IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

68-0157 (9-06) - 3091078 - EI

ERIN E PARSLEY
Claimant

NELLIS MANAGEMENT COMPANY
Employer

APPEAL NO: 18A-UI-07694-JC-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 06/10/18
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(7) – Excessive Unexcused Absenteeism
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 filed an appeal from the July 12, 2018, (reference 02) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on Monday, August 6, 2018. The claimant registered a phone number with the Appeals Bureau but was unavailable for the hearing when called. The employer participated through Melissa Newman, general manager. Employer Exhibit 1 was admitted. The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

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?
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: The claimant was employed part-time as a team member and was separated from employment on May 28, 2018, when she separated from employment.

The employer has a policy which states that an employee must arrange for coverage if they will miss a shift and that one no-call/no-show will result in separation due to voluntary quitting. The claimant was made aware of the employer policies upon hire.

On May 26, 2018, the claimant was scheduled to work 11:00 a.m. to 4:00 p.m.. She notified her manager that she did not have a babysitter. She was advised to call Ms. Newman. The claimant did not call Ms. Newman immediately; rather Ms. Newman called the claimant and told her there were two employees she could contact to switch shifts. To the best of Ms. Newman's knowledge, the claimant neither contacted either employee, nor showed up to her shift. The claimant was not scheduled for May 27, 2018. On May 28, 2018, after the claimant returned to work, she was informed the employer deemed her to have quit her job because of her conduct on May 26, 2018, which it interpreted to be a no-call/no-show. The claimant had no prior warnings for attendance or similar conduct. Separation thereby ensued.

The administrative record reflects that claimant has received unemployment benefits in the amount of $576.00, since filing a claim with an effective date of June 10, 2018. The administrative record also establishes that the employer did participate in the fact-finding interview or make a witness with direct knowledge available for rebuttal. Maria Faulkner, representative from Thomas and Company, attended on behalf of the employer.

REASONING AND CONCLUSIONS OF LAW:

The first issue in this case is whether claimant was discharged or resigned from employment.

Iowa unemployment insurance law disqualifies claimants who voluntarily quit employment without good cause attributable to the employer or who are discharged for work-connected misconduct. Iowa Code §§ 96.5(1) and 96.5(2)a. The employer has the burden to establish the separation was a voluntary quitting of employment rather than a discharge. Iowa Code § 96.6(2).

A voluntary quitting of employment requires that an employee exercise a voluntary choice between remaining employed or terminating the employment relationship. *Wills v. Emp't Appeal Bd.*, 447 N.W.2d 137, 138 (Iowa 1989); *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438, 440 (Iowa Ct. App. 1992). 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). In this case, the claimant did not have the option of remaining employed nor did she express intent to terminate the employment relationship. Rather, separation ensued after she missed her shift on May 26, 2018, due to childcare issues and she attempted to return to employment the next scheduled shift. Where there is no expressed intention or act to sever the relationship, the case must be analyzed as a discharge from employment. *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438 (Iowa Ct. App. 1992).

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:
>
> 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).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *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 law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.,* 616 N.W.2d 661 (Iowa 2000). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *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). 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).

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.

In instances where an employee is fired for a single unexcused absence the issue is somewhat different than with excessive absenteeism. *Hiland v. EAB*, No. 12-2300 (Iowa App. 7/10/13). With a single absence, misconduct can be shown based on things such as the nature of an employee's work, the effect of the employee's absence, dishonesty or falsification by the

employee in regard to the unexcused absence, and whether the employee made any attempt to notify the employer of the absence. *Sallis v. Employment Appeal Bd*, 437 N.W.2d 895, 897 (Iowa 1989). Here, the claimant was honest when she reported in advance of her shift that she would be absent due to childcare issues. The claimant's failure to secure her replacement resulted in a single unexcused absence.

Most important here is that the employer never warned the claimant that she must correct the behavior or her employment would be terminated. The claimant had no previous disciplinary warnings regarding her attendance or otherwise. 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. Training or general notice to staff about a policy is not considered a disciplinary warning. The employer failed to establish claimant was terminated for job-related misconduct.

Because the claimant is allowed benefits, the issues regarding overpayment are moot and will not be discussed further in this decision.

DECISION:

The July 12, 2018 (reference 02) decision is affirmed. The claimant was separated for no disqualifying reason. The claimant is eligible to receive unemployment insurance benefits, provided she meets all other eligibility requirements.

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Jennifer L. Beckman
Administrative Law Judge

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Decision Dated and Mailed

jlb/scn