

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

TASHA M PETTIT
Claimant

BETHANY MANOR INC
Employer

APPEAL 17A-UI-07370-DB-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 06/25/17
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting
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/appellant filed an appeal from the July 17, 2017 (reference 01) unemployment insurance decision that allowed benefits to the claimant based upon her separation from employment. The parties waived due notice of the hearing. A telephone hearing was held on August 10, 2017. The claimant, Tasha M. Pettit, participated personally and was represented by Attorney Katrina M. Phillip. The employer, Bethany Manor Inc., participated through witness Shannon Andersen. Claimant's Exhibits 1 – 4 were admitted. Employer's Exhibits A – N were admitted. The administrative law judge took official notice of the claimant's unemployment insurance benefits records.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Did claimant voluntarily quit the employment with good cause attributable to employer?
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can any charges to the employer's account 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 personal companion from September 24, 2015 until her employment ended on June 16, 2017. Claimant's job duties included providing daily care to residents in the assisted living center. Her job duties also included cleaning the nurse's station and general living areas. Ashley Weisberg was claimant's immediate supervisor.

This employer has a conflict of interest policy that claimant received a copy of upon hire. See Exhibit F. The policy specifically states that a conflict of interest results when a team member arranges to provide services to individuals in their homes that benefit them financially and are services that could be provided by Bethany Life. See Exhibit F. Bethany at Home is a division of Bethany Life that provides residential and commercial cleaning services. The conflict of

interest policy does not provide any type of discipline that can result from a violation of the policy. See Exhibit F.

Claimant has been self-employed as the owner of Touch of Clean Homes for the past eighteen years. Touch of Clean Homes provides residential and commercial cleaning services. Cleaning services provided by Touch of Clean Homes are services that could be provided by Bethany at Home.

When claimant applied for the position as a personal companion, she listed her current self-employment as owner of Touch of Clean Homes. See Exhibit B. No date was listed for when claimant worked through on her application. See Exhibit B. There was no indication on the application that claimant was going to stop working at Touch of Clean Homes.

Liz Stuck was the manager that claimant interviewed with prior to being hired by this employer. During claimant's interview with Ms. Stuck, she disclosed to her that she had her own cleaning business. Ms. Stuck did not tell claimant at this time that her own cleaning business would be a conflict of interest. Claimant was hired, even though the employer knew she was running her own cleaning business. Claimant was allowed to work at this employer and run her own cleaning business for almost 21 months.

During a conversation with Ms. Andersen regarding other issues, claimant spoke to her about her cleaning business. Ms. Andersen told claimant that she was unaware of her operating Touch of Clean Homes and that it needed to be investigated as a conflict of interest under the employer's policy.

On May 4, 2017, Ms. Andersen, Kristi Eley, and Ms. Weisberg all met with claimant to discuss the conflict of interest her cleaning business presented. Claimant was given three options during the meeting. She was told she could either completely discontinue her business and receive a raise in pay; convert her clients to Bethany Life clients and she would continue as a Bethany Life Home Health employee; or only provide cleaning services to clients who received payments through Medicaid and Medicare. If claimant did not choose one of these options, she would no longer work for the employer.

Claimant did not choose one of these options, as she did not believe that there was a conflict of interest. Claimant was told that she would have six weeks to continue working with the employer and her last day would be June 16, 2017 if she did not choose one of those options. Claimant finished her six-week period and her last day was June 16, 2017. Claimant did not intend to resign her position with this employer. See Exhibit M. Claimant had no previous discipline during the course of her employment.

Claimant received benefits in the amount of \$2,880.00 for the six weeks between June 25, 2017 and August 5, 2017. Employer did participate in the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes as follows:

The first issue is whether the claimant voluntarily quit.

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 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).

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)(emphasis added). 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. *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438 (Iowa Ct. App. 1992). Such cases must be analyzed as a discharge from employment. *Id.*

In this case, it is clear that the claimant did not voluntarily quit her employment. Claimant was told that if she did not choose from one of the three options given to her during the May 4, 2017 meeting, her last day of employment would be June 16, 2017. Claimant had no intention of

quitting her employment and did not carry out any intention with any overt act. It is clear that claimant was discharged from employment.

Because claimant was discharged 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).

The decision in this case rests, at least in part, upon the credibility of the parties. 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.* The administrative law judge concludes that the claimant's testimony that she notified Ms. Stuck of her cleaning business upon hire is credible. There was no credible evidence presented that claimant indicated she would no longer be operating her cleaning business upon hire with this employer.

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). Further, 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). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000). Reoccurring acts of negligence by an employee would probably be described by most employers as in disregard of their interests. *Greenwell v Emp't Appeal Bd.*, No. 15-0154 (Iowa Ct. App. March 23, 2016). The misconduct legal standard requires more than reoccurring acts of negligence in disregard of the employer's interests. *Id.*

In this case, the claimant disclosed her cleaning business to the employer at the time of hire. The employer determined no conflict of interest at this time and claimant was hired. There was no deceit or fraud on claimant's part with regard to her continuing to work at her cleaning business while still employed with this employer. The employer waived any violation of their conflict of interest policy when it allowed claimant to work at her cleaning business for almost 21 months without discipline. The employer failed to meet its burden of proof in establishing disqualifying job related misconduct. As such, benefits are allowed. Because benefits are allowed, the issues of overpayment and chargeability are moot.

DECISION:

The July 17, 2017 (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

Dawn Boucher
Administrative Law Judge

Decision Dated and Mailed

db/rvs