IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

VICKIE A RATHJEN
607 W PINE ST
MARENGO IA 52301

DINNERWARE PLUS HOLDINGS INC
$^{C}/_{O}$ TALX UCM SERVICES
PO BOX 429503
CINCINNATI OH 45242-9503

Appeal Number: 05A-UI-03568-DT
OC: 02/27/05 R: 03
Claimant: Respondent (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5-2-a – Discharge
Section 96.5-1 – Voluntary Leaving

STATEMENT OF THE CASE:

Dinnerware Plus Holdings, Inc. (employer) appealed a representative's March 25, 2005 decision (reference 01) that concluded Vickie A. Rathjen (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on April 26, 2005. The claimant participated in the hearing. Jim Argiro appeared on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was there a disqualifying separation from employment either through a voluntary quit without good cause attributable to the employer or through a discharge for misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on July 15, 1992. Since approximately 1995, she worked full time as manager of the employer's Williamsburg, Iowa crystal and china store. Her last day of work was March 1, 2005. On that date, the employer advised her that she could either quit or be fired, and she agreed to quit. The reason for the forced separation was that the new district manager, Mr. Argiro, concluded that the claimant had violated various policies such as improperly allowing her daughter to work at the store and being in the store during the middle of the night by herself.

Mr. Argiro discovered that the claimant's 30-year old daughter was listed on the store's payroll, but there were no timecard records for the daughter. He was concerned that the claimant had violated the employer's policy against managers hiring or supervising family members. However, the employer had had at least an informal policy allowing the hiring of friends and family members during the fourth quarter of the year to assist with the holiday sales period and also during the inventory period conducted approximately the first week of January each year. The claimant's daughter had worked in this capacity at the store for at least the last 10 years with the knowledge and at least tacit approval of the claimant's prior district manager. The claimant acknowledged that the daughter did not always go by a regular timecard punch, but that also had never been a question in the past. There was no evidence of any actual fraud on the part of the claimant or her daughter. The employer asserted that the daughter might have been paid for time outside of the fourth quarter and the inventory period, but no specific or persuasive evidence to that effect was presented.

Mr. Argiro also questioned the claimant's presence in the store at times between 1:00 a.m. to 3:00 a.m. The claimant acknowledged that sometimes she would come in and take care of paperwork during those hours on days she was otherwise scheduled to be off. She also acknowledged that her prior regional manager had cautioned her about being in the store alone "in the middle of the night." The claimant viewed the comment to be more a statement of concern as to the claimant's personal safety than any concern about a threat the claimant's presence might pose to the employer's security so that the claimant would be committing a policy breach by her presence. The claimant acknowledged that in February 2005 she had been in the store between 1:00 a.m. and 3:00 a.m. 13 times; 8 of those occasions were after 3:00 a.m. No evidence was presented that there was any actual inappropriate activity or loss that resulted due to the claimant's presence during those hours.

REASONING AND CONCLUSIONS OF LAW:

The first issue in this case is whether the claimant voluntarily quit.

Iowa Code section 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.

871 IAC 24.26(21) provides:

> Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:
>
> (21) The claimant was compelled to resign when given the choice of resigning or being discharged. This shall not be considered a voluntary leaving.

871 IAC 24.25 provides that, in general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. Bartelt v. Employment Appeal Board, 494 N.W.2d 684 (Iowa 1993). The claimant did not exhibit the intent to quit and did not act to carry it out. The claimant did not have the intent to sever the employment relationship necessary to treat the separation as a "voluntary quit" for unemployment insurance purposes. She did not have the option to continue her employment; she could either quit or be discharged. As the separation was not a voluntary quit, it must be treated as a discharge for purposes of unemployment insurance. 871 IAC 24.26(21).

The next issue in this case is whether the employer discharged the claimant for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue is not whether the employer was right or even had any other choice but to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate decisions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988). A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code section 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982).

The focus of the definition of misconduct is on acts or omissions by a claimant that "rise to the level of being deliberate, intentional or culpable." Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer's interest, such as found in:
   a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
   b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:
   a. Manifest equal culpability, wrongful intent or evil design; or
   b. Show an intentional and substantial disregard of:
      1. The employer's interest, or
      2. The employee's duties and obligations to the employer.

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).

The reason the employer effectively discharged the claimant was the conclusion that she had violated the employer's policies, particularly with regard to employing her daughter but not maintaining regular time card records, and being in the store alone "in the middle of the night." Misconduct connotes volition. Huntoon, supra. There is no evidence the claimant intentionally violated any of the employer's policies; if her practices varied from strict application of the employer's policies, it had been with the past knowledge and consent attributed to the employer. There is no evidence that the advice to her regarding being in the store in the middle of the night was any more that friendly advice regarding her personal safety. Under the circumstances of this case, the claimant's actions were at worst the result of inefficiency, unsatisfactory conduct, inadvertence or ordinary negligence in an isolated instance. The claimant's actions that led to the loss of her job were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's March 25, 2005 decision (reference 01) is affirmed. The claimant did not voluntarily quit and the employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

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