

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

ELIZABETH S TOUBEKIS
Claimant

AEROTEK INC
Employer

APPEAL 16A-UI-08236-NM-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 12/20/15
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the July 19, 2016, (reference 02) unemployment insurance decision that denied benefits based upon her discharge for insubordination. The parties were properly notified of the hearing. A telephone hearing was held on August 16, 2016. The claimant Elizabeth Toubekis participated and was represented by attorney Gary Nelson. The employer Aerotek Inc. participated through Professional Account Recruiting Manager Jackie Finley.

ISSUE:

Did claimant voluntarily leave the employment with good cause attributable to the employer or did employer discharge the claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a light industrial assembler from July 31, 2015, until this employment ended on July 1, 2016, when she was discharged.

On July 1, 2016, claimant was joking with her immediate supervisor, Ryan Sherman, that he should fire her. Finley testified that Sherman was confused by claimant's statements to him and told her to return to work. According to Finley claimant refused to return to work even after being asked by Sherman to do so multiple times. Finley testified Sherman eventually told claimant if she was not going to work she needed to leave, which she then did. Claimant had no further contact with the employer after July 1.

Claimant admitted she was joking with Sherman about firing her on July 1, but denies she actually wanted to be discharged. Claimant testified she had similar interactions with Sherman in the past without incident, so she assumed he knew she was kidding. Claimant's interaction with Sherman that day occurred while she was waiting for her machine parts to be changed out.

After their initial conversation, claimant left to go to the bathroom. When she came back Sherman approached her and, according to claimant, told her to gather her things because he was walking her out. At first claimant thought Sherman was kidding and just taking her to work on a different machine, as her parts were still being changed out. Claimant testified she then asked Sherman where they were really going and he confirmed he was escorting her out of the building. According to claimant, she then told Sherman she was kidding about getting fired, but he told her the decision had already been made. Claimant denied she was ever directed by Sherman to get back to work, as her machine parts were being changed out throughout their entire conversation and as she was being escorted out. Claimant denies she refused to complete any task as directed or that she gave any indication she wanted to quit her job.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

Iowa Code section 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.

A voluntary quitting means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer and requires an intention to terminate the employment. *Wills v. Emp't Appeal Bd.*, 447 N.W. 2d 137, 138 (Iowa 1989); see also Iowa Admin. Code r. 871-24.25(35). 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). Here, there is no indication that claimant expressed any intention to resign her position. At best, claimant left work after being discharged for insubordination.

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.

871 IAC 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 Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The decision in this case rests, at least in part, on the credibility of the witnesses. 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.*

The employer contends claimant was discharged after she refused multiple instructions to go back to work. Claimant testified she was never instructed to go back to work and did not refuse to complete any task as directed. Mindful of the ruling in *Crosser*, taking into consideration the applicable factor listed above, using her own common sense and experience, and noting that the claimant presented direct, first-hand testimony while the employer relied upon second-hand witnesses, the administrative law judge finds the claimant's version of events to be more credible than the employer's recollection of those events.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 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. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

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. A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

While claimant's joking with her supervisor about wanting to be terminated was certainly ill-advised, this conduct, in and of itself, does not meet the standard of misconduct for the purposes of determining unemployment insurance benefits. The employer has provided insufficient evidence to show claimant was insubordinate. Inasmuch as employer has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning, benefits are allowed.

DECISION:

The July 19, 2016, (reference 02) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

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