IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

KRISTA L KOBLISKA Claimant **BREMER COUNTY** Employer	**APPEAL 17A-UI-10109-LJ-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 09/03/17** **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 September 25, 2017 (reference 01) unemployment insurance decision that denied benefits based upon a determination that claimant was discharged for using profanity. The parties were properly notified of the hearing. A telephone hearing was held on October 30, 2017. The claimant, Krista Kobliska, participated and was represented by Erin Patrick Lyons, Attorney at Law. The employer, Bremer County, participated through Connie Sents, Communications Supervisor; and Dan Pickett, Sheriff; and County Attorney Kasey Wadding represented the employer. Claimant's Exhibits 1 and 2 and Employer's Exhibits A through D were received and admitted into the record without objection.

ISSUES:

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, most recently as a 911 dispatcher, from June 11, 2017, until September 7, 2017, when she was given the option to resign or be discharged. Claimant chose to resign at that time, and the parties agree that she would have been fired had she not resigned. The employer chose to separate claimant from her employment for a combination of work performance and conduct reasons.

Claimant struggled to meet the employer's expectations throughout her employment, and there was not a sustained period during her employment that she consistently met expectations. Claimant failed to communicate all of the necessary information over the radio when dispatching officers or deputies to calls. She was not following the employer's procedures for call handling. Claimant was not paging emergency response properly, and she was not completing the CAD forms properly. She also failed to collect all the necessary information from callers, and she failed to code calls properly. Claimant was usually able to field simple, non-urgent calls, but even those were not 100% accurate. When the employer reviewed claimant's performance issues with her, she would often respond that this was not how she had done things at her

previous job. She also seemed to not accept or appreciate feedback and instructions for improvement. Claimant was never given any performance warnings, and she was not aware her job was in jeopardy for this issue.

The employer met with claimant on August 24 to discuss her performance issues. At that time, the employer extended her probationary period to give her more time to align her work performance with the employer's expectations. Claimant explained that part of the difficulty on specific calls the employer identified was that she was the only dispatcher working and she was busier than usual. The following day, claimant answered a call that came in and did not handle it properly. Specifically, claimant failed to communicate over the radio pertinent information regarding the size of the person at issue and the need for multiple responders. Additionally, after the August 24 meeting, Sents reviewed the video footage of claimant's work area from the dates in question where claimant had struggled to meet expectations. One of these dates was August 13, 2017. On August 13, claimant complained to a deputy about Sents. Later, claimant had an extended conversation with Deputy Beenblossom during which both people used profanity, including the F-word. They complained about various issues at work, and claimant specifically complained about Sents and stated that she needed to "get f***ed." Sents wrote Sheriff Pickett a memo on or about August 30, pointing out this conversation and asking him to speak with claimant. On September 7, Sheriff Pickett and Sents met with claimant. They gave her the opportunity to review the video recording, which she initially did not want to do. Claimant was discharged during this meeting, for a combination of performance and behavior issues. The employer would not have discharged claimant for her behavior on August 13, had she not also had extended performance issues. The employer suspended Deputy Beenblossom for his conduct on August 13.

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. Benefits are allowed, provided she is otherwise eligible.

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.

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). Here, the parties agree that claimant's employment was ending on September 7, 2017. Since claimant would not have been allowed to continue working had she not resigned, the separation

was a discharge, the burden of proof falls to the employer, and the issue of misconduct is examined.

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).

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.

The employer based its decision to discharge claimant in part on her August 13 comments during a conversation with Deputy Beenblossom. This conduct, while inappropriate, was merely an isolated incident of poor judgment. 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. Further, the employer admits the August 13 conversation on its own was not going to

cause claimant's discharge. As the 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.

The employer also based its decision to discharge claimant in part on her poor work performance throughout her employment. Iowa Admin. Code r. 871-24.32(5) provides:

> (5) Trial period. A dismissal, because of being physically unable to do the work, being not capable of doing the work assigned, not meeting the employer's standards, or having been hired on a trial period of employment and not being able to do the work shall not be issues of misconduct.

Discharge within a probationary period, without more, is not disqualifying. Failure in job performance due to inability or incapacity is not considered misconduct because the actions were not volitional. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979). Where an individual is discharged due to a failure in job performance, proof of that individual's ability to do the job is required to justify disqualification, rather than accepting the employer's subjective view. To do so is to impermissibly shift the burden of proof to the claimant. *Kelly v. Iowa Dep't of Job Serv.*, 386 N.W.2d 552 (Iowa Ct. App. 1986). Since the employer agreed that claimant had never had a sustained period of time during which she performed her job duties to employer's satisfaction and inasmuch as she did attempt to perform the job to the best of her ability but was unable to meet its expectations, no intentional misconduct has been established, as is the employer's burden of proof. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). Accordingly, no disqualification pursuant to Iowa Code § 96.5(2)a is imposed.

DECISION:

The September 25, 2017 (reference 01) unemployment insurance decision is reversed. Claimant did not quit but 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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Elizabeth A. Johnson
Administrative Law Judge

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Decision Dated and Mailed

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