IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

LATOYA N MONROE
Claimant

PARCO LTD
Employer

APPEAL NO. 18A-UI-07863-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 06/24/18
Claimant: Respondent (1)

Iowa Code Section 96.5(2)(a) – Discharge

STATEMENT OF THE CASE:

The employer filed a timely appeal from the July 13, 2018, reference 01, decision that allowed benefits to the claimant provided she was otherwise eligible and that held the employer's account could be charged for benefits, based on the Benefits Bureau deputy's conclusion that the claimant was discharged on June 16, 2018 for no disqualifying reason. After due notice was issued, a hearing was commenced on August 14, 2018 and concluded on August 30, 2018. Jessica Walsh represented the employer on both hearing dates. Claimant Latoya Monroe did not receive required notice of the August 14, 2018 proceeding and, therefore, did not participate in the August 14, 2018 appeal hearing. Ms. Monroe contacted the Appeals Bureau on August 14, 2018, within minutes after the hearing record had closed. The fact that Ms. Monroe did not receive the required hearing notice provided good cause to reopen the hearing record to allow both parties fair and full opportunity to participate in the hearing. Exhibit 1 was received into evidence. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant (DBRO). On August 14, 2018, the administrative law judge took official notice of the fact-finding materials for the limited purpose of determining whether the employer participated in the fact-finding interview. Due to Ms. Monroe's participation and testimony on August 30, 2018, it became unnecessary for the administrative to take official notice of the fact-finding interview.

There is more to be said regarding Ms. Monroe's absence from the August 14, 2018 appeal hearing. The Appeals Bureau was unable to serve Ms. Monroe with notice of that appeal hearing. On July 26, 2018, the Appeals Bureau mailed notice of the appeal hearing to Ms. Monroe's last-known address of record. That address corresponded to a room at a Cedar Rapids Motel 6. Also on July 26, 2018, the Appeals Bureau, in a separate mailing, sent a copy of the employer's appeal materials to Ms. Monroe at the same last-known address of record. On August 1, 2018, the Appeals Bureau received both envelopes back from the United States Postal Service (USPS). Affixed to each envelopment was a sticker that indicated "RETURN TO SEND, ATTEMPTED – NOT KNOWN, UNABLE TO FORWARD." On August 1, 2018, an Appeals Bureau clerk called Ms. Monroe's last-known telephone number of record and left a message for Ms. Monroe to call back with an updated address. Ms. Monroe did not respond to that message. The Appeals Bureau clerk made an additional attempt to contact Ms. Monroe with a similar outcome. On August 2, 2018, the Appeals Bureau mailed a copy of the fact-finding materials to Ms. Monroe at the same last-known address of record. On August 9, 2018, the Appeals Bureau received that envelope back from the USPS with the same sort of sticker indicating that Ms. Monroe was unknown at the address of record and that USPS was unable to

forward the correspondence. When Ms. Monroe made contact with the Appeals Bureau on August 14, 2018, she provided an alternate mailing address in care of her brother.

ISSUE:

Whether Ms. Monroe separated from the employment for a reason that disqualifies her for unemployment insurance benefits or that relieves the employer's account of liability for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Latoya Monroe was employed by Parco, Ltd., d/b/a Wendy's, as a full-time crew member. Ms. Monroe commenced the employment on March 28, 2018 and last performed work for the employer on June 16, 2018. On June 16, 2018, Ms. Monroe was working with three other crew members and Assistant Manager Josiah Coleman. Ms. Monroe was scheduled to work from 5:00 p.m. to 2:00 a.m. Shortly before 8:45 p.m., Mr. Coleman directed Ms. Monroe to leave. Mr. Coleman did not provide Ms. Monroe with a reason for his decision to send her home. Ms. Monroe had not done anything to prompt Mr. Coleman to send her home. Ms. Monroe had recently been promoted to a quasi-managerial status and had been provided with the uniform that went with those duties. When Ms. Monroe asked for a reason, Mr. Coleman directed her to leave and threatened to call the police. At no time did Mr. Coleman direct Ms. Monroe to contact Diane Kelly, District Manager. At no time did Ms. Monroe contact her boyfriend or anyone else to involve them in the matter. Pursuant to Mr. Coleman's directive, Ms. Monroe clocked at 8:45 p.m. At no time did Ms. Monroe indicate that she was quitting the employment. As Ms. Monroe was leaving, her fellow crew members became upset that Mr. Coleman was sending her home. When Ms. Monroe departed from the workplace, the other three crew members walked out in protest of Mr. Coleman's decision to send Ms. Monroe home. Once they were outside the workplace, law enforcement officers arrived. The law enforcement officers entered the restaurant to speak with Mr. Coleman and then came outside to speak with Ms. Monroe and counseled her to leave the premises. Ms. Monroe advised that she had been leaving. Later that evening, Ms. Monroe telephoned the workplace to ask when she would receive her final paycheck. Mr. Coleman told Ms. Monroe to call back on June 25, 2018. Ms. Monroe said okay and terminated the call.

On June 25, 2018, Ms. Monroe went to the workplace to collect her paycheck. While she was there, Ms. Monroe spoke to Assistant Manager Andrew Sexton regarding a concern about the accuracy of her check. Mr. Sexton directed Ms. Monroe to contact Diane Kelly, District Manager. Ms. Monroe had never met or interacted with Ms. Kelly. Ms. Monroe told Mr. Sexton that she lacked a telephone number for Ms. Kelly. Mr. Sexton said he would call Ms. Kelly on Ms. Monroe's behalf. Mr. Sexton used his personal cell phone to call Ms. Kelly and then went to the back of the store to speak privately with Ms. Kelly. Ms. Monroe did not follow and was not invited to follow. Mr. Sexton then returned to speak with Ms. Monroe. Mr. Sexton told Ms. Monroe that Ms. Kelly said the paycheck was correct, that Ms. Kelly wanted Ms. Monroe off the property, and that if Ms. Monroe did not leave, Ms. Kelly would call the police.

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. Iowa Administrative Code rule 871-24.1(113)(c). A quit is a separation initiated by the employee. Iowa Administrative Code rule 871-24.1(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 Iowa Administrative Code rule 871-24.25.

In considering an understanding or belief formed, or a conclusion drawn, by an employer or claimant, the administrative law judge considers what a reasonable person would have concluded 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 Ct. 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 weight of the evidence establishes that Ms. Monroe was discharged by the employer on June 16, 2018 and did not voluntarily quit. Ms. Monroe provided candid and credible testimony regarding the circumstances surrounding her departure from the workplace on June 16, 2018 and the events that followed. Ms. Monroe's testimony at the appeal hearing was consistent with the statement she made at the July 10, 2018 fact-finding interview and consistent with her assertion, at the time she established her claim, that she was discharged on June 16, 2018. On the other hand, the information provided by the employer has evolved over time, most recently in connection with the filing of the appeal, to which the employer attached an unsworn and unsigned statement attributed to Diane Kelly and drafted for the appeal. Ms. Kelly's statement regarding the events that transpired on June 16 and the relevant days that followed was drafted about a month after the separation had occurred. The employer elected not to present testimony from Ms. Kelly or from any of the several individuals directly involved in the events of June 16. The employer had the ability to present such testimony and the absence of such testimony was conspicuous. The employer presented insufficient evidence to rebut Ms. Monroe's testimony. Ms. Monroe reasonably concluded that she was discharged from the employment when Mr. Coleman directed her to leave the workplace and summoned law enforcement to ensure that she left. The weight of the evidence does not support the employer's assertion that Ms. Monroe was just sent home for the day, does not support the assertion that she was directed on June 16 to contact Ms. Kelly, or the assertion that if she did that she might have been welcomed back to the workplace. The message Mr. Sexton delivered to Ms. Monroe on June 25 further supports the conclusion that Ms. Monroe was discharged and did not quit the employment.

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:
>
> 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 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(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 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 Iowa Administrative Code rule 871-24.32(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).

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. See Iowa Administrative Code rule 871-24.32(4).

An employer has the right to expect decency and civility from its employees and an employee's use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct disqualifying the employee from receipt of unemployment insurance benefits. *Henecke v. Iowa Department of Job Service*, 533 N.W.2d 573 (Iowa App. 1995). Use of foul language can alone be a sufficient ground for a misconduct disqualification for unemployment benefits. *Warrell v. Iowa Dept. of Job Service*, 356 N.W.2d 587 (Iowa Ct. App. 1984). An isolated incident of vulgarity can constitute misconduct and warrant disqualification from unemployment benefits, if it serves to undermine a superior's authority. *Deever v. Hawkeye Window Cleaning, Inc.* 447 N.W.2d 418 (Iowa Ct. App. 1989).

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).

The weight of the evidence in the record establishes a discharge for no disqualifying reason. The employer presented insufficient evidence, and insufficiently direct and satisfactory evidence, to rebut Ms. Monroe's testimony and to prove, by a preponderance of the evidence, that Ms. Monroe's separation from the employment was based on misconduct in connection with the employment. The employer's allegations concerning purported abusive language, purported threats, the purported involvement of Ms. Monroe's boyfriend, and Mr. Coleman's alleged fear do not rise above mere allegations. The administrative law judge would again note the employer's election not to present testimony from any of the individuals directly involved in the relevant events and the conspicuous absence of such testimony. Because the evidence establishes a discharge for no disqualifying reason, Ms. Monroe is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The July 13, 2018, reference 01, decision is affirmed. The claimant was discharged on June 16, 2018 for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/rvs