

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

XIN WEI
Claimant

HY-VEE INC
Employer

APPEAL 21A-UI-11742-AR-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 02/21/21
Claimant: Appellant (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.4(3) – Ability to and Availability for Work

STATEMENT OF THE CASE:

On April 26, 2021, claimant, Xin Wei, filed an appeal from the April 16, 2021, reference 02, unemployment insurance decision that denied benefits based upon the determination that claimant quit her employment with the employer, Hy-Vee, Inc., without showing good cause for having done so. The parties were properly notified about the hearing held by telephone on July 14, 2021. The claimant participated personally, with witness Patrick Vasques. The employer participated through its hearing representative, Erin Bewley, with Penny Wrage as the employer's witness. CTS Language Link provided language services for the claimant. The administrative law judge took official notice of the administrative record.

ISSUES:

Did the claimant quit her employment without good cause attributable to the employer, or did the employer discharge claimant for job-related misconduct?
Was claimant able to and available for work?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a sushi/Asian cook beginning on November 19, 2019, and was separated from employment on January 15, 2021, when she was discharged.

Claimant last performed work for the employer on September 11, 2020. Thereafter, she went out on leave for cancer treatment. The employer approved claimant for an unpaid leave of absence from September 13, 2020, through January 15, 2021. On January 19, 2021, Wrage called claimant and asked how she was. She also asked when claimant expected to be able to return to work. Claimant told her that she could not return to work for a significant amount of time. Claimant's doctor issued her a stern warning to strictly avoid catching COVID-19 because of her medical condition. Wrage told claimant she could either allow claimant to work part-time, or she could terminate claimant's employment with the understanding that claimant would be rehired as soon as she was ready to return to work. Claimant told Wrage that she did not care

what was decided. Wrage told her that since she could not return for a long time, she would terminate her employment. Claimant's employment was terminated as of January 15, 2021, the date on which her approved leave ended. Claimant continues to exercise caution against contracting COVID-19, and has not returned to work as a result.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes that claimant did not quit, but was discharged for no disqualifying reason, but that claimant was not able to and available for work effective September 13, 2020.

The first question is whether claimant's separation was disqualifying. The administrative law judge concludes that it was not.

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 § 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).

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

Here, claimant testified that she did not intend to sever the employment relationship, she simply could not return to work at the time her leave exhausted. Additionally, both parties agreed that the employer initiated the termination of employment. The separation was a discharge.

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." *Id.*

The employer agreed that claimant was not discharged due to disqualifying misconduct. Instead, her discharge was related to her inability to return to work at the end of an approved leave. The separation is not disqualifying.

The next question is whether claimant was able to and available for work effective September 13, 2020. For the reasons that follow, the administrative law judge concludes that she was not.

Iowa Code § 96.4(3) provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph (1), or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5,

subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

Iowa Admin. Code r. 871—24.22(1)a provides:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(1) Able to work. An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.

a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

Iowa Admin. Code r. 871—24.23 provides, in relevant part:

Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.

(1) An individual who is ill and presently not able to perform work due to illness.

...

(10) The claimant requested and was granted a leave of absence, such period is deemed to be a period of voluntary unemployment and shall be considered ineligible for benefits for such period.

To be able to work, "[a]n individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood." *Sierra v. Emp't Appeal Bd.*, 508 N.W.2d 719, 721 (Iowa 1993); *Geiken v. Lutheran Home for the Aged*, 468 N.W.2d 223 (Iowa 1991); Iowa Admin. Code r. 871—24.22(1). "An evaluation of an individual's ability to work for the purposes of determining that individual's eligibility for unemployment benefits must necessarily take into consideration the economic and legal forces at work in the general labor market in which the individual resides." *Sierra*, 508 N.W.2d at 723. The court in *Gilmore v. Emp't Appeal Bd.*, 695 N.W.2d 44 (Iowa Ct. App. 2004), noted that "[i]nsofar as the Employment Security Law is not designed to provide health and disability insurance, only those employees who experience illness-induced separations that can fairly be attributed to the employer are properly eligible for unemployment benefits." *White v. Emp't Appeal Bd.*, 487 N.W.2d 342, 345 (Iowa 1992) (citing *Butts v. Iowa Dep't of Job Serv.*, 328 N.W.2d 515, 517 (Iowa 1983)).

Claimant specified that she was not told that she could not return to work by her doctor. However, she elected not to return to work after her leave in order to protect herself against

COVID-19. Claimant was not able to and available for work from September 13, 2020, through January 15, 2021, because she was on an approved leave of absence. Thereafter, claimant elected not to return to work due to COVID-19. She testified that she is unable to work due to the status of her immune system. She is not able to and available for work.

DECISION:

The April 16, 2021, (reference 02) decision is affirmed. Claimant did not quit but was discharged from employment for no disqualifying reason. However, claimant was not able to and available for work effective September 13, 2020. Benefits are denied.



Alexis D. Rowe
Administrative Law Judge

July 23, 2021
Decision Dated and Mailed

ar/lj