

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

KIMBERLY CAFARO
Claimant

MILE HIGH PSYCHIATRY
Employer

APPEAL 21A-UI-08218-SN-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 01/17/21
Claimant: Appellant (2)

Iowa Code § 96.5(1) – Voluntary Quit
Iowa Code § 96.4(3) – Ability to and Availability for Work
Iowa Admin. Code r. 871-24.22 – Able & Available - Benefits Eligibility Conditions

STATEMENT OF THE CASE:

The claimant filed an appeal from the March 19, 2021, (reference 01) unemployment insurance decision that denied benefits based upon her voluntary quit. The parties were properly notified about the hearing. A telephone hearing was held on May 17, 2021. Claimant participated and testified. Employer participated through Human Resources Manager Vanessa Parrott. The administrative law judge took official notice of the agency records. The claimant's proposed exhibits were not admitted because the employer did not receive them prior to the appeal.

ISSUE:

Was the separation a layoff, discharge for misconduct or voluntary quit without good cause attributable to the employer?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

The claimant was employed full-time as a psychiatric mental health nurse from January 1, 2021, until she was separated from employment on January 22, 2021, when she was terminated. The claimant's immediate supervisor was Psychiatric Director Kelly Killcrease.

The employer has an employee manual which lists all of its policies. The claimant received an employee handbook at the time of her hire. One of the policies states the employer does not tolerate discrimination or harassment on the basis of age and any other characteristic protected by law.

The claimant was hired on November 6, 2020. The claimant had three interviews prior to her hire including one with Owner and Chief Operating Officer Michael Chism. When she was interviewed, the claimant explained she did not have experience treating children and had only treated adults. The agents of the employer stated to her in response that they treated the whole

lifespan, but they said that not every employee did so. The claimant explained that children and adolescents have different needs for care.

In the first week of January 2021, the claimant attended training at the employer's facility. The claimant told Mr. Chism she was not comfortable providing care to children due to her lack of experience and training. Mr. Chism told her to let him know if she ran into problems with treating that age group.

On January 19, 2021, Nataly Rodriguez sent a biography to the claimant for the review. The biography stated the claimant had the following specialties: geriatrics, psychosomatic medicine, PTSD, adjustment disorders, depression, anxiety, psychotic disorders and mood disorders. A couple of lines down it said, "Age range: 15 [and] up." The claimant agreed to see adolescents over the age of 15 because her network would be able to provide her information regarding that smaller age range.

On January 20, 2021, the claimant was assigned to treat an 11-year-old child. This was a group evaluation with the foster child's parents and his therapist. The claimant expressed confusion because the therapist had not diagnosed the child. That night, the claimant stated her concerns with being assigned children to Mr. Chism.

On January 21, 2021, the claimant was assigned another foster child. The claimant sent a message over Skype to her medical assistant, "Also I need to see about not having kids. I didn't know I had a freaking foster kid. I am not trained for this." This Skype message was reviewed by the employer's leadership.

On January 21, 2021, the claimant sent a lengthy email to Ms. Killcrease. She began by apologizing for not responding over Skype earlier. In the email, the claimant explained that her reasons for not wanting to be assigned to children was because she lacked the training and experience to effectively do so. She said this was compounded with foster children who had experienced significant trauma. She stated she was interested in adopting foster children herself and that she had a relative with a foster child. She also explained her frustration with being scheduled four 10 hour days instead of being schedule five 10 hour days as requested. In conclusion, the claimant said she would be willing to be treat children in a pinch if it was after the first month, so she could get acclimated to the employer's resources and system.

On the morning of January 22, 2021, the claimant spoke with Killcrease. The claimant explained the same points she had in her email the previous day. Ms. Killcrease merely reiterated that the claimant would have to treat children. The claimant eventually told Ms. Killcrease that she had to go because it was 8:50 a.m. and she had a 9:00 a.m. counseling session.

On January 22, 2021, the claimant stated that she would be resigning effective February 4, 2021, if the employer continued to assign her children for treatment, at least prior to her obtaining enough training to feel comfortable treating them. That same day, Mr. Chism made the decision to terminate her because she violated the employer's discrimination policy and refused to work as instructed.

On January 23, 2021, the claimant was locked out of the computer system.

On January 25, 2021, the claimant spoke with Director of HR Verena Dipafquale regarding her inability to get into her email account. Ms. Dipafquale explained the employer accepted her resignation, as is its practice.

The claimant was not warned for similar behavior in the past.

The next section details the claimant's ability and availability after separating from employment with the employer:

The claimant has worked for a supplemental employer, Avalon, performing per diem assignments of approximately five hours per month.

After being separated, the claimant immediately began looking for work in the greater Des Moines metropolitan area and even national jobs which would allow her to telework. The administrative record KCCO shows she made the requisite employer contacts for her work search. The claimant obtained a position with Walnut Creek Psychiatry for the week ending March 11, 2021. The claimant said it took her this long to find patients because she needed to obtain separated credentials and a license for this new provider, which ordinarily takes months. The claimant was not ill or subject to restrictions during the time she was searching for work.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged for no disqualifying reason. The administrative law judge also concludes she was able and available for work effective January 22, 2021.

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.

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) and (23) provide:

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.

(23) The claimant left work because the type of work was misrepresented to such claimant at the time of acceptance of the work assignment.

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). The claimant's intention to voluntarily leave work was evidenced by words and actions.

The administrative law judge finds the claimant did not quit on January 22, 2021. The claimant's message on January 22, 2021 was conditioned on the employer not responding effectively to her concerns prior to February 4, 2021, that she was being asked to treat children despite being promised she would not need to do so. The employer terminated the claimant that same day before her conditions could be met prior to February 4, 2021. Alternatively, if the claimant quit it was due to the employer misrepresenting the position and she has good cause attributable to the employer under Iowa Admin. Code r. 871-24.26 (23). The administrative law judge will next evaluate whether the employer terminated her for misconduct.

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 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).

In this case, the claimant did not refuse to treat a child patient. The claimant reluctantly met with the child and expressed her frustration to the scheduler. As a result, the administrative law judge does not find the claimant engaged in insubordination or violated the employer's non-discrimination policy. Furthermore, the employer did not formally discipline the claimant under either of these policies. An employee is entitled to fair warning about what the employer's expectations are. The claimant was terminated for non-disqualifying conduct.

The next issue to evaluate is whether the claimant was able and available effective January 22, 2021.

Iowa Code section 96.4(3) provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph (1), or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

Iowa Admin. Code r. 871-24.22(1)a provides:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(1) *Able to work.* An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.

a. *Illness, injury or pregnancy.* Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

Iowa Admin. Code r. 871-24.22(2) provides:

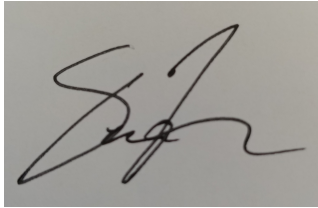
Benefit eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(2) *Available for work.* The availability requirement is satisfied when an individual is willing, able, and ready to accept suitable work which the individual does not have good cause to refuse, that is, the individual is genuinely attached to the labor market. Since, under unemployment insurance laws, it is the availability of an individual that is required to be tested, the labor market must be described in terms of the individual. A labor market for an individual means a market for the type of service which the individual offers in the geographical area in which the individual offers the service. Market in that sense does not mean that job vacancies must exist; the purpose of unemployment insurance is to compensate for lack of job vacancies. It means only that the type of services which an individual is offering is generally performed in the geographical area in which the individual is offering the services.

The claimant began looking for work immediately after she was terminated for no disqualifying reason. She was able and available to work from January 22, 2021 until March 11, 2021 when she obtained a position with Walnut Creek Psychiatry. Benefits are granted.

DECISION:

The March 19, 2021, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. She was able and available for work after separating from employment. Benefits are allowed.

A rectangular box containing a handwritten signature in black ink. The signature is stylized and appears to read 'S. Nelson'.

Sean M. Nelson
Administrative Law Judge
Unemployment Insurance Appeals Bureau
1000 East Grand Avenue
Des Moines, Iowa 50319-0209
Fax (515) 725-9067

June 15, 2021
Decision Dated and Mailed

smn/kmj