

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

REBECCA L KUCERA
Claimant

APPEAL 21A-UI-16344-JC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

WESTERN HOME SERVICES INC
Employer

OC: 08/30/20
Claimant: Respondent (1)

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
PL116-136, Sec. 2104 – Federal Pandemic Unemployment Compensation (FPUC)

STATEMENT OF THE CASE:

The employer/appellant, Western Home Services Inc., filed an appeal from the July 16, 2021 (reference 03) Iowa Workforce Development (“IWD”) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on September 15, 2021. The claimant, Rebecca L. Kucera, participated and was represented by Greg Greiner, attorney at law. Claire Stephens testified at the claimant’s request. The employer participated through Barbara Buss, hearing representative with Talx/Equifax. Jordan Elsamiller testified for the employer.

The administrative law judge took official notice of the administrative records. 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:

Was the claimant discharged for disqualifying job-related misconduct?
Did claimant voluntarily quit the employment with good cause attributable to employer?
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?
Is the claimant eligible for Federal Pandemic Unemployment Compensation?

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 CNA and was separated from employment on May 7, 2021. Claimant last physically performed work on May 5, 2021. The evidence is disputed as to whether the claimant voluntarily quit her job through job abandonment or was discharged.

Claimant worked in employer's facility which houses residents including those with dementia. Claimant's job duties included "making rounds" and communicating to staff working the next shift any updates for resident care purposes. Claimant's scheduled shift was 2:00 p.m. until 10:30 p.m. but it was customary and even encouraged to clock out when work was done. Claimant stated this meant she frequently ended her shifts between 10:00 and 10:10 p.m.

Employer has a written rule which states an employee who leaves work without permission is subject to discipline up to and including dismissal. Employer clarified the claimant would need permission from the charge nurse to leave. Claimant had no prior warnings and was unaware her job was in jeopardy prior to May 5, 2021.

The undisputed evidence is claimant clocked out of her shift at 10:03 p.m. on May 5, 2021. Julie Ames was the charge nurse on duty, and a second charge nurse was coming on to shift at the time claimant was leaving. Prior to clocking out, claimant and her co-worker had been making rounds when she was confronted by the second charge nurse and informed they would have to redo rounds to include an oncoming CNA. Claimant's co-worker saw claimant was frustrated by the request and told her to go clock out and she'd finish up. The charge nurse on duty, Ms. Ames, was present during this exchange. Claimant did not explicitly request permission, nor was she told by Ms. Ames that she could not leave. Claimant clocked out, unaware that she would be disciplined for the incident.

Claimant attempted to return to work on May 7, 2021. When she arrived to work, she was informed by the administrator that separation had occurred because she had voluntarily quit her job by way of job abandonment on May 5, 2021. Claimant denied quitting. Separation ensued.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant did not voluntarily quit the employment. Claimant was discharged from the employment for no disqualifying reason.

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. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id.*

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. 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). Claimant in this case did not intend to quit her employment when she clocked out at 10:03 p.m. on May 5, 2021. This was evident by the fact claimant attempted to return to work her next shift. Claimant did not communicate to the employer any intent to sever the employer relationship. Rather, she clocked out, as she previously had, unaware that this time would result in her separation.

However, when claimant arrived to work on May 7, 2021, she was not allowed to work and told she had been separated from the employment. In this case, the claimant did not have the option of remaining employed nor did she express intent to terminate the employment relationship. 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 Administrative Code rule 871-24.32(1)a provides:

"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.871-24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

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. The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 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. IDJS*, 364 N.W.2d 262 (Iowa 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. IDJS*, 425 N.W.2d 679 (Iowa 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.” *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). The focus is on deliberate, intentional, or culpable acts by the employee. See *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

The credible evidence presented is that claimant had previously clocked out between 10:00 and 10:30 p.m. without obtaining explicit permission from her charge nurse, and she had not been disciplined, nor had her co-workers. On May 5, 2021, her charge nurse observed her clocking out and said nothing that would have served as notice that claimant’s conduct would be violating procedure or policy. Claimant could not have reasonably anticipated that her clocking out that evening would lead to separation. Since employer had not previously warned claimant about its specific expectations about obtaining permission before clocking out, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee might even infer employer acquiescence after multiple clock outs without warning or counseling. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct prior to discharge. 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.

The question before the administrative law judge in this case is not whether the employer has the right to discharge this employee, but whether the claimant’s discharge is disqualifying under the provisions of the Iowa Employment Security Law. While the decision to terminate the claimant may have been a sound decision from a management viewpoint, for the above stated reasons, the administrative law judge concludes that the employer has not sustained its burden of proof in establishing that the claimant’s discharge was due to job-related misconduct. Accordingly, benefits are allowed provided the claimant is otherwise eligible.¹

Because the claimant is eligible for benefits, the issues of overpayment of regular unemployment insurance benefits and relief of charges are moot.

Because the claimant is allowed regular unemployment insurance benefits, she is also eligible for FPUC, provided she is otherwise eligible. See PL116-136, Sec. 2104. The employer is not charged for these federal benefits.

The parties are reminded that under Iowa Code § 96.6-4, a finding of fact or law, judgment, conclusion, or final order made in an unemployment insurance proceeding is binding only on the parties in this proceeding and is not binding in any other agency or judicial proceeding. This provision makes clear that unemployment findings and conclusions are only binding on unemployment issues, and have no effect otherwise.

DECISION:

The July 16, 2021, (reference 03) unemployment insurance decision is **AFFIRMED**. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. She is not overpaid benefits. The employer's account cannot be relieved of charges associated with the claim for regular unemployment insurance benefits. The claimant is also eligible for FPUC, provided she is otherwise eligible.



Jennifer L. Beckman
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September 23, 2021
Decision Dated and Mailed

jlb/scn

ⁱ A reference 04 decision has denied benefits to claimant due to being able and available.