IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

LUCAS P GILPIN Claimant **BRANDON VAN VLEET** Employer	**APPEAL 21A-UI-00228-SC-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 09/20/20** **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:

On December 4, 2020, Brandon Van Vleet (employer) filed an appeal from the December 1, 2020, reference 03, unemployment insurance decision that allowed benefits based upon the determination Lucas P. Gilpin (claimant) was not discharged for willful or deliberate misconduct. The parties were properly notified about the hearing held by telephone on February 4, 2021. The claimant participated personally. The employer participated through Kari Miller, Office Assistant, and Randy Barnes, Transportation Supervisor. The claimant's proposed exhibit was not admitted into the record as it was not relevant. The employer's Exhibit 1 was admitted over the claimant's objection to the foundation.

ISSUES:

Did the claimant voluntarily quit employment with good cause attributable to the employer or did the employer discharge the claimant for job related misconduct?
Has the claimant been overpaid unemployment insurance benefits and, if so, can the repayment of those benefits to the agency be waived and charged to the employer's account?

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 Seasonal Driver beginning on July 10, 2019, and his last day worked was August 21, 2020. The claimant reported directly to Randy Barnes, Transportation Supervisor. The employer does not schedule employees or have an attendance policy. Barnes would text employees the day before and let them know what hours they would be working the following day. If an employee needed a day off, they would write their name on a white board and Barnes would erase it, if he denied the request.

The week of August 17, the claimant submitted his two-week notice. The following day, he spoke with Rodney Garber, Field Supervisor. The claimant revoked his resignation and asked to transfer to another area with the employer, because he no longer wanted to work for Barnes. The same week, the claimant also put his name on the board to be off on Saturday, August 22, and Barnes did not erase it.

On August 21, Barnes notified the claimant via text that he would be working the following day. The claimant refused and Barnes called the claimant. The claimant told Barnes that he was a "fat lazy piece of shit" who should have moved the machines earlier and Barnes responded, "fuck that" and "suck my dick." (Barnes' Testimony) The argument escalated from there. Barnes then asked the claimant about his request to transfer. The claimant acknowledged he made the request and stated it was because he did not like working for Barnes and called him a "fucking bully," who did not treat people with respect. (Claimant's Testimony) Barnes then challenged the claimant to say that to his face.

The claimant went to the shop and the two continued to argue about ongoing work issues, including whether the claimant would work the following day. Barnes was yelling at the claimant and both were using profanity. The conversation ended when Barnes told the claimant that he was fired and to remove his personal items form the truck. The claimant had not had prior warnings related to his behavior or attendance and did not know his job was in jeopardy.

REASONING AND CONCLUSIONS OF LAW:

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

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:
>
> 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.
>
> …
>
> 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 provides, in relevant part:

> 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).

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*. When 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 findings of fact show how the disputed factual issues were resolved. Both the claimant and Barnes have similar motives and purposes for presenting the information that they did. As the employer has the burden of proof to show that the claimant voluntarily quit and, if not, that he was discharged for disqualifying misconduct, any disputed facts were found in the claimant's favor.

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 burden of proof rests with the employer to show that the claimant voluntarily left he employment. *Irving v. Emp't Appeal Bd.*, 883 N.W.2d 179 (Iowa 2016). 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). It 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). 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 employer has not met the burden of proof to establish that the claimant voluntarily quit employment. The claimant rescinded his resignation and requested an internal transfer. Barnes and the claimant both agree that he was discharged on August 21. Therefore, the claimant did not voluntarily end the employment relationship.

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). 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. However, 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 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).

What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. 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." Typically, "the use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct, even in the case of isolated incidents or situations in which the target of abusive name-calling is not present when the vulgar statements are initially made." *Myers v. Emp't Appeal Bd.*, 462 N.W.2d 734 (Iowa Ct. App. 1990).

The employer has not met the burden of proof to establish that the claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. In most cases, the use of profanity and name-calling toward a supervisor would be disqualifying conduct, even without prior warning. However, in this case, the supervisor responded in kind. It appears this was a form of communication on the job site and was tolerated in the work environment. Therefore, it is not disqualifying misconduct without prior warning.

In this case, the employer had not previously warned the claimant about the issue leading to the separation. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Accordingly, benefits are allowed.

As benefits are allowed, the issue of overpayment is moot and charges to the employer's account cannot be waived.

DECISION:

The December 1, 2020, reference 03, unemployment insurance decision is affirmed. The claimant did not voluntarily quit, but he was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. As benefits are allowed, the issue of overpayment is moot and charges to the employer's account cannot be waived.

Stephanie R. Callahan
Administrative Law Judge

February 19, 2021
Decision Dated and Mailed

src/mh