IOWA DEPARTMENT OF INSPECTIONS AND APPEALS
ADMINISTRATIVE HEARINGS DIVISION, UI APPEALS BUREAU

AARON A HOWELL Claimant **SAMS RIVERSIDE AUTO PARTS INC** Employer	**APPEAL NO. 22A-UI-13182-JT-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 05/01/22** **Claimant: Appellant (2)**

Iowa Code Section 96.5(2)(a) – Discharge
Iowa Code Section 96.5(1) – Voluntary Quit

STATEMENT OF THE CASE:

On May 27, 2022, Aaron Howell (claimant) filed a timely appeal from the May 23, 2022 (reference 01) decision that disqualified the claimant for benefits and that relieved the employer's account of liability for benefits, based on the deputy's conclusion that the claimant voluntarily quit on May 5, 2022 without good cause attributable to the employer. After due notice was issued, a hearing was held on July 13, 2022. Claimant participated. Cara Bucklin represented the employer. Exhibits 1 and A were received into evidence.

ISSUES:

Whether the claimant was laid off, was discharged for misconduct in connection with the employment, or voluntarily 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:

Aaron Howell (claimant) was employed by Sam's Riverside Auto Parts, Inc. as a full-time tire technician from 2018 until May 6, 2022. The claimant's scheduled work hours were 8:00 a.m. to 5:00 p.m. on Monday through Friday, and 8:00 a.m. to noon on alternating weekends. Tom Sly, Wheel Store Manager, was the claimant's immediate supervisor. The claimant shares joint physical custody of two minor children. The claimant has physical custody of his children during alternating weeks. One child has to be dropped at school at 7:30 a.m., but the other child, a five-year-old, does not start school until 8:45 a.m. The claimant had an informal agreement with his supervisor whereby the claimant was allowed to report for work at 9:00 a.m. during those weeks when the claimant needed to drop the five-year-old at school.

The employer's payroll policy called for the claimant to be paid each Friday. The claimant had arranged to have his check direct-deposited. The claimant's financial institution usually credited the weekly pay to the claimant's account on Thursday, the day before the scheduled pay date. Co-workers who used the same financial institution likewise generally received their pay a day earlier than the scheduled pay date. The claimant lived paycheck-to-paycheck and was accustomed to receiving the weekly pay in his bank account on Thursdays. A little over a month

prior to the May 6, 2022 separation, the employer switched payroll processors. The change resulted in the pay no longer landing in the claimant's account on Thursday. Instead the pay landed in the claimant's account on the Friday pay date. The claimant perceived this as delayed payment and was upset by the situation.

On the morning of Friday, May 6, 2022, the claimant spoke to his supervisor about not having receiving his pay. The supervisor told the claimant he would need to contact the employer's administrative personnel. At 8:00 a.m. on May 6, 2022, the claimant reported to the employer's office with his five-year-old son in tow. The employer understood the claimant was there due to a concern about his pay. The employer was intent on making certain the claimant received his pay. Cara Bucklin, Office Manager, had the claimant wait while she discussed the matter with the business owners, including Gary Galinsky. The seat where the claimant waited was about 20 feet away from Ms. Bucklin's desk. While Ms. Bucklin asserts the claimant was uttering negative comments under his breath as he waited, Ms. Bucklin was not close enough to discern the claimant was merely chatting with his child. The employer was willing to provide an advance, but wanted to have the claimant provide his paystub for the week. The claimant has left the paystub in his vehicle. After the claimant has waited an extended period, Ms. Bucklin asked the claimant to go to his vehicle to retrieve the paystub. The claimant was indeed aggravated as he exited the office to retrieve his paystub. The claimant stated, "this is getting crazy." Mr. Galinsky heard this utterance and erupted in anger. As Mr. Howell approached the door out of the office, Mr. Galinsky asked the claimant, "What the fuck did you say?" Mr. Galinsky then directed abusive language at the claimant despite the presence of a child of tender years. Mr. Galinsky told the claimant, "Get the fuck out." Mr. Galinsky called the claimant "a piece of shit" and "lazy." Mr. Galinsky continued to yell and berate the claimant while the claimant attempted to secure his child in the vehicle. Ms. Bucklin asserts she did not hear any of Mr. Galinsky's utterances, due to her desk being about forty feet from the door.

Pursuant to the employer's directive, the claimant left. The claimant did not return. The claimant understood, Mr. Galinsky's utterances and behavior to mean the claimant was fired from the employment. Later that morning the claimant's weekly pay was deposited to the claimant's bank account.

REASONING AND CONCLUSIONS OF LAW:

A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, or failure to pass a probationary period. Iowa Administrative Code rule 871-24.1(113)(c). A quit is a separation initiated by the employee. Iowa Administrative Code rule 871-24.1(113)(b). 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.

In considering an understanding or belief formed, or a conclusion drawn, by an employer or claimant, the administrative law judge considers what a reasonable person would have concluded under the circumstances. See *Aalbers v. Iowa Department of Job Service*, 431 N.W.2d 330 (Iowa 1988) and *O'Brien v. Employment Appeal Bd.,* 494 N.W.2d 660 (1993).

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 Ct. 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.*

The weight of the evidence indicates the claimant reasonably concluded from Mr. Galinsky's utterances, actions and demeanor that the employer discharged him from the employment on the morning of May 6, 2022. The claimant offered candid and credible testimony regarding his utterances and Mr. Galinsky's utterances, demeanor and behavior on the morning of May 6, 2022. Ms. Bucklin was too distance to discern the claimant's quiet utterances while he waited about 20 feet from her desk. Ms. Bucklin asserts she has no knowledge of what was uttered as the claimant, the claimant's child, and Mr. Galinsky exited the office or when they were outside. The employer presented insufficient evidence to rebut the claimant's version of events. The employer could have presented testimony through Mr. Galinsky or other personnel, but elected not to present such testimony.

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).

The employer has the burden of proof in a discharge matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See *Lee v. Employment Appeal Board,* 616 N.W.2d 661 (Iowa 2000). 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).

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 Iowa Administrative Code rule 871-24.32(4).

An employer has the right to expect decency and civility from its employees and an employee's use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct disqualifying the employee from receipt of unemployment insurance benefits. *Henecke v. Iowa Department of Job Service*, 533 N.W.2d 573 (Iowa App. 1995). Use of foul language can alone be a sufficient ground for a misconduct disqualification for unemployment benefits. *Warrell v. Iowa Dept. of Job Service*, 356 N.W.2d 587 (Iowa Ct. App. 1984). An isolated incident of vulgarity can constitute misconduct and warrant disqualification from unemployment benefits, if it serves to undermine a superior's authority. *Deever v. Hawkeye Window Cleaning, Inc.*, 447 N.W.2d 418 (Iowa Ct. App. 1989). Likewise, the claimant had the right to expect decent decency and civility from the employer as it related to the claimant and to the claimant's child of tender years.

The weight of the evidence in the record establishes the employer discharged the claimant on May 6, 2022 for no disqualifying reason. The employer became incensed and discharged the claimant for expressing concern about the timing of receipt of weekly pay, about the extended wait, and about the additional step of having to retrieve the paystub from the claimant's vehicle. The weight of the evidence does not support the employer's assertion that the claimant uttered profanity during the incident. The evidence indicates instead that the claimant was mindful of the impact of his words and conduct, as well as the impact of the employer's words and conduct, on the claimant's young child. The weight of the evidence indicates the employer did the opposite. Nothing in the claimant's conduct demonstrated a willful or wanton disregard of the employer's interests. Based on the discharge for no disqualifying reason, the claimant is eligible for benefits, provided the claimant meets all other eligibility requirements, and the employer's account may be charged.

Even if the claimant has voluntarily quit on May 6, 2022, the quit would have been with good cause attributable to the employer due to the employer abusive utterances, demeanor and aggressive behavior. Iowa Code section 96.5(1) provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 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.

Quits due to intolerable or detrimental working conditions are deemed to be for good cause attributable to the employer. See Iowa Admin. Code r. 871-24.26(4). The test is whether a reasonable person would have quit under the circumstances. See *Aalbers v. Iowa Department of Job Service*, 431 N.W.2d 330 (Iowa 1988) and *O'Brien v. Employment Appeal Bd.,* 494 N.W.2d 660 (1993). Aside from quits based on medical reasons, prior notification of the employer before a resignation for intolerable or detrimental working conditions is not required. See *Hy-Vee v. EAB*, 710 N.W.2d (Iowa 2005). The employer created intolerable and detrimental working conditions for the claimant on the morning of May 6, 2022. A reasonable person subjected to the employer's profane and abusive utterances and to the employer's aggressive behavior would have left the employment. Thus even if the separation were a quit, the claimant is eligible for benefits, provided the claimant is otherwise eligible, and the employer's account may be charged for benefits.

DECISION:

The May 23, 2022 (reference 01) decision is reversed. The claimant was discharged on May 6, 2022 for no disqualifying reason. In the alternative, the claimant voluntarily quit on May 6, 2022 with good cause attributable to the employer. The claimant is eligible for benefits, provided the claimant is otherwise eligible. The employer's account may be charged for benefits.

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James E. Timberland
Administrative Law Judge

September 12, 2022
Decision Dated and Mailed

jet/mh

APPEAL RIGHTS. If you disagree with the decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
Online: eab.iowa.gov

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

AN APPEAL TO THE BOARD SHALL STATE CLEARLY:
1) The name, address, and social security number of the claimant.
2) A reference to the decision from which the appeal is taken.
3) That an appeal from such decision is being made and such appeal is signed.
4) The grounds upon which such appeal is based.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at https://www.legis.iowa.gov/docs/code/17A.19.pdf.

Note to Parties: YOU MAY REPRESENT yourself in the appeal or obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds.

Note to Claimant: It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:
A true and correct copy of this decision was mailed to each of the parties listed.

DERECHOS DE APELACIÓN. Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
En línea: eab.iowa.gov

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:
1) El nombre, dirección y número de seguro social del reclamante.
2) Una referencia a la decisión de la que se toma la apelación.
3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días después de que la decisión adquiera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que está en línea en https://www.legis.iowa.gov/docs/code/17A.19.pdf.

Nota para las partes: USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

Nota para el reclamante: es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

SERVICIO DE INFORMACIÓN:
Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.