

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

ANGELINA MILLER
Claimant

WESTAR FOODS INC
Employer

APPEAL 20A-UI-04548-HP-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 05/12/19
Claimant: Appellant (1)

Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant Angelina Miller filed an appeal from the May 19, 2020 (reference 03) unemployment insurance decision that denied benefits based upon her being discharged for misconduct by her employer, Westar Foods Inc. (“Westar”). The parties were properly notified of the hearing. A telephone hearing was held on June 10, 2020. Claimant Angela Miller appeared and testified. Harold McDonald testified on behalf of Miller. Tim Speir represented Westar. Kim McDonald testified on behalf of Westar. I took administrative notice of the claimant’s unemployment insurance benefits records maintained by Iowa Workforce Development.

ISSUE:

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

FINDINGS OF FACT:

Miller commenced her employment with Westar as an hourly crew worker on February 6, 2020. Westar operates a Hardees Restaurant where Miller worked. Miller’s job responsibilities included cashiering, taking orders, working the fry station, bagging orders, routine cleaning, prep work, and washing dishes. Miller testified 95 percent of her job involved cashiering. David Alba was Miller’s supervisor. Miller reported she worked 35 to 40 hours per week. McDonald, the district manager, reported Miller worked 20 to 25 hours per week.

March 6, 2020, is the last day Miller performed services for Westar. Miller testified she spoke to McDonald about her concerns about contracting coronavirus on March 6, 2020. Miller’s daughter has a heart condition and she reported she told McDonald she was thinking about going into quarantine with her children because of fears over her daughter’s life. Miller reported McDonald told her she believed she was overreacting. McDonald denies having this conversation with Miller.

Miller testified she asked McDonald for personal protective equipment, including gloves and a mask. McDonald denies Miller requested personal protective equipment.

On March 7, 2020, Miller was scheduled to work 11:00 a.m. through 4:00 p.m. Miller called the restaurant and spoke with McDonald. Miller told McDonald she would not be coming in. McDonald testified she asked Miller why she was not going to come in and Miller responded, “[j]ust because I’m not!” and McDonald reportedly responded “okay.” Miller did not state she was quitting. Miller testified when she told McDonald she was not coming in and McDonald asked why she was not coming in Miller responded, “[d]o you remember the conversation we had yesterday?” Miller avers McDonald stated “[w]ell, if you don’t come in today, we don’t need your services anymore.” McDonald denied Miller spoke to her regarding concerns she had about being exposed to Covid-19 at work and her potential exposure to family members. McDonald further denied telling Miller her services were not needed anymore. McDonald relayed employees are not terminated when they call in sick to work, or for the first no-call/no-show.

Miller was scheduled to work Sunday, March 8, 2020, from 9:00 a.m. until 3:00 p.m. Miller did not come into work that day or call Westar to state she was not coming in. McDonald testified Amber Rose Bassett was the manager in charge on Sunday, March 8, 2020. McDonald reported Bassett attempted to reach Miller, but she should not reach her. Miller denied receiving a call on her cellular telephone from Bassett. Miller was not scheduled to work on Monday, March 9, 2020.

Westar operates on a Tuesday through Monday workweek. Employees are responsible for coming in or calling on Mondays to check the schedule for the following week. On Monday, March 9, 2020, Miller did not call or come in to check her hours for the next week. McDonald did not put Miller on the schedule and determined she had voluntarily terminated her employment.

Miller has not contacted Westar since March 7, 2020. Westar did not contact Miller to inform her she had been terminated. McDonald testified she believed Miller had voluntarily terminated her employment.

McDonald testified on February 6, 2020, Miller completed an orientation and signed an employee handbook. The handbook requires employees to give a two-hour notice when they are not going to be able to work their scheduled shift. March 8, 2020 was the first time Miller did not call or show up for work. Miller had not been disciplined in the past for failing to show up or call in for work. During orientation, Westar informed Miller she needed to obtain her schedule on Monday each week and instructed her where the schedule was posted.

McDonald reported it is common for employees to quit by not coming to work. McDonald relayed the week before Miller told her she was thinking about putting in her notice because she had a landscaping business that was kicking off for the season and she would be working many hours for her business.

McDonald testified around the time Miller quit other employees were concerned about Covid-19. Two other part-time employees requested leaves of absence during the pandemic, which Westar granted. Miller did not request a leave of absence from Westar.

REASONING AND CONCLUSIONS OF LAW:

There is a dispute in this case as to whether McDonald discharged Miller or whether Miller voluntarily quit. Miller attended the fact-finding interview, Westar did not. A representative of Iowa Workforce Development issued a decision on May 19, 2020, reference 03, finding Miller was not eligible for unemployment insurance benefits because she was discharged on March 6, 2020 for violation of a known company rule.

Under Iowa Code section 96.5(2)a,

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.

871 Iowa Administrative Code 24.31(1)a, defines the term "misconduct" 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 Iowa Legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 558 (Iowa 1979).

Miller testified on March 6, 2020, she spoke to McDonald about her concerns about contracting Covid and she requested personal protective equipment. Miller's daughter has a heart condition and she testified she told McDonald she was thinking about going into quarantine with her children because of fears over her daughter's life. Miller testified McDonald told her she believed she was overreacting. McDonald denies making the statement and having the conversation with Miller about Covid-19 and her concerns about her family. McDonald also denied Miller requested personal protective equipment.

Miller was scheduled to work 11:00 a.m. through 4:00 p.m. on March 7, 2020. Miller called McDonald and reported she was not coming to work. McDonald testified she asked Miller why she was not coming to work and Miller replied, "[j]ust because 'I'm not.'" Miller testified she responded, "[d]o you remember the conversation we had yesterday?" Miller avers McDonald stated "[w]ell, if you don't come in today, we don't need your services anymore." McDonald testified she did not make the statement or have a conversation with Miller about concerns related to Covid-19, and reported Westar does not terminate employees for calling in sick to work, or for the first no call, no show incident.

Miller did not show up for work or call in March 8, 2020 for work. She did not call or come in on March 9, 2020, regarding her schedule for the next week. McDonald testified he believed Miller had quit when she was a no-call/no-show, and when she failed to call or come in regarding the next schedule.

Miller's and McDonald's testimony raises credibility issues. During the hearing I assessed Miller's and McDonald's credibility by considering whether their testimony was reasonable and consistent with other evidence I believe, whether they had made inconsistent statements, their "conduct, memory and knowledge of the facts," and their interest in the case. State v. Frake, 450 N.W.2d 817, 819 (Iowa 1990). Miller has an interest in this case because she is seeking unemployment benefits. McDonald has an interest in this case because she works for Westar.

I do not find Miller's testimony McDonald told her "[w]ell, if you don't come in today, we don't need your services anymore." McDonald testified employees are not discharged for an absence. Miller also testified she worked 35 to 40 hours per week. This is not consistent with her schedule March 7, 2020 through March 9, 2020. Miller was not scheduled to work full-time or nearly full-time. I do not believe Miller requested personal protection equipment on March 6, 2020, or that she discussed her daughter's medical condition or fears of contracting and passing on Covid-19 with McDonald. If Miller were concerned about Covid-19, there was no reason why she did not tell McDonald that was the reason she was calling in on March 7, 2020. Moreover, Miller never requested a leave of absence. McDonald testified Westar has granted two part-time employees leaves of absence due to the employee's concerns about contracting Covid-19. I do not find Miller was discharged for misconduct. Therefore, it is necessary to determine whether she voluntarily quit.

Iowa Code section 96.5(1) provides an individual "shall be disqualified for benefits, regardless of the source of the individual's wage credits: . . . If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department." The Iowa Supreme Court has held a "voluntary quit" means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer." *Wills v. Emp't Appeal Bd.*, 447 N.W.2d 137, 138 (Iowa 1989). A voluntary quit requires "an intention to terminate the employment relationship accompanied by an overt act carrying out the intent." *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438, 440 (Iowa Ct. App. 1992). "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). The claimant has the burden of proving that the voluntary leaving was for good cause attributable to the employer. Iowa Code § 96.6(2). The employer has the burden of proving that a claimant's departure from employment was voluntary. *Irving v. Emp't Appeal Bd.*, 883 N.W.2d 179 (Iowa 2016).

871 Iowa Administrative Code -24.25(4), (21), and (23) provide:

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:

(4) The claimant was absent for three days without giving notice to employer in violation of company rule.

(21) The claimant left because of dissatisfaction with the work environment.

(23) The claimant left voluntarily due to family responsibilities or serious family needs.

871 Iowa Administrative Code 24.26(4) 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:

24.26(4) The claimant left due to intolerable or detrimental working conditions.

If the claimant establishes the claimant left due to intolerable or detrimental working conditions, benefits are allowed. Generally, notice of an intent to quit is required by *Cobb v. Employment Appeal Board*, 506 N.W.2d 445, 447-78 (Iowa 1993), *Suluki v. Employment Appeal Board*, 503 N.W.2d 402, 405 (Iowa 1993), and *Swanson v. Employment Appeal Board*, 554 N.W.2d 294, 296 (Iowa Ct. App. 1996). These cases require an employee to give an employer notice of intent to quit, thus giving the employer an opportunity to cure working conditions. The Iowa Administrative Code was amended in 1995 to include an intent-to-quit requirement. The requirement was only added, however, to rule 871-24.26(6)(b), the provision involving work-related health problems. No intent-to-quit requirement was added to rule 871-24.26(4), the intolerable working conditions provision.. The Iowa Supreme Court concluded that, because the intent-to-quit requirement was added to 871-24.26(6)(b) but not 871-24.26(4), notice of intent to quit is not required for intolerable working conditions. *Hy-Vee, Inc. v. Emp't Appeal Bd.*, 710 N.W.2d 1 (Iowa 2005).

“Good cause attributable to the employer” does not require fault, negligence, wrongdoing or bad faith by the employer. *Dehmel v. Emp't Appeal Bd.*, 433 N.W.2d 700, 702 (Iowa 1988) (“good cause attributable to the employer can exist even though the employer is free from all negligence or wrongdoing in connection therewith”); *Shontz v. Iowa Emp't Sec. Comm'n*, 248 N.W.2d 88, 91 (Iowa 1976)(benefits payable even though employer “free from fault”); *Raffety v. Iowa Emp't Sec. Comm'n*, 76 N.W.2d 787, 788 (Iowa 1956) (“good cause attributable to the employer need not be based upon a fault or wrong of such employer”). Good cause may be attributable to “the employment itself” rather than the employer personally and still satisfy the requirements of the Act. *Raffety*, 76 N.W.2d at 788 (Iowa 1956). Therefore, the claimant is not required to give the employer any notice with regard to the alleged intolerable or detrimental working conditions prior to her quitting. However, the claimant must prove the claimant’s working conditions were intolerable or detrimental.

McDonald testified Miller called in on March 7, 2020 and she was a no call, no show on March 8, 2020. Miller was not scheduled to work on March 9, 2020, but she did not call in or come in to view her new schedule that day for the next week. McDonald considered Miller had voluntarily terminated her employment when she did not come in or call regarding her next schedule. Miller’s actions of not calling in and showing up for work on March 8, 2020, and not calling or coming in to check her schedule for the next week are both evidence of her intention to sever the employment relationship and overt acts of carrying out her intention.

The record does not support Miller had been absent for three days without giving notice to Westar in violation of a company rule when McDonald determined she voluntarily quit. The record supports Miller was dissatisfied with the work environment due to her cashiering duties and she also left to care for her children. While Miller had good personal reasons for quitting her job, those reasons are not attributable to Westar. McDonald testified she granted to requests from part-time employees for leaves of absence due to Covid-19. I do not find Miller requested personal protective equipment from Westar or that Westar refused to provide it. Miller has not established

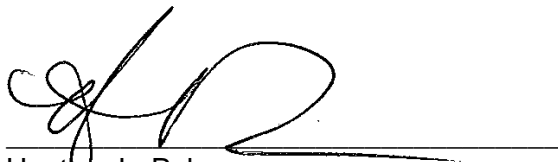
the working conditions were unsafe, intolerable, or detrimental. Miller's work as a cashier and her concerns about contracting Covid-19 do not rise to the level where a reasonable person would feel compelled to quit and is not a good cause reason attributable to Westar for Miller to have quit. Benefits are denied.

While the claimant may not be eligible for regular State of Iowa unemployment insurance benefits, the claimant may be eligible for unemployment insurance benefits that have been made available to claimants under the Coronavirus Aid, Relief, and Economic Security Act ("Cares Act"). The Pandemic Unemployment Assistance ("PUA") section of the Cares Act discusses eligibility for claimants who are unemployed due to the Coronavirus. For claimants who are ineligible for regular unemployment insurance benefits under Iowa Code Chapter 96, they may be eligible under PUA.

Note to Claimant: If this decision determines you are not eligible for regular unemployment insurance benefits and you disagree with this decision, you may file an appeal to the Employment Appeal Board by following the instructions on the first page of this decision. Individuals who do not qualify for regular unemployment insurance benefits, but who are currently unemployed for reasons related to COVID-19 may qualify for Pandemic Unemployment Assistance ("PUA"). **You will need to apply for PUA to determine your eligibility under the program. Additional information on how to apply for PUA can be found at <https://www.iowaworkforcedevelopment.gov/pua-information>.**

DECISION:

The May 19, 2020 (reference 03) unemployment insurance decision denying unemployment insurance benefits affirmed. The claimant voluntarily quit her employment without good cause attributable to the employer. Unemployment insurance benefits are denied until the claimant has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.



Heather L. Palmer
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June 25, 2020
Decision Dated and Mailed

hlp/scn