

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

MARYLYS E NITCHER
1125 N PUBLIC RD
SHELL ROCK IA 50670

BLACK HAWK COUNTY
C/O PERSONNEL DIRECTOR
316 E 5TH ST
WATERLOO IA 50703

Appeal Number: 06A-UI-00701-DT
OC: 12/18/05 R: 03
Claimant: Appellant (4/R)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319.**

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.

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.

YOU MAY REPRESENT yourself in this appeal or you may 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. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge
Section 96.5-1 – Voluntary Leaving/Requalification
Section 96.7-2-a(2) – Charges Against Employer's Account

STATEMENT OF THE CASE:

Marlys E. Nitcher (claimant) appealed a representative's January 17, 2006 decision (reference 02) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment with Black Hawk County (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on February 6, 2006. The claimant participated in the hearing. June Watkins appeared on the employer's behalf and presented testimony from two other witnesses, Sheri Niles and Ellen Whitehead. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was there a disqualifying separation from employment either through a voluntary quit without good cause attributable to the employer or through a discharge for misconduct?

FINDINGS OF FACT:

The claimant originally started working for the employer on May 19, 2003. She worked part time (approximately 20 hours per week) as a barber/beautician in the employer's long-term care nursing facility. Her last day of work during her initial period of employment was March 2, 2005. She resigned effective that date in order to retire.

The claimant subsequently sought to be rehired, and was on April 19, 2005. She resumed working under her prior arrangement, but she began a new six-month probationary period. The probationary period expired on October 19, 2005. The claimant's last day of work was October 11, 2005; she had already been approved for medical leave from October 17 through December 5, 2005 for a bowel surgery, but then called in sick between October 12 and October 17, 2005. On October 18, 2005 the employer discharged her by sending her a letter informing her that she had not satisfactory completed the probationary period.

The employer cited problems with the claimant's work performance, specifically confrontations with caregivers and inappropriate responses to direction. The only specific instance that was referred to was that on October 11: the claimant was cutting the hair of a male resident who wanted his hair cut a different way than what his guardian wanted; the claimant sought to persuade the guardian to look at what the resident wished. No specific warnings had been given to the claimant.

The claimant established an unemployment insurance benefit year effective December 18, 2005. Her base period was set as July 1, 2004 through June 30, 2005, and her weekly benefit amount was calculated to be \$88.00.

REASONING AND CONCLUSIONS OF LAW:

There are two separations from employment which must be considered. The first issue in this case is whether the claimant voluntarily quit as of March 2, 2005, and if so, whether it disqualifies her from benefits.

Iowa Code section 96.5-1-g 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. But the individual shall not be disqualified if the department finds that:

g. The individual left work voluntarily without good cause attributable to the employer under circumstances which did or would disqualify the individual for benefits, except as provided in paragraph "a" of this subsection but, subsequent to the leaving, the individual worked in and was paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

871 IAC 24.25 provides that, in general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The claimant did express her intent to end her employment with the employer. A voluntary leaving of employment requires an intention to terminate the employment relationship. Bartelt v. Employment Appeal Board, 494 N.W.2d 684 (Iowa 1993). The claimant did exhibit the intent to quit and did act to carry it out. The claimant would be disqualified for unemployment insurance benefits unless she voluntarily quit for good cause.

The claimant has the burden of proving that the voluntary quit was for a good cause that would not disqualify her. Iowa Code § 96.6-2. Quitting in order to retire is not good cause attributable to the employer. 871 IAC 24.25(24). The claimant has not satisfied her burden. However, the administrative law judge further concludes from information contained in the administrative record that the claimant has requalified for benefits since the separation from this employer. Accordingly, benefits are allowed and the account of the employer shall not be charged for benefits paid to the claimant based on wages paid to her for work prior to March 2, 2005.

The next issue in this case is whether the employer discharged the claimant on October 18, 2005 for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate questions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code §96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982).

Iowa Code section 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.

871 IAC 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 Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The focus of the definition of misconduct is on acts or omissions by a claimant that "rise to the level of being deliberate, intentional or culpable." Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer's interest, such as found in:
 - a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
 - b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:
 - a. Manifest equal culpability, wrongful intent or evil design; or
 - b. Show an intentional and substantial disregard of:
 1. The employer's interest, or
 2. The employee's duties and obligations to the employer.

Henry, supra. The reason cited by the employer for discharging the claimant is her failure to satisfactorily complete her probationary period. Misconduct connotes volition. A failure in job performance is not misconduct unless it is intentional. Huntoon, supra. There is no evidence the claimant intentionally failed to perform satisfactorily. The claimant had not previously been warned that there were issues with her conduct or performance that were unsatisfactory and that could result in termination unless she corrected her behavior. Higgins v. IDJS, 350 N.W.2d 187 (Iowa 1984). Under the circumstances of this case, the claimant's behavior was at worst the result of inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence in an isolated instance, and was a good faith error in judgment or discretion. The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's January 17, 2006 decision (reference 02) is modified in favor of the claimant. The claimant voluntarily left her employment on March 2, 2005 without good cause attributable to the employer, but has requalified for benefits since the separation. On October 18, 2005, the employer did discharge the claimant but not for disqualifying reasons.

The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible. The employer's account is not subject to charge for benefits paid to the claimant based upon wages paid for employment through March 2, 2005. The matter is remanded to the Claims Section for calculation of the employer's chargeability based on the claimant's wages paid only from April 19 through June 30, 2005.

ld/pjs