IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

KOLTON J EALY Claimant **PRECISION UNDERGROUND** Employer	**APPEAL 17A-UI-00400-JCT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 12/11/16** **Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the January 9, 2017, (reference 02) unemployment insurance decision that denied benefits based upon separation. The parties were properly notified about the hearing. A telephone hearing was held on February 20, 2017. The claimant participated personally and was represented by Katrina M. Phillip, Attorney at Law. Former employee, Raymond Miller, testified on behalf of the claimant. The employer participated through Tara Z. Hall, Attorney at Law. Employer witnesses included Jamie Nobiling, Owner, and Doug Rose, Coordinator. Employer Exhibits 1 through 4 and Claimant Exhibit A were received into evidence. 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.

ISSUE:

Did the claimant quit the employment with good cause attributable to the employer, or was he discharged for reasons that would constitute misconduct?

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/operator and was separated from employment on December 13, 2016. The evidence is disputed whether he voluntarily quit or was discharged.

The employer provides utility services which require primarily outdoor work, year round. The claimant began employment in May 2016. When he was hired, he was not issued a written handbook or written policies regarding winter weather, attendance (including no-call/no shows), insubordination or OSHA. The claimant had no verbal or written warnings prior to separation.

In late November/early December, the employer held a meeting with its staff. The claimant was made aware that he would be working in winter conditions before they arrived, and when offered a winter layoff, he declined, in exchange for retaining summer vacation. During the meeting, the employer verbally explained that through the winter, they would adhere to a 15 degree threshold, meaning that foremen had the discretion to call off work when the maximum

temperature for the day, pre-wind chill, was 15 degrees or less. The employer provided a winter boot allowance to the employer, and expected employees to dress accordingly for weather. The employer also utilized an idled, heated van, for when employees needed to warm up. At the meeting, the employer also explained that existing deadlines had to be met, and it was the foreman's discretion to call the work off.

The claimant continued to work for several weeks in cold, Iowa winter conditions, and acknowledged some days the temperature was below 15 degrees. Prior to separation, the claimant did not raise any concerns to the employer, through management or human resources, about continuing to work in winter conditions. The claimant last performed work on December 9, 2016. The claimant was off work on December 12, 2016, for a prescheduled deer hunting day. On December 13, 2016, the claimant did not report to work. It was the claimant's position that he should not have to work because it was -32 degrees according to his cellphone. The claimant did not supply records which corroborated the -32 temperature but records reflect the temperatures on December 13, 2016 ranged from 3 (-11 with wind chill) to 14 degrees that day (Claimant Exhibit A). Most of the employer's staff worked outdoors and performed work on December 13, 2016 (Employer Exhibit 3). Because the air temperature was above -15 degrees, no special protocol (per OSHA) was needed to perform the work, although Mr. Nobiling stated he expected employees to take breaks to warm up as needed.

According to employer phone records, the claimant first attempted to call his foreman, Bryan Brendeland, after the 7:00 a.m. start time but could not reach him. The claimant could not reach Mr. Brendeland because earlier that morning, he and a co-worker, Raymond Miller, had tendered their resignations to Mr. Nobiling, which became effective immediately. (The claimant's brother was an employee and also called off his shift around the same time.) The claimant then called Todd Tilley, who advised him to call Doug Rose. The claimant called Mr. Rose, who confirmed the crew was working that day. The claimant stated he was not coming in. Upon learning of the claimant's refusal to come to work, Mr. Nobiling called the claimant around 8:44 a.m. He did not reach him and did not leave a message. He then followed up with a text message (Employer Exhibit 1) at 8:48 a.m., stating he was aware the claimant had refused to come into work and if he was refusing to work, it would be considered his resignation and he needed to return his employer property. The claimant immediately called Mr. Nobiling back, and an argument ensued. The undisputed evidence is the claimant refused to come into work, and Mr. Nobiling responded that he could not pick and choose when he felt like coming to work. The claimant stated he was not resigning. The claimant was told he was expected to return to work the next day and according to Mr. Nobiling, he replied "I'll be in on the 14th," but did not elaborate if it would be to return tools or return to work.

The claimant asserted he believed he was fired based on the call. However, there was no discussion about discharge/fire/termination, or returning tools during the phone conversation. At 10:03 a.m., Mr. Nobiling sent the claimant a second text message indicating the claimant was not fired but needed to report to work at 7:00 a.m. (Employer Exhibit 1). The claimant did not report to work at 7:00 a.m. but if he had, he would have received a written warning from Mr. Nobiling based on his conduct on December 13, 2016. At the hearing, the claimant indicated he did not intend to return to perform work after December 13, 2016. Instead, the claimant called Mr. Nobiling at 6:21 a.m. and told him that he was "done" and did not want to work outside. He then went to the employer at 9:00 a.m. to return to his tools and separation subsequently occurred.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was not discharged, but quit the employment without good cause.

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. The credible evidence presented does not support that the claimant's separation was initiated by the employer. Rather, even in the absence of submitting a formal resignation letter, the claimant refused to come into work on December 13, had no intent to return and then returned his tools to the employer on December 14, 2016. The administrative law judge is not persuaded that the contact with Mr. Nobiling on December 13, 2016, would support a reasonable person believing they were discharged. Instead, Mr. Nobiling told the claimant in the prior text message that if he was quitting, he needed to return his tools. He had a follow up conversation minutes after the text message was sent and no credible evidence was presented that Mr. Nobiling discharged the claimant but rather, told him that he was expected to come in the next day at 7:00 a.m. Further, Mr. Nobiling followed up with a second text message, explicitly stating the claimant was not fired and to come to work the next day (Employer Exhibit 1).

Generally, when an individual mistakenly believes they are discharged from employment, but was not told so by the employer, and they discontinue reporting for work, the separation is considered a quit without good cause attributable to the employer. However, this does not appear to be consistent with the case at hand, as it cannot be ignored that the claimant stated he did not intend to return to work after the December 13, 2016 call off. There was no mistake or miscommunication, but rather, the employer said if the claimant was quitting he needed to return tools, and the claimant voluntarily relinquished tools the next day. For these reasons, the administrative law judge concludes that the claimant voluntarily quit the employment, and was not discharged.

The next issue is whether the claimant voluntarily quit the employment for reasons that would constitute good cause attributable to the employer.

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. 871-24.25(21) 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:
>
> (21) The claimant left because of dissatisfaction with the work environment.

Iowa Admin. Code r. 871-24.25(27) 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:
>
> (27) The claimant left rather than perform the assigned work as instructed.

The claimant has the burden of proving that the voluntary leaving was for good cause attributable to the employer. "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. Industrial Relations Commission*, 277 So.2d 827 (Fla. App. 1973). Quits due to intolerable or detrimental working conditions are deemed to be for good cause attributable to the employer. See 871 IAC 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).

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*. After assessing the credibility of the claimant who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the weight of the evidence in the record does not establish unsafe or detrimental working conditions that would cause a reasonable person to quit the employment without notice.

The credible evidence is that the claimant was offered a winter layoff before the winter season began, and he declined it, in exchange for summer vacation. He was made aware that he would be working in outdoor winter conditions, which are generally cold in Iowa, and even uncomfortable at times. The claimant was given a boot allowance, and expected to dress accordingly to perform his work. The employer also expected employees to take necessary breaks to keep warm. The claimant then worked in winter conditions from November through December 9, 2016, and acknowledged there were days that he worked in less than 15 degrees. He never reported concerns to the employer or human resources about non-adherence to the 15 degree guideline. Inasmuch as the claimant suggested that he was not returning to work because he was expected to work in less than 15 degree weather, his concerns are not individually addressed as the claimant acquiesced to them by not raising concerns with her supervisor or quitting earlier when they arose. Further, the employer explained at the meeting

regarding weather conditions that the 15 degree guideline was based on the foreman's discretion, (not mandatory), and may not apply when there were deadlines to be met. The administrative law judge is not persuaded that the employer was not or did not intend to honor the 15 degree guidelines whenever possible.

In addition, the evidence presented does not corroborate that the weather was -32 degrees as the claimant asserted, and stated for the reason of not performing work on December 13, 2016. Rather, the claimant's own evidence was that temperatures on December 13, 2016 ranged from 3 (-11 with wind chill) to 14 degrees that day (Claimant Exhibit A). It cannot be ignored that most of the employer's staff (excluding those who quit, and the claimant and his brother who called off) worked outside on December 13, 2016 (Employer Exhibit 3) and without issue. If it was indeed -32 degrees, it may lend support to the claimant's position that it was too cold to reasonably expect employees to work outside on December 13, 2016, in light of any existing deadlines, but that is not the case at hand. Therefore, based on the evidence presented, the administrative law judge concludes the claimant voluntarily quit the employment because he did not like the winter work conditions. While the claimant's leaving the employment may have been based upon good personal reasons, it was not for a good cause reason attributable to the employer according to Iowa law. Benefits must be denied.

DECISION:

The January 9, 2017, (reference 02) unemployment insurance decision is affirmed. The claimant voluntarily left the employment without good cause attributable to the employer. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

_____
Jennifer L. Beckman
Administrative Law Judge

_____
Decision Dated and Mailed

jlb/rvs

NOTE TO EMPLOYER:
If you wish to change the street name of record, please access your account at:
https://www.myiowaui.org/UITIPTaxWeb/.
Helpful information about using this site may be found at:
http://www.iowaworkforce.org/ui/uiemployers.htm and
http://www.youtube.com/watch?v=_mpCM8FGQoY