

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

TAMMY L GILLMORE
Claimant

MONTICELLO NURSING HOME COMPANY
Employer

APPEAL 18A-UI-00739-JP-T
ADMINISTRATIVE LAW JUDGE
DECISION

OC: 12/17/17
Claimant: Respondent (4)

Iowa Code § 96.5(2)a – Discharge for Misconduct
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 January 10, 2018, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on February 9, 2018. Claimant did not register for the hearing and did not participate. Employer participated through senior director of administrators Melissa Kann. Official notice was taken of the administrative record with no objection.

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 unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can 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: Claimant was employed full-time as the Director of Pennington Square Assisted Living from April 25, 2016, and was separated from employment effective December 31, 2017.

As the Director of Pennington Square Assisted Living, claimant had to perform nursing duties along with marketing duties. Ms. Kann testified that claimant never had a sustained period of time where she was able to successfully perform her marketing duties. Claimant did successfully perform her nursing duties. As the Director of Pennington Square Assisted Living claimant supervised four or five universal workers (CNAs) at the assisted living facility. As the Director of Pennington Square Assisted Living, claimant's supervisor was Administrator Laurissa Martin.

Around December 20, 2017, the employer offered claimant the position as a charge nurse at the nursing home facility because she was not able to successfully perform her marketing duties; the employer's census was down at the assisted living facility. As a charge nurse at the nursing home facility, claimant would have the same nursing duties she did as the Director of Pennington Square Assisted Living. Claimant would supervisor four or five nurse aides (CNAs) at the nursing home. Claimant's pay rate would remain the same and she could work whichever shift she wanted. Claimant would remain a full-time employee. If claimant did not accept the charge nurse position at the nursing home, she would be separated from employment. As a charge nurse at the nursing home, claimant's supervisor would remain as Administrator Laurissa Martin. As a charge nurse at the nursing home, claimant would not be working with the employees she had supervised at the assisted living facility.

On December 20, 2017, claimant gave the employer her resignation notice effective January 20, 2018. Claimant decided to resign as opposed to becoming a charge nurse. The employer accepted claimant's resignation. The employer paid claimant through December 31, 2017.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$473.00, since filing a claim with an effective date of December 17, 2017, for the one week ending January 13, 2018. The administrative record also establishes that the employer did participate in the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant voluntarily left the employment without good cause attributable to the employer, but was discharged for no disqualifying reason prior to the intended resignation date.

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.

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).

Iowa Admin. Code r. 871-24.25(38) provides:

Voluntary quit without good cause. 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. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:

(38) Where the claimant gave the employer an advance notice of resignation which caused the employer to discharge the claimant prior to the proposed date of resignation, no disqualification shall be imposed from the last day of work until the proposed date of resignation; however, benefits will be denied effective the proposed date of resignation.

Iowa Admin. Code r. 871-24.26(1) 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:

(1) A change in the contract of hire. An employer's willful breach of contract of hire shall not be a disqualifiable issue. This would include any change that would jeopardize the worker's safety, health or morals. The change of contract of hire must be substantial in nature and could involve changes in working hours, shifts, remuneration, location of employment, drastic modification in type of work, etc. Minor changes in a worker's routine on the job would not constitute a change of contract of hire.

Claimant has the burden of proving that the voluntary leaving was for good cause attributable to the employer. Iowa Code § 96.6(2). "Good cause" for leaving employment must be that which is reasonable to the average person, not the overly sensitive individual or the claimant in particular. *Uniweld Products v. Indus. Relations Comm'n*, 277 So.2d 827 (Fla. Dist. Ct. App. 1973). In general, a substantial pay reduction of 25 to 35 percent or a similar reduction of working hours creates good cause attributable to the employer for a resignation. *Dehmel v. Emp't Appeal Bd.*, 433 N.W.2d 700 (Iowa 1988). 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).

Around December 20, 2017, the employer informed claimant she was going to have to switch positions from the Director of Pennington Square Assisted Living to the charge nurse at the employer's nursing home. On December 20, 2017, claimant gave the employer her resignation notice, effective January 20, 2018, because she did not want to transfer to the charge nurse position. The employer accepted claimant's resignation. Ms. Kann credibly testified that as a charge nurse, claimant would still perform her same nursing duties, but she would not have to perform any of the marketing duties she struggled with. Ms. Kann also credibly testified that claimant would remain a full-time employee, keep her same pay rate, and continue to supervise four or five employees. Furthermore, Ms. Kann testified claimant would not be working with any of the employees she worked with in assisted living and she would still have her same supervisor. Claimant also had the option to select which shift she wanted to work.

Claimant has the burden of proving that the voluntary leaving was for good cause attributable to the employer. Iowa Code § 96.6(2). An employer has the right to allocate personnel in accordance with the needs and available resources. *Brandl v. Iowa Dep't of Job Serv.*, (No. ___-___/___-___, Iowa Ct. App. filed ___, 1986). Claimant has failed to stratify her burden of proof that her position change to charge nurse was a substantial change in her contract of hire. Therefore, claimant has not met the burden of proof to show she quit with good cause attributable to the employer.

Although claimant's decision to quit was not a good cause reason attributable to the employer, her resignation notice did not go into effect until January 20, 2018. Despite her resignation notice not going into effect until January 20, 2018, the employer accepted her resignation, paid her through December 31, 2017, and separated her from employment. Because the discharge was in response to claimant's resignation notice, no misconduct is established. Since the employer terminated the employment relationship in advance of the resignation notice effective date, claimant is entitled to benefits from December 31, 2017 until the effective date of the proposed resignation. Benefits are allowed from December 31, 2017 to January 20, 2018.

The administrative law judge further concludes that claimant not has been overpaid unemployment insurance benefits. Claimant filed for one week of unemployment insurance benefits for the week-ending January 13, 2018 and she received a gross amount of \$473.00.

DECISION:

The January 10, 2018, (reference 01) unemployment insurance decision is modified in favor of the appellant. Claimant voluntarily left the employment without good cause attributable to the employer, but was discharged prior to the resignation effective date. Benefits are allowed from December 31, 2017 until January 20, 2018. Thereafter, benefits are withheld until such time as claimant works in and has been paid wages equal to ten times her weekly benefit amount.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

jp/rvs