IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

GREGORY L ALLER
Claimant

ARAMARK CAMPUS LLC
Employer

APPEAL NO. 15A-UI-05784-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 06/15/14
Claimant: Appellant (1)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
871 IAC 24.26(21) – Quit in Lieu of Discharge

STATEMENT OF THE CASE:

Gregory Aller filed a timely appeal from the May 8, 2015, reference 01, decision that disqualified him benefits and that relieved the employer of liability for benefits, based on an Agency conclusion that he had been discharged on April 15, 2015 for misconduct in connection with the employment. After due notice was issued, a hearing was held on June 26, 2015. Gregory Aller participated personally and was represented by his father, Delmar Aller. Janell Wollschlager represented the employer.

ISSUE:

Whether Gregory Aller separated from the employment for a reason that disqualifies him for benefits or that relieves the employer of liability for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Aramark Campus, L.L.C., contracts with Upper Iowa University to provide food service to students. Gregory Aller was employed by Aramark Campus as a part-time food service utility worker from 2011 and last performed work for the employer on April 13, 2015. On that day, Mr. Aller uttered a statement that the evening supervisor, Nikki Goldsmith, and an Upper Iowa University staff member reasonably perceived as a threat to the workplace. Mr. Aller was frustrated with the employer's request that she shift his work hours to a bit later in the evening so that his floor cleaning duties would conflict less with the needs of students. Mr. Aller's work hours had up to that point been 5:00 to 9:00 p.m. Janell Wollschlager, Food Service Director, told Mr. Aller that she wanted to move his work hours to 6:00 to 9:30 p.m. Mr. Aller was also frustrated on April 13 with what he characterizes as the employer's nitpicking. Mr. Aller was also frustrated that other staff were not rinsing tin cans before they were to be crushed. During his shift on April 13, Mr. Aller stated, "I feel like I could shoot up the place." In response to that utterance, the employer and/or university staff summoned local law enforcement and campus security. The law enforcement personnel escorted Mr. Aller off campus and transported him to an emergency room for evaluation. Mr. Aller met with an emergency room doctor who strongly recommended that Mr. Aller voluntarily commit himself to an inpatient behavioral treatment

facility in La Crosse, Wisconsin. Mr. Aller agreed to do that and was transported to the facility in La Crosse during the early morning hours of April 14, 2015. Mr. Aller met later that day with the staff psychiatrist, who determined that Mr. Aller did not need to remain at the inpatient facility. The staff psychologist recommended that Mr. Aller seek outpatient counseling. Mr. Aller complied with that recommendation. None of the medical personnel with whom Mr. Aller had contact on April 13-14 advised him to quit his employment.

When Mr. Aller returned home on April 14, 2015, he listened to a voicemail message that Ms. Wollschlager had left on his cell phone at 10:16 a.m. that day. In the message, Ms. Wollschlager told Mr. Aller that he was banned from the Upper Iowa campus and that she did not yet know the status of his employment. Later that day, Mr. Aller left a voicemail message for Ms. Wollschlager. In his message, Mr. Aller said that he would be quitting immediately for the sake of his mental health and to get medical assistance. Later that same evening, Ms. Wollschlager left a voicemail message for Mr. Aller. In that message, Ms. Wollschlager told Mr. Aller that she was not accepting his resignation, that she needed to speak to human resources personnel, and that Mr. Aller was not allowed on campus. Thereafter, the parties had no further contact until the employer mailed a letter to Mr. Aller on May 5, 2015. In the letter, Ms. Wollschlager acknowledged Mr. Aller's attempt to resign from the employment, but advised that he had been discharged for violence in the workplace. Mr. Aller received the letter on May 6, 2015.

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. 871 IAC 24.1(113)(c). A quit is a separation initiated by the employee. 871 IAC 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 871 IAC 24.25.

The weight of the evidence in the record establishes that circumstances of Mr. Aller's removal from the workplace on April 13, 2015 and the employer's voicemail message on the morning of April 14, 2015, were sufficient to communicate to a reasonable person that discharge from the employment was imminent. The employer's voicemail message clearly communicated that Mr. Aller was suspended from the employment. The weight of the evidence establishes that Mr. Aller attempted to preempt the unfolding discharge process by communicating a voluntary quit before the employer had the opportunity to communicate a definitive discharge. Very shortly after Mr. Aller communicated his quit, the employer communicated that it was accepting the quit, that the review of the matter was still in process, and that Mr. Aller was banned from the workplace. The employer then further complicated THE matter by taking three weeks to mail a discharge letter.

This matter can be analyzed as a quit in lieu of discharge or as a voluntary quit, both of which lead to the same outcome.

871 IAC 24.26(21) 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:
>
> (21) The claimant was compelled to resign when given the choice of resigning or being discharged. This shall not be considered a voluntary leaving.

In analyzing quits in lieu of discharge, the administrative law judge considers whether the evidence establishes misconduct that would disqualify the claimant for unemployment insurance benefits.

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.

Iowa Admin. Code r. 871-24.32(1)a provides:

> Discharge for misconduct.
>
> (1) Definition.
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> 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).

Threats of violence in the workplace constitute misconduct that disqualifies a claimant for benefits. The employer need not wait until the employee acts upon the threat. See Henecke v. Iowa Dept. Of Job Services, 533 N.W.2d 573 (Iowa App. 1995).

Mr. Aller concedes that he uttered the verbal threat. The employer reasonably perceived the utterance as a threat. The threat utterance constituted misconduct in connection with the employment. The suspension that was initially effected by the law enforcement escort off campus on April 13 and that was verbally communicated by the employer on April 14, 2015, was sufficient to place Mr. Aller on notice that his employment was in jeopardy. The employer's delay in sending the termination letter did not prevent the conduct that triggered the separation from being a "current act" for unemployment insurance purposes. Based on the misconduct in connection with the employment, Mr. Aller would be disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he must then also meet all other eligibility requirements. The employer's account shall not be charged for benefits.

The analysis of this matter, in the alternative, as a voluntary quit is as follows:

Iowa Code section 96.5(1)d 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. But the individual shall not be disqualified if the department finds that:
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> d. The individual left employment because of illness, injury or pregnancy upon the advice of a licensed and practicing physician, and upon knowledge of the necessity for absence immediately notified the employer, or the employer consented to the absence, and after recovering from the illness, injury or pregnancy, when recovery was certified by a licensed and practicing physician, the individual returned to the employer and offered to perform services and the individual's regular work or comparable suitable work was not available, if so found by the department, provided the individual is otherwise eligible.

Workforce Development rule 817 IAC 24.26(6) provides as follows:

> Separation because of illness, injury, or pregnancy.
> a. Nonemployment related separation. The claimant left because of illness, injury or pregnancy upon the advice of a licensed and practicing physician. Upon recovery, when recovery was certified by a licensed and practicing physician, the claimant returned and offered to perform services to the employer, but no suitable, comparable work was

> available. Recovery is defined as the ability of the claimant to perform all of the duties of the previous employment.
> b. Employment related separation. The claimant was compelled to leave employment because of an illness, injury, or allergy condition that was attributable to the employment. Factors and circumstances directly connected with the employment which caused or aggravated the illness, injury, allergy, or disease to the employee which made it impossible for the employee to continue in employment because of serious danger to the employee's health may be held to be an involuntary termination of employment and constitute good cause attributable to the employer. The claimant will be eligible for benefits if compelled to leave employment as a result of an injury suffered on the job.
> In order to be eligible under this paragraph "b" an individual must present competent evidence showing adequate health reasons to justify termination; before quitting have informed the employer of the work–related health problem and inform the employer that the individual intends to quit unless the problem is corrected or the individual is reasonably accommodated. Reasonable accommodation includes other comparable work which is not injurious to the claimant's health and for which the claimant must remain available.

Iowa Admin. Code r. 871-24.25(28) 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:
>
> (28) The claimant left after being reprimanded.

The evidence indicates that no licensed and practicing physician advised Mr. Aller to leave the employment for medical or mental health reasons. By the time Mr. Aller left his quit message for the employer, he had been evaluated by a psychiatrist who advised that he did not have a mental health condition that warranted inpatient and recommended that he follow up on his own with outpatient counseling. Nothing about that scenario establishes a medical basis for voluntarily quitting the employment. Rather the evidence establishes that the attempt to voluntarily quit was prompted by disciplinary action that had begun to unfold prior to the quit notice and that was still unfolding at the time of the quit notice. The quit in response to the unfolding discipline would be a quit without good cause attributable to the employer. The fact that the purported quit was from part-time employment, rather than full-time employment, does not help Mr. Aller because this employer was the sole base period employer and there are no other base period wages upon which benefits might be based. Thus, if the administrative law judge were to conclude that Mr. Aller voluntarily quit the employment, Mr. Aller would be disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he must then also meet all other eligibility requirements. The employer's account shall not be charged for benefits.

DECISION:

The May 8, 2015, reference 01, decision is affirmed. The claimant quit in lieu of discharge for misconduct in connection with the employment. In the alternative, the claimant voluntarily quit without good cause attributable to the employer. The claimant is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he must then also meet all other eligibility requirements. The employer's account shall not be charged for benefits.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

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