IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

DAVID J ALMEIDA Claimant **REGENCY MOTORS INC % MP BASICS** Employer	**APPEAL 17A-UI-00290-JCT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 12/11/16** **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 December 27, 2016, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on February 13, 2017. A second hearing was held on February 16, 2017, to complete the testimony. The same people attended both hearings: The claimant participated personally. Susan Almeida, mother of the claimant, attended as an observer. The employer participated through Dr. J. Michael Bertroche, president. Employer witnesses included Teri Bertroche and Lance Kitzmiller. Claimant Exhibits 1 through 5 and Employer Exhibits A through D were received into evidence.[1] 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.

[1] [1] The administrative law judge would note that the hearing was originally scheduled for February 1, 2017 but due to both parties' non-receipt of the opposing parties' proposed exhibits, the hearing was continued to February 13, 2017. On February 1, 2017, the employer was advised to send a copy of its proposed exhibit, consisting of a jump drive, to the claimant for the next hearing. The employer waited nine days from the first hearing, until Thursday, February 9, 2017 to mail the jump drive to the claimant's PO Box. It was received at the PO Box on Friday, February 10, 2017. However, the employer also acknowledged at the hearing of knowing the claimant's mail was being forwarded to a Florida address where he is residing, because he is in the midst of a divorce with the employer/owner's daughter, thereby making it unlikely to be received by Monday, February 13, 2016. The jump drive was not admitted into evidence.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct or did the claimant quit the employment with 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 general manager and was separated from employment on December 3, 2016. The evidence is disputed as to whether the claimant voluntarily quit the employment or was discharged by the employer.

The employer and claimant in this case have a complicated relationship: The claimant was married to Dr. Bertroche and Ms. Bertroche's daughter, Heather, and therefore the son-in-law of his employer/boss. It cannot be ignored that one day prior to separation, December 2, 2016, the claimant filed for divorce from Heather Almeida. At the time of the hearing, the claimant and Ms. Almeida remained separated.

At the time of hire, the claimant did not receive any kind of handbook or procedures, and had no documented warnings or disciplinary action. According to the claimant, he had been told on two occasions, November 9 and 29, 2016, by Dr. Bertroche, that if he was to divorce his wife, (Dr. Bertroche's daughter), his "tenure would be over" and he would "have his wings clipped." These comments contributed to the claimant believing his job was or could be in jeopardy.

As a general manager, the claimant's primary duties included sales of vehicles, as well as marketing, primarily online. The claimant was responsible for uploading and displaying photos and information about the employer's vehicles for sale on websites including Facebook, Craiglist and others. The claimant was paid primarily based upon commission, as well as a fee for any vehicle sold from an online posting that he was personally responsible for listing. The employer reported its sales had dropped and that it was due to the claimant "not doing his job". According to records presented by the claimant, the employer's overall sales had dropped for a period in 2016, but had improved in November (Claimant Exhibit 5). The claimant asserted he sold two vehicles in his final day of employment.

On December 3, 2016, a meeting was conducted involving Dr. Bertroche, Teri Bertroche, the claimant, and Lance Kitzmiller, sales associate. The evidence is disputed as to the contents of the meeting but both parties acknowledge the claimant's marital status was referenced. According to the employer, the claimant volunteered at the meeting that things were not stable with his wife, and that was the only comment made about the possible divorce and the discussion was involving his unsatisfactory work performance. The employer said based on a review of its prior months of sales, it was apparent the claimant was not posting on the websites as required, and thus, sales were slumping. The employer did not furnish the period of time that was reviewed in making the determination. No specific sales numbers were offered by the employer, nor were any specific details regarding the amount of online listings the claimant did or did not make over any period of time. It was the employer's position that the claimant had continuing work available but could only sell vehicles (and not do the marketing) and that his "wings were being clipped" temporarily so he would focus on sales.

The claimant, however, disputed that his marital status was not a part of the meeting, and instead stated that he was told that because he was divorcing the Bertroche's daughter, that his "wings were being clipped". The claimant interpreted this to mean he was discharged. The undisputed evidence is that the claimant was then told he needed to return his company issued IPAD, phone and keys. The evidence was disputed as to whether the claimant was also told give the employer passwords for various websites.

When the claimant retrieved the IPAD a few minutes later, the employer reported the claimant had deleted its contents, using a "factory reset" mode, and admitted to deleting the content. The employer also alleged the claimant dismantled its Facebook page and other websites, causing the employer to have to recover and rebuild several postings. The claimant denied deleting the IPAD or dismantling the websites upon the employer's request on December 3, 2016 to return items.

The claimant left that day after the meeting and did not return to perform work. The claimant never stated he quit verbally, nor was a resignation letter submitted. The employer never furnished the employee a letter stating he had been terminated or told him he was fired. The employer insisted the claimant had not been fired, but that he abandoned his job when he did not return to work the following week, and the employer did not inquire about his whereabouts because he was a "big boy". The employer also acknowledged that after the claimant left the building, the employer spent time on December 3, 2016 resetting passwords and locks on various accounts and the safe for the employer.

The administrative record reflects that claimant has received unemployment benefits in the amount of $3,129.00, since filing a claim with an effective date of December 11, 2016. The administrative record also establishes that the employer did participate in the December 23, 2016 fact-finding interview by way of J. Michael Bertroche, owner.

REASONINGS AND CONCLUSIONS OF LAW:

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

Iowa unemployment insurance law disqualifies claimants who voluntarily quit employment without good cause attributable to the employer or who are discharged for work-connected misconduct. Iowa Code §§ 96.5(1) and 96.5(2)a. 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). A 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).

Separation occurred in the case at hand following a meeting on December 3, 2016, in which the claimant was told that he was having his "wings clipped". The employer, through Dr. Bertroche, had twice referenced to the claimant on November 2 and 29, that if he divorced their daughter, his "tenure would be over" and his "wings would be clipped" which reasonably eludes to employment ending. The undisputed evidence is the employer used the same "wings clipped" verbiage at the December 3, 2016 meeting, coupled with immediately requesting the employer issued phone, IPAD and keys back from the claimant. Once the claimant left meeting, the employer reset passwords and its safe. For these reasons, the administrative law judge

concludes the claimant reasonably interpreted the employer's use of "wings clipped" and its actions on December 3, 2016, to mean he was not being temporarily demoted or disciplined. Based on the evidence presented, the administrative law judge concludes that the claimant did not have the option of remaining employed nor did he express intent to terminate the employment relationship. Where there is no expressed intention or act to sever the relationship, the case must be analyzed as a discharge from employment. *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438 (Iowa Ct. App. 1992).

The next issue is whether the claimant was discharged for reasons that would constitute misconduct.

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:
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> 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).

Iowa Admin. Code r. 871-24.32(4) provides:

> (4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. 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. In cases where a suspension or

disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

In an at-will employment environment, an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

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 found the claimant's testimony to be more credible than the employer, and 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.

In this case, the claimant's separation occurred at a December 3, 2016 meeting between the Bertroches and the claimant, with Lance Kitzmiller present. The administrative law judge is persuaded that separation occurred at the time the employer requested back its company issued keys, IPAD and phone from the claimant, and not thereafter. Therefore, any actions the claimant may or may not have taken after the separation to reset or delete the contents of the IPAD before returning it, or subsequently deleting Facebook and other accounts are irrelevant, because they occurred after the decision to separate was initiated by the employer. Nor did the employer offer specific information about why the claimant was confronted on December 3, 2016, if he had been neglecting his job duties for months.

Under the definition of misconduct for purposes of unemployment benefit disqualification, the conduct in question must be "work-connected." *Diggs v. Emp't Appeal Bd.*, 478 N.W.2d 432 (Iowa Ct. App. 1991). The claimant credibly testified the employer twice warned him of being discharged, should he elect to divorce Heather Almeida, who was Dr. Bertroche and Mrs. Bertroche's daughter. Besides the obvious tensions that arise between divorcing families, the employer failed to show how the claimant's divorcing the Bertroches' daughter could constitute work related misconduct. Further, the administrative law judge is not persuaded that the

claimant's timing of filing for divorce one day prior to his separation had zero impact on the decision to discharge him.

It was the employer's position that the claimant was being disciplined based upon his failure to do his job, including not posting or uploading vehicles to various websites to generate sales. The employer failed to furnish any specific details except that its sales had slumped and it was attributable to the claimant's failure to do his job. The employer did not furnish a timeline of months that were analyzed to determine sales were down. The employer did not elaborate to any specifics in terms of the number of vehicles posted in the past on the website and what the claimant was or was not posting at the time of his separation.

Iowa Admin. Code r. 871-24.32(8) provides:

> (8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

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). In contrast, the claimant provided specific reports which reflected that sales had previously declined in 2016 but in November had increased (Claimant exhibit 5), which would suggest even if he had slipped in his job duties, that sales were not being affected in the month leading up to his discharge. The claimant further credibly testified he sold two vehicles on his final day of employment, which would reasonably suggest he was successfully completing his job duties.

The employer has the burden of proof to establish misconduct in a discharge situation, the employer did not rebut the claimant's credible testimony. Mindful of the ruling in *Crosser*, *id.,* and noting that the claimant presented direct, first-hand testimony, while the employer failed to provide specific information supporting the "clipping of wings" of the claimant, the administrative law judge concludes that the claimant's recollection of the events is more credible than that of the employer. The employer has not established a current or final act of misconduct, and, without such, the history of other incidents need not be examined. Regardless of whether the claimant was fired for his alleged poor performance, which is not supported by the evidence, or because of the relationship with his employer's daughter, misconduct has not been established. Therefore 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.

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

DECISION:

The December 27, 2016, (reference 02) decision is affirmed. The claimant was not discharged from employment due to job-related misconduct. Benefits are allowed, provided he is otherwise

eligible. The claimant has not been overpaid benefits and the employer is not relieved of charges associated with the claim.

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Jennifer L. Beckman
Administrative Law Judge

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Decision Dated and Mailed

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