

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

68-0157 (9-06) - 3091078 - EI

BEVERLY A STACK

Claimant

APPEAL NO. 19A-UI-05518-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DES MOINES IND COMM SCHOOL DIST

Employer

OC: 06/16/19

Claimant: Respondent (1)

Iowa Code section 96.5(2)(a) – Discharge

STATEMENT OF THE CASE:

The employer filed a timely appeal from the July 9, 2019, reference 01, decision that allowed benefits to the claimant provided she was otherwise eligible and that held the employer's account could be charged for benefits, based on the Benefits Bureau deputy's conclusion that the claimant was discharged on June 11, 2019 for no disqualifying reason. After due notice was issued, a hearing was started on August 5, 2019, continued on August 15, 2019, and concluded on August 16, 2019. Claimant Beverly Stack participated and presented additional testimony through Valerie Cohen. Rhonda Wagoner represented the employer and presented additional testimony through Lashone Mosley and Cathy McKay. Exhibits 1, 2, 3 and A through E were received into evidence. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant. The administrative law judge took official notice of the fact-finding materials for the limited purpose of determining whether the employer participated in the fact-finding interview.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Beverly Stack began her employment with the Des Moines Independent Community School District in 1998 and last performed work for the employer on February 5, 2019. From 2010 until the end of the employment, Ms. Stack's job title was Bus Driver Class 3 – Full Time Lead Driver. The written job description for the position included the following:

BASIC FUNCTION: Operate a school bus in a safe and efficient manner to insure the safety of passengers. The essential functions as show below represent only the key areas of responsibility; specific position requirements will vary depending on the needs of the transportation department.

ESSENTIAL FUNCTIONS:

1. Assist and support the Director of Transportation and Specialists in managing the daily operations of the Transportation Department.
2. Lead, coordinate, train, and guide Bus Drivers and Bus Associates in the performance of their respective assignments and duties.

Ms. Stack's usual duties included driving a morning bus route and an afternoon bus route. In between the bus routes, Ms. Stack often spent her work time training students throughout the Des Moines School District on bus emergency evacuation procedure. Ms. Stack also trained bus drivers in aspects of bus driving duties that did not require her to be a passenger on a bus. Ms. Stack also assisted with bus dispatching duties. Ms. Stack has a life-long diagnosed motion sickness disorder that impacts her when she is the passenger in a vehicle. Ms. Stack is not susceptible to motion sickness when she is the driver of a vehicle. Ms. Stack takes prescription medication to address her motion sickness issues. However, the medication Ms. Stack takes to control her motion sickness when she is a passenger in a vehicle renders her unable to safely operate a vehicle. Accordingly, Ms. Stack could not both drive a bus route and perform ride-along driver training duties in the same shift. Until the 2018-2019 school year, the employer accommodated Ms. Stack's chronic medical condition and Ms. Stack was able to successfully perform her Bus Driver Class 3 – Full Time Lead Driver duties without issue.

In January 2018, Lashone Mosley became Director of Transportation and thereby became Ms. Stack's supervisor. In October 2018, Ms. Mosley told Ms. Stack that she expected Ms. Stack to commence doing ride-along bus driver training in between her morning and afternoon bus routes. Ms. Stack told Ms. Mosley that she had a medical note on file with the District that stated she could not drive and be a passenger in the same shift. Ms. Mosley told Ms. Stack that the medical note had expired. Ms. Mosley and Ms. Stack discussed the possibility of Ms. Stack dropping down from a lead driver position to a regular driving position. Ms. Mosley agreed to look into whether Ms. Stack could make that change without formally bidding on a bus route under the bus driver seniority system. However, Ms. Mosley did not get back to Ms. Stack with an answer to that question. At the time one or more bus driving positions opened for bidding in October 2018, Ms. Stack had still not heard back from Ms. Mosley and did not bid on the open positions.

On November 18, 2018, Ms. Stack provided Ms. Mosley with a new medical restriction document from her primary medical provider. The provider released Ms. Stack to return to work, but recommended that Ms. Stack not continue her supervisor/driving examiner duties due to ongoing issues with motion sickness that required medication. The medical provider indicated that Ms. Stack's motion sickness issues were specific to situations wherein she was a *passenger* on a bus, meaning that the issues did not apply when Ms. Stack was the bus driver. Ms. Mosley told Ms. Stack that she would not accept the note regarding Ms. Stack's medical restrictions. Ms. Mosley told Ms. Stack that she expected Ms. Stack to produce a medical note stating that she had no medical restrictions.

On December 7, 2018, Ms. Stack's primary medical provider provided Ms. Stack with a medical note that stated Ms. Stack "may need intermittent leave for follow up appointment for serious medical condition." Ms. Stack provided the medical note to the employer. The employer approved Ms. Stack for intermittent leave under the Family and Medical Leave Act (FMLA). Ms. Stack did not request consecutive, non-intermittent leave for any reason.

On December 10, 2018, Ms. Mosely provided the employer with a medical release based on a medical issue other than the motion sickness disorder. That medical note stated that Ms. Mosely could return to work with no restrictions.

On January 28, 2019, Ms. Stack's primary medical provider provided Ms. Stack with a medical note that stated Ms. Stack was not restricted from driving, but that the primary medical provider recommended that she "did not work as passenger on a bus due to history of severe motion sickness." Ms. Stack provided the note to Ms. Mosley, but Ms. Mosley declined to accept the medically-based work restrictions set forth in the note.

Effective February 6, 2019, the employer compelled Ms. Stack to commence an indefinite absence from the employment, based on the employer's conclusion that Ms. Stack was unable to perform the "essential functions" of her job due to the medical restrictions associated with her motion sickness disorder.

On April 24, 2019, the employer mailed Ms. Stack a memo that stated as follows:

Per the attached District Attendance Policy: The District has the right to fill any vacancy that occurs as a result of an employee's leave pursuant to the Family Medical Leave Act (FMLA) after the time period established by the district in accordance with FMLA guidelines. Your FMLA will expire on May 8th.

You are receiving this letter as notification that your position with the Des Moines Public Schools (DMPS) could be released.

If you are released to return to work, you will need to provide a written statement from your physician to your immediate supervisor.

According to the policy, if an employee is released to return to work and his or her position has been filled, he or she will be offered the next available position for which he or she is qualified.

Please continue to inform the DMPS Human Resource Department regarding the status of your medical condition.

If you have any questions, please contact your immediate supervisor.

On May 29, 2019, Cathy McKay, Director of Employee Services, mailed Ms. Stack a memo that stated as follows:

Per the Employment Information Handbook: When an employee has been absent and has not performed active service for DMPS for 120 calendar days and all available paid and unpaid leaves have been exhausted, the employee may be subject to termination.

Attending training does not constitute return to active service. Therefore, the first date of your inactive service remains February 6, 2019.

You are receiving this letter as notification that your employment with the Des Moines Public Schools (DMPS) will be terminated effective June 11, 2019.

If you are released to return to work prior to June 11, 2019 you will be required to provide a written statement from your physician to Cathy McKay no later than June 7, 2019.

Please be advised that this does not in any way impact your application or claim for disability benefits. If you would like to set up a meeting to discuss any of the processes or procedures, please contact Cathy McKay.

If you have any questions, please email or call Sherri Weatherly [phone number and email omitted by administrative law judge] or Rhonda Wagoner [phone number and email omitted by administrative law judge].

Ms. Stack did not respond to the May 29, 2019 letter.

Ms. Stack has at all relevant times been able to perform the established duties of her Bus Driver Class 3 – Full Time Lead Driver with the reasonable accommodations the employer had provided for most of the employment.

REASONING AND CONCLUSIONS OF LAW:

Iowa Administrative Code rule 871-24.1(113) characterizes the different types of employment separations as follows:

Separations. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.

a. Layoffs. A layoff is a suspension from pay status initiated by the employer without prejudice to the worker for such reasons as: lack of orders, model changeover, termination of seasonal or temporary employment, inventory-taking, introduction of laborsaving devices, plant breakdown, shortage of materials; including temporarily furloughed employees and employees placed on unpaid vacations.

b. Quits. A quit is a termination of employment initiated by the employee for any reason except mandatory retirement or transfer to another establishment of the same firm, or for service in the armed forces.

c. Discharge. A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.

d. Other separations. Terminations of employment for military duty lasting or expected to last more than 30 calendar days, retirement, permanent disability, and failure to meet the physical standards required.

In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 698, 612 (Iowa 1980) and *Peck v. EAB*, 492 N.W.2d 438 (Iowa App. 1992). 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. See Iowa Administrative Code rule 871-24.25.

An employer has an obligation to provide an employee with reasonable accommodations that enable the employee to continue in the employment. See *Sierra v. Employment Appeal Board*, 508 N.W. 2d 719 (Iowa 1993).

In *Wills v. Employment Appeal Board*, the Supreme Court of Iowa held that an employee did not voluntarily separate from employment where the employee, a C.N.A., presented a limited medical release that restricted the employee from performing significant lifting, and the employer, as a matter of policy, precluded the employee from working so long as the medical restriction continued in place. See *Wills v. Employment Appeal Board*, 447 N.W.2d 137 (Iowa 1989). In *Wills*, lifting was amongst the essential duties of the employee's employment. Though the employee was unable to perform significant lifting, the employee was able to perform several other essential functions associated with her employment. In *Wills*, the Court concluded that the employer's actions were tantamount to a discharge.

The evidence in the present case establishes that Ms. Stack was discharged on February 6, 2019, when the employer compelled her to commence an indefinite, involuntary absence from the employment based on her medical condition and the employer's decision to no longer reasonably accommodate the medical condition. As in *Wills*, Ms. Stack's medical condition impacted her ability to perform a limited portion of her essential duties, but did not prevent her from performing all other aspects of the duties associated with her job.

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).

Because the discharge in this matter was not based on misconduct, the discharge would not disqualify Ms. Stack for unemployment insurance benefits or relieve the employer of liability for benefits. Ms. Stack is eligible for benefits, provided she meets all other eligibility requirements. The employer's account may be charged for benefits.

DECISION:

The July 9, 2019, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. The discharge was effective February 6, 2019, when the employer compelled the claimant to commence an indefinite, involuntary absence from the employment. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs