iowa Code § 96.6(2). "Good cause" for leaving employment must be that which is reasonable to the average person, not the overly sensitive individual or the claimant in particular. *Uniweld Products v. Indus. Relations Comm'n*, 277 So.2d 827 (Fla. Dist. Ct. App. 1973). 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).

Here, claimant left work prior the end of her shift, however, the next day she called in the attendance hotline to notify employer she was sick. She would not have done so if she intended to sever the employment relationship. Claimant's action in calling in sick the following day failed to establish a voluntary leaving of employment. As such, the separation was a discharge, the burden of proof falls to the employer, and the issue of misconduct is examined.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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).

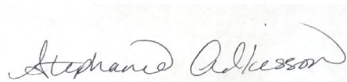
In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. 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 impose discipline up to or including discharge for the incident under its policy.

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, leaving work prior to the end of her shift without speaking to her supervisor, 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.

Because claimant is eligible for benefits, the issues of overpayment of regular unemployment insurance benefits and relief of charges are moot.

DECISION:

The July 5, 2023, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. The issues of overpayment, repayment and chargeability are moot.



Stephanie Adkisson
Administrative Law Judge

September 11, 2023
Decision Dated and Mailed

APPEAL RIGHTS. If you disagree with the decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
Online: eab.iowa.gov**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

AN APPEAL TO THE BOARD SHALL STATE CLEARLY:

- 1) The name, address, and social security number of the claimant.
- 2) A reference to the decision from which the appeal is taken.
- 3) That an appeal from such decision is being made and such appeal is signed.
- 4) The grounds upon which such appeal is based.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at <https://www.legis.iowa.gov/docs/code/17A.19.pdf> or by contacting the District Court Clerk of Court <https://www.iowacourts.gov/iowa-courts/court-directory/>.

Note to Parties: YOU MAY REPRESENT yourself in the appeal or obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds.

Note to Claimant: It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:

A true and correct copy of this decision was mailed to each of the parties listed.

DERECHOS DE APELACIÓN. Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
En línea: eab.iowa.gov**

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:

- 1) El nombre, dirección y número de seguro social del reclamante.
- 2) Una referencia a la decisión de la que se toma la apelación.
- 3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
- 4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días después de que la decisión adquiera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que se encuentra en línea en <https://www.legis.iowa.gov/docs/code/17A.19.pdf> o comunicándose con el Tribunal de Distrito Secretario del tribunal <https://www.iowacourts.gov/iowa-courts/court-directory/>.

Nota para las partes: USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

Nota para el reclamante: es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

SERVICIO DE INFORMACIÓN:

Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.