

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

TAMMY A KREISEL
Claimant

APPEAL 20A-UI-15872-DZ-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

SHELL ROCK HEALTHCARE CENTER
Employer

**OC: 08/30/20
Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quit
Iowa Code § 96.5(11) – Incarceration

STATEMENT OF THE CASE:

Tammy A Kreisel, the claimant/appellant, filed an appeal from the November 20, 2020, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified of the hearing. A telephone hearing was held on January 29, 2021. Ms. Kreisel participated and testified. The employer participated through Michelle Danner, vice president of human resources and Christina Hubka, executive administrator. Claimant's Exhibit A and Employer's Exhibits 1 and 2 were admitted into evidence.

ISSUES:

Was Ms. Kreisel laid off, discharged for misconduct or did she voluntarily quit without good cause attributable to the employer?

Was Ms. Kreisel's separation from employment due to incarceration?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Ms. Kreisel began working for the employer on April 3, 2018. She worked as a full-time home health aide. She was separated from employment on September 1, 2020, when the employer terminated her employment.

The employer's policy provides that "[i]f [an employee is] arrested or charged with any crime other than a minor traffic violation...you must notify the Executive Director within 48 hours of such charge or arrest...." Employer's Exhibit 1. An employee who fails to report a criminal charge or arrest to the Executive Director within 48 hours of the arrest or charge is subject to discipline up to, and including, termination of employment. Ms. Kreisel was aware of the policy.

Ms. Kreisel was arrested at 9:30 p.m. on Saturday, August 29, 2020 at Heery Woods Park in Clarksville, Iowa. Claimant's Exhibit A and Employer's Exhibit 1. That evening, Ms. Kreisel called the facility where she worked and asked for Ms. Hubka's cell phone number. Ms. Kreisel

had Ms. Hubka's cell phone number stored in her cell phone but Ms. Kreisel did not have her cell phone with her. Ms. Kreisel's cell phone was in her car, which was at the location where she was arrested. Ms. Kreisel was released on Sunday, August 30 at about 10:00 a.m. Ms. Hubka found out about Ms. Kreisel's arrest on August 30, from an August 30 post by the Clarksville Police Department on their Facebook page. Employer's Exhibit 1.

On Monday, August 31, Ms. Kreisel was suspended without pay. Ms. Hubka asked the supervising registered nurse to let Ms. Kreisel know about the suspension. Ms. Kreisel received a text message from the supervising registered nurse that morning saying that her voice mailbox was full and asking her to call the facility. Ms. Kreisel called the facility where she worked that morning and spoke with her supervisor. Ms. Kreisel told her supervisor that she had been arrested on August 29 and asked what she was supposed to do. Ms. Kreisel's supervisor told her to call Ms. Hubka. Ms. Kreisel called Ms. Hubka that morning and told her about the arrest. Ms. Hubka told Ms. Kreisel that the information about her arrest had already been sent to the employer's corporate office. Ms. Hubka told Ms. Kreisel to not come to work for her scheduled shift that night. Ms. Kreisel did not attend work that night.

On September 1, Ms. Hubka consulted with the regional human resources director and she approved the termination of Ms. Kreisel's employment. Ms. Hubka then called Ms. Kreisel and told her that her employment was terminated for violating the employer's policy requiring her to report her August 29 arrest to the Executive Director within 48 hours of the arrest. That same day, the employer mailed Ms. Kreisel a written copy of the September 1, 2020 Shell Rock Senior Living Notice of Discipline. Employer's Exhibit 1.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes Ms. Kreisel was discharged from employment for no disqualifying reason.

Iowa Code section 96.5(2)a and (11) provide:

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.

...

Incarceration — disqualified.

a. If the department finds that the individual became separated from employment due to the individual's incarceration in a jail, municipal holding facility, or correctional institution or facility, unless the department finds all of the following:

(1) The individual notified the employer that the individual would be absent from work due to the individual's incarceration prior to any such absence.

(2) Criminal charges relating to the incarceration were not filed against the individual, all criminal charges against the individual relating to the incarceration

were dismissed, or the individual was found not guilty of all criminal charges relating to the incarceration.

(3) The individual reported back to the employer within two work days of the individual's release from incarceration and offered services.

(4) The employer rejected the individual's offer of services.

b. A disqualification under this subsection 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.

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 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). 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).

The decision in this case rests, at least in part, on the credibility of the witnesses. 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 findings of fact show how the administrative law has resolved the disputed factual issues in this case. The administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using his own common sense and experience.

In an at-will employment environment 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, it incurs potential liability for unemployment insurance benefits related to that separation. A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

In this case, Ms. Kreisel did not violate policy for which the employer terminated her employment. Ms. Kreisel was arrested at 9:30 p.m. on Saturday, August 29. Per the employer's policy, Ms. Kreisel had until Monday, August 31 at 9:30 p.m. to report her arrest to Ms. Hubka. She did that. The morning of Monday, August 31, Ms. Kreisel told Ms. Hubka that she had been arrested. While Ms. Kreisel's notification to Ms. Hubka occurred after receiving a text message from the supervising registered nurse and after she got her phone back on Sunday, August 30, the policy does not require employees to notify the employer before the employer finds out about an arrest or as soon as possible. The policy simply requires employee to notify Ms. Hubka with 48 hours of an arrest. Ms. Kreisel did that. Benefits are allowed.

DECISION:

The November 20, 2020, (reference 01) unemployment insurance decision is reversed. Ms. Kreisel was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.



Daniel Zeno
Administrative Law Judge
Unemployment Insurance Appeals Bureau
Iowa Workforce Development
1000 East Grand Avenue
Des Moines, Iowa 50319-0209
Fax 515-478-3528

February 16, 2021
Decision Dated and Mailed

dz/scn