IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

ELIZABETH R BURNS Claimant **AREA RESIDENTIAL CARE INC** Employer	**APPEAL 18A-UI-01607-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 12/31/17** **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 January 26, 2018, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on March 1, 2018. Claimant participated. Attorney Emilie Roth Richardson participated on claimant's behalf. Prior to March 1, 2018, the employer sent the Appeals Bureau Employer Exhibit 1 and stated its witness, Amy Gullikson, was "unable to attend the Appeal Hearing[.]" Employer Exhibit 1. The employer did not request a postpoment of the hearing. Prior to March 1, 2018, Ms. Gullikson registered for the hearing, but indicated she was not going to participate. On March 1, 2018, the administrative law judge attempted to contact the employer's registered witness, Ms. Gullikson, but she did not answer when contacted at the number provided and did not participate. During the hearing, Employer Exhibit 1 was admitted into evidence with no objection. Claimant Exhibit A was also admitted into evidence with no objection.

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 full-time as a community living instructor from June 12, 2013, and was separated from employment on January 2, 2018, when she was discharged. As a community living instructor, claimant's job duties required her to have the "[a]bility to lift/transfer 20 lbs regularly and up to 50 pounds." Claimant Exhibit A. Claimant's job duties also required her to have the "[a]bility to transfer individuals in and out of a wheelchair." Claimant Exhibit A.

Starting September 28, 2017, claimant went on Family and Medical Leave Act (FMLA) leave due to a non-work related injury. Claimant returned to work from her FMLA leave on October 27, 2017. When claimant returned to work, she had certain work restrictions (Post Robotic Instructions). Claimant Exhibit A. Claimant provided her work restrictions to the employer. Claimant's work restrictions included no lifting over 20 pounds. Claimant Exhibit A.

The employer accommodated claimant's work restrictions and allowed her to return to work on October 27, 2017.

On November 7, 2017, claimant met with her doctor regarding her back and she was given updated work restrictions. Claimant Exhibit A. Claimant's updated work restrictions included: no lifting over twenty pounds and no transferring residents. Claimant Exhibit A. Claimant's updated work restrictions were to be in effect from November 7, 2017 until March 7, 2018. Claimant Exhibit A. The employer accommodated claimant's updated work restrictions and allowed her to work until November 13, 2017.

On November 13, 2017, Ms. Gullikson and a supervisor met with claimant regarding her employment. The employer gave claimant a letter dated November 8, 2017, which informed her that the employer was not going to accommodate her work restrictions anymore. Claimant Exhibit A. The employer recommended that claimant use FMLA leave because they were not going to accommodate her work restrictions. Claimant testified she did not feel like she had any choice and agreed to go back on FMLA leave. Claimant had almost 8 weeks of FMLA leave remaining. *See* Claimant Exhibit A. Claimant started her FMLA leave effective November 14, 2017.

In December 2017, claimant contacted her supervisor about picking up some things. While claimant was talking to her supervisor, her supervisor informed her that the employer was eliminating her position. Claimant's supervisor told her that she should get a letter about it from the employer. Claimant never received a letter from the employer because the employer sent it to the wrong address. *See* Employer Exhibit 1.

Claimant called Ms. Gullikson after talking with her supervisor, but before December 12, 2017. Claimant informed Ms. Gullikson that she did not receive a letter about her position being eliminated. Ms. Gullikson told claimant she would send out the paperwork. Claimant asked Ms. Gullikson if the employer had any positions available for her (in accordance with her work restrictions). Ms. Gullikson told claimant the employer did not have any positions available that claimant could perform.

On December 12, 2017, the employer sent claimant a letter informing her that her FMLA leave would be exhausted as of January 2, 2018. Employer Exhibit 1. The employer also provided claimant an "Employee Request for Unpaid Leave of Absence" form that she could fill out if she wanted to. Employer Exhibit 1. The letter also stated: "Approval for an extended leave of absence will be at the discretion of our Executive Director, Allen Ward." Employer Exhibit 1.

Claimant did not contact Ms. Gullikson regarding the December 12, 2017 letter until January 2, 2018. On January 2, 2018, claimant left Ms. Gullikson a voicemail saying she was not going to request a leave of absence. Employer Exhibit 1. Claimant testified she did not request a leave of absence because the employer was not willing to work with her regarding her work restrictions. Claimant testified that every time she called the employer about returning to work, they did not have anything available for her that would accommodate her work restrictions. Claimant did not tell the employer she was quitting. The employer did not respond to claimant's voicemail, but immediately sent her a letter dated January 2, 2018. Claimant Exhibit A and Employer Exhibit 1. The employer's lettered informed claimant she was "terminated effective January 2nd, 2018." Claimant Exhibit A and Employer Exhibit 1.

Claimant never told the employer she was quitting. Claimant testified she intended to return to work for the employer if the employer would accommodate her work restrictions or when the restrictions were lifted. The employer had accommodated claimant's work restrictions from October 27, 2017 to November 13, 2017. The employer had previously accommodated claimant's work restrictions from May 22, 2017 through June 22, 2017 for a similar non-work related injury. The employer had previously accommodated claimant's work restrictions from

January 12, 2017 through February 20, 2017 for a similar non-work related injury. In 2013, claimant received her only warning for absenteeism.

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 section 96.5(1) provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 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). Claimant clearly did not intend to end her employment with the employer. Claimant never informed the employer she was quitting. Claimant had requested return to work, but the employer declined to accommodate her work restrictions, even though it had in the past. Furthermore, the employer's letter dated January 2, 2018 stated claimant was "terminated effective January 2nd, 2018[,]" which corroborates claimant's interpretation that her separation was a discharge. Claimant Exhibit A and Employer Exhibit 1. Therefore, the burden of proof falls to the employer.

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:
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> 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).

Iowa Admin. Code r. 871-24.32(4) provides:

> **(4)** *Report required.* The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

Iowa Admin. Code r. 871-24.32(7) provides:

> **(7)** *Excessive unexcused absenteeism.* Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

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). Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct **except for illness or other reasonable grounds** for which the employee was absent and that were properly reported to the employer. Iowa Admin. Code r. 871-24.32(7) (emphasis added); see *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 190, n. 1 (Iowa 1984) holding "rule [2]4.32(7)…accurately states the law." 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).

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. Inasmuch as claimant was discharged because her FMLA leave had exhausted and the employer was unwilling to hold her position for her, the employer has not met the burden of proof to establish that claimant engaged in misconduct. Absences due to properly reported illness cannot constitute work-connected misconduct since they are not volitional, even if the employer was fully within its rights to assess points or impose discipline up to or including discharge for the absence under

its attendance policy. Iowa Admin. Code r. 871-24.32(7); *Cosper*, supra; *Gaborit v. Emp't Appeal Bd.*, 743 N.W.2d 554 (Iowa Ct. App. 2007).

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). Although the employer discharged claimant after it determined her FMLA had been exhausted, it did not provide sufficient evidence of job-related misconduct. "Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification." Iowa Admin. Code r. 871-24.32(4). "If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established." Iowa Admin. Code r. 871-24.32(4). The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

DECISION:

The January 26, 2018, (reference 01) unemployment insurance decision is reversed. Claimant did not quit but was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. Any benefits withheld shall be paid to claimant.

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Jeremy Peterson
Administrative Law Judge

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Decision Dated and Mailed

jp/rvs