IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

SHANE A KESTER Claimant **SHERWOOD COMPANY INC** Employer	**APPEAL 17A-UI-05727-JCT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 05/07/17** **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

STATEMENT OF THE CASE:

The employer filed an appeal from the June 1, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on June 16, 2017. The claimant participated personally. The employer participated through Jerry Sherwood, owner. Becky Sherwood, co-owner, also testified.
The administrative law judge took official notice of the administrative records including the fact-finding documents. 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 or did he quit without good cause attributable to the 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?

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 laborer and was separated from employment on May 10, 2017. The evidence is disputed as to whether the claimant quit or was discharged.

Unbeknownst to the claimant, the employer had decided to lower his rate of pay from $20.00 to $17.00. The employer made this change and applied it retroactively to the claimant's paycheck. The employer elected to do so in response to the claimant's attendance and performance issues.

The claimant was not warned or told he would have his wages reduced if his performance did not improve. The employer intended to reduce the pay to "give him a little wake up call."

The claimant missed work May 9, 2017 and as a result, was not informed that his crew would be leaving for assignment early the following day. The claimant showed up to work and encountered Tyler Sherwood, who is the son of the owners. He was informed that his crew had left already. The claimant asked Mr. Sherwood what he was supposed to do. The evidence is disputed as to what Mr. Sherwood said in response, but the claimant stated Mr. Sherwood was mad and told him to punch out, and so the claimant did. Mr. Sherwood then texted the claimant and requested items back. The claimant interpreted the exchange to mean he had been fired even though no one said to him "you are fired." Tyler Sherwood did not participate in the hearing or provide a written statement in lieu of attending the hearing.

The administrative record reflects that claimant has received unemployment benefits in the amount of $2,993.00, since filing a claim with an effective date of May 7, 2017. The administrative record also establishes that the employer did participate in the fact-finding interview.

REASONINGS AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant did not quit but was discharged from employment for no disqualifying reason. Benefits are allowed.

An unemployed person who meets the basic eligibility criteria receives benefits unless they are disqualified for some reason. Iowa code 96.4. Generally, disqualification from benefits is based on three provisions of the unemployment insurance law that disqualify claimants until they have been reemployed and they have been reemployed and have been paid wages for insured work equal to ten times their weekly benefit amount. An individual is subject to such a disqualification if the individual (1) "has left work voluntarily without good cause attributable to the individual's employer" Iowa Code 96.5(1) or (2) is discharged for work –connected misconduct, Iowa Code 96.5(2) a, or (3) fails to accept suitable work without good cause, Iowa Code 96.5(3).

Generally, the employer bears the burden of proving disqualification of the claimant. Iowa Code 96.6(2). Where a claimant has quit, however, the claimant has "the burden of proving that a voluntary quit was for good cause attributable to the employer pursuant to Iowa Code section 96.5(1). Since the employer has the burden of proving disqualification, and the claimant only has the burden of proving the justification for a quit, the employer also has the burden of providing that a particular separation was a quit. The Iowa Supreme Court has thus been explicitly, "the employer has the burden of proving that a claimant's department from employment was voluntary." *Irving v. Employment Appeal Board*, 883, NW 2d 179, 210 (Iowa 2016).

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). Generally, a quit is defined to be 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." Furthermore, 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 evidence presented does not support that the claimant intended to quit his employment on May 10, 2017, but rather, reasonably relied upon Tyler's Sherwood's

directive to punch out, while he was mad, and then request company items back, to mean he was discharged. As a result, the case will be analyzed as a discharge and not quit.

Based on the evidence presented, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

Iowa Code § 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.

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).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.*. In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id*. Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the

factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also *Greene v. EAB*, 426 N.W.2d 659, 662 (Iowa App. 1988).

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. See 871 IAC 24.32(4). The Iowa Supreme Court has ruled that if a party has the power to produce more explicit and direct evidence than it chooses to present, the administrative law judge may infer that evidence not presented would reveal deficiencies in the party's case. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976).

This case rests on the credibility of the witnesses and the crux of the case is the conversation between the claimant and Tyler Sherwood on May 10, 2017. The employer presented only hearsay testimony regarding the conversation whereas the claimant credibly testified he showed up and was informed the crew was gone, and to punch out, while Mr. Sherwood was mad. Mr. Sherwood then text messaged the claimant requesting company property. Mindful of the ruling in *Crosser*, *id.,* and noting that the claimant presented direct, first-hand testimony while the employer relied upon second-hand reports, the administrative law judge concludes that the claimant's recollection of the events is more credible than that of the employer.

The employer referred to multiple incidents that occurred in the past regarding poor performance and attendance but did not articulate why the claimant was told to return his belongings and punch out on May 10, 2017 or why it would warrant immediate discharge. Further, it is unclear from the evidence whether the claimant could have reasonably anticipated his job was in jeopardy based on a lack of prior discipline. It cannot be ignored that the employer elected not to notify the claimant, who was absent the day prior, that his crew would be starting and leaving early, and consequently, he had no way to know he would arrive on May 10, 2017 and they would be gone. Based on the evidence presented, the administrative law judge concludes the employer has not met its burden of proof to establish a current or final act of misconduct, and, without such, the history of other incidents need not be examined. While the employer may have been justified in discharging the claimant, work-connected misconduct as defined by the unemployment insurance law has not been established in this case. Benefits are allowed.

Nothing in this decision should be interpreted as a condemnation of the employer's right to terminate the claimant for violating its policies and procedures. The employer had a right to follow its policies and procedures. The analysis of unemployment insurance eligibility, however, does not end there. This ruling simply holds that the employer did not meet its burden of proof to establish the claimant's conduct leading separation was misconduct under Iowa law.

Alternatively, if the claimant did in fact quit the employment, the administrative law judge concludes that it was for good cause attributable to the employer and the claimant would remain eligible.

Iowa Code § 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. 871-24.26(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.

In the absence of an agreement to the contrary, an employer's failure to pay wages when due constitutes good cause for leaving employment. *Deshler Broom Factory v. Kinney*, 140 Nebraska 889, 2 N.W.2d 332 (Nebraska 1942). There are circumstances that a claimant's wages may be demoted and he may be ineligible for benefits. However, in this case, the employer reduced the wages of the claimant without notification, and applied it retroactively to his past pay period, as a "wake up call" to him. The employer's choice to not pay the claimant wages at $20.00 per hour for his pay period and retroactively apply a demotion without notification would constitute good cause attributable to the employer for quitting the employment. Whether the separation is characterized as a quit or a discharge, the claimant is eligible for benefits.

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

DECISION:

The June 1, 2017, (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. The employer is not relieved of charges. The claimant is not overpaid benefits.

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Jennifer L. Beckman
Administrative Law Judge

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Decision Dated and Mailed

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