IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

WESTHOFF, JOHN, J
Claimant

RON SAN ENTERPRISES INC
DAYS INN AND SPIRITS BAR & GRILL
Employer

APPEAL NO. 12A-UI-15037-JT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 02/26/12
Claimant: Appellant (2)

Section 96.5(1) – Voluntary Quit

STATEMENT OF THE CASE:

John Westhoff filed a timely appeal from the December 18, 2012, reference 01, decision that denied benefits. After due notice was issued, an in-person hearing was held in Dubuque on February 28, 2013. Mr. Westhoff participated personally and was represented by attorney Zeke McCartney. Attorney Christopher Williams represented the employer and presented testimony through Ron Conrad Junior, Cindy Moran, Julia Harwick and Bernie Fortman. Exhibits Three through Six were received into evidence.

ISSUE:

Whether Mr. Westhoff separated from the employment for a reason that disqualifies him for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Ron Conrad, Sr., and Sandra Conrad, husband and wife, operate the Days Inn Motel in Dubuque and the associated Spirits Bar & Grill on the same premises. On September 5, 2012, Ron Conrad, Sr., had discharged John Westhoff from his maintenance position. On September 12, 2012, Ron Conrad, Sr., rehired Mr. Westhoff to work part-time in motel maintenance and also to work part-time as a barback in the bar & grill. The maintenance work hours were mornings, Monday through Friday. The barback hours consisted of four hours on Fridays and four hours on Saturdays. At the time of the rehire, the employer set the pay for the maintenance work at $9.50 per hour. At the time of the rehire, the employer set the pay for the barback work at $9.00 per hour plus tips. When Mr. Westhoff worked in maintenance, his immediate supervisor was Bernie Fortman, Maintenance Manager.

At the start of November 2012, the employer reduced Mr. Westhoff's pay for the barback work to $8.00 per hour plus tips. The change appeared with the paycheck Mr. Westhoff received on November 9, 2012. The employer reduced the barback pay after Mr. Westhoff prepared and gave free pizza to a front desk employee without authorization.

Ron Conrad, Sr., was out-of-town on November 9, when Mr. Westhoff received the paycheck that reflected the reduction in pay. During that time, Ron Conrad, Jr., General Manager, was in charge of the motel and bar & grill operations. When Mr. Westhoff collected his paycheck on November 9 and saw the reduction in pay for the barback work he had performed, he entered the front office and sat in a chair. Ron Conrad, Jr., and Cindy Moran, assistant to Sandra Conrad, were in the front office. Mr. Westhoff told Ron Conrad, Jr., and Ms. Moran that he was quitting and was giving his two-week notice. Mr. Westhoff added that he could not live on $8.00 per hour. Ms. Moran told Mr. Westhoff that while there was no policy requiring a written resignation, she would like to have Mr. Westhoff's resignation in writing. Ron Conrad, Jr., told Mr. Westhoff to "think about it." Mr. Westhoff at that time reaffirmed that he was quitting.

At the time Mr. Westhoff announced his intention to quit, the employer had been contemplating discharging Mr. Westhoff from the employment due to work performance. At the time, the employer was battling an ongoing bedbug infestation. As a member of the maintenance department, Mr. Westhoff was responsible for spraying insecticide in guest rooms in an attempt to kill the bedbugs. On November 6, Mr. Fortman and Ron Conrad, Sr., inspected rooms that Mr. Westhoff had been instructed to check for bedbugs. They found evidence of bedbugs in at least one of the rooms and concluded that Mr. Westhoff had not adequately performed his bug spraying duties. In addition, bartenders had complained to the employer that Mr. Westhoff was not available when they most needed him.

After Mr. Westhoff announced his quit to Ron Conrad, Jr., and Ms. Moran, he told other staff on that same day that he was quitting and had given his two-week notice. Mr. Westhoff told Mr. Fortman, his supervisor in maintenance. He told Julia Harwick, Executive Housekeeper.

On November 10, Mr. Westhoff reported for work. During his shift, he told Ron Conrad, Jr., and Ms. Moran that he was not going to quit until he found another job. Neither Ron Conrad, Jr., nor Ms. Moran responded to the statement. Neither asserted that the employer had accepted Mr. Westhoff's notice of quit from the previous day nor asserted that Mr. Westhoff could not rescind the quit. Thereafter, Mr. Westhoff continued to report for work. Prior to November 26, no one from the employer said anything to Mr. Westhoff to indicate that the employer had accepted his quit notice or that the employer anticipated the employment would end on a date certain.

Either Ron Conrad, Jr., or Ms. Moran had reported the November 9 conversation with Mr. Westhoff to Ron Conrad, Sr., and Sandra Conrad.

On the morning November 26, when Ron Conrad, Sr., arrived at the workplace and found Mr. Westhoff there, he went into the office and asked Ron Conrad, Jr., what Mr. Westhoff was doing there and added that he thought Mr. Westhoff had quit. When Mr. Westhoff came into the office, Ron Conrad, Sr., told Mr. Westhoff that he thought he had quit. What immediately followed was a shouting match between Ron Conrad, Sr., and Mr. Westhoff. Ron Conrad, Sr., told Mr. Westhoff that he blamed Mr. Westhoff for the bedbug infestation and told Mr. Westhoff that he was going to cost him $10,000.00. When it became clear to Mr. Westhoff that the employer would no longer allow him to report for work, Mr. Westhoff stated that he was going to get himself a "billboard" that announced the bedbug infestation and was going to post himself at the entrance to the employer's driveway. The shouting match occurred within earshot of the guests in the motel's breakfast area. At the end of the shouting match, Mr. Westhoff left the workplace, based on the employer's position that he had quit and could no longer work there.

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. 871 IAC 24.1(113)(c). A quit is a separation initiated by the employee. 871 IAC 24.1(113)(b).

Quitting requires an intention to terminate the employment relationship accompanied by an overt act carrying out the intent. Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 698, 612 (Iowa 1980). When an employee gives definite notice of leaving employment at a future date, the employee has quit. Id. In Local Lodge #1426, the employee had provided written notice of his quit to his foreman and had then started to look for another job the next week. The Court concluded that the job search indicated that the worker "was serious about quitting." Id. The Court further concluded that, "[T]he notice was effective as a voluntary termination of employment unless he had a right to retract it" under the applicable collective bargaining agreement.

The employer has the burden of proving the claimant quit his job without good cause attributable to the employer. See Langley v. Employment Appeal Board, 490 N.W. 2d 300, 304 (Iowa Ct. App 1992) (citing Des Moines Independent Community School District v. Department of Job Service, 372 N.W 2d 605, 608 (Iowa 1985).

The present case is distinguishable from the Local Lodge case and does not involve a definite notice of leaving employment nor an overt act to carry out an intent to quit. Mr. Westhoff's quit utterances were in immediate, rash response to learning that his pay for the barback work had been reduced by $1.00 per hour. Both of the people who purportedly had the authority to accept the quit notice responded in a manner that indicated the employer was not there and then accepting the quit notice. Ms. Moran asked Mr. Westhoff to reduce the quit notice to writing, which Mr. Westhoff did not do. Ron Conrad, Jr., asked Mr. Westhoff to think about it. Though Mr. Westhoff repeated his quit utterances to other employees on November 9, the weight of the evidence indicates that he did think about it, as instructed by Ron Conrad, Jr. On November 10, Mr. Westhoff told Ms. Moran and Ron Conrad, Jr., that he had decided to stay on while he looked for other employment. The employer said nothing to indicate that the quit notice had been accepted or that Mr. Westhoff could not change his mind after he calmed down. When Mr. Westhoff said he had decided to stay on, neither Ms. Moran nor Ron Conrad, Jr., told him he could not. There is no indication that Mr. Westhoff had commenced a search for other work between November 9 and 26.

In Langley, the Iowa Court of Appeals held that "when an employee voluntarily resigns and the employer refuses a subsequent withdrawal of resignation *prior to its effective date*, the employee is considered to have voluntarily quit for purposes of eligibility for unemployment benefits," Langley, 490 N.W. 2d at 304 (emphasis added). The present case is distinguishable from Langley. After Ms. Moran and Ron Conrad, Jr., made statements on November 9 that indicated the employer was not accepting Mr. Westhoff's utterance as a bonafide notice of quit, and after Mr. Westhoff indicated the next day that he intended to stay on, Mr. Westhoff continued to report for work as usual and did so beyond what would have been the end of his notice period if he had in fact quit. Prior to November 26, which was beyond what would have been the effective quit date, no one from the employer ever notified Mr. Westhoff that the employer took his November 9 utterances as a bonafide quit nor indicated to him that his statement on November 10, that he intended to continue in the employment, was unacceptable to the employer.

The weight of the evidence indicates that Mr. Westhoff was indeed discharged from the employment by Ron Conrad, Sr., on November 26, 2012 and did not in fact voluntarily separate from the employment. The shouting match on November 26 further reinforces that the separation was not voluntary.

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:
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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.

871 IAC 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.

The employer has the burden of proof in this 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 871 IAC 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 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

The weight of the evidence fails to establish disqualifying misconduct in connection with the employment. At the time of the discharge, the most recent alleged work performance issue had been the discovery of bedbugs on November 6 in a room that Mr. Westhoff had been assigned to spray. The weight of the evidence establishes that Mr. Westhoff had in fact sprayed the room in question. The employer blamed Mr. Westhoff for a bedbug infestation that was well beyond his control, an infestation that could not be controlled through use of bug spray. Mr. Fortman's testimony that the employer had a bug spray that was "99 percent effective" on bedbugs was incredulous. The weight of the evidence indicates that Mr. Westhoff's utterances on November 26, concerning posting himself in the employer's driveway to warn of bedbugs, was uttered *after* Ron Conrad, Sr., notified him that the employment was done. The weight of the evidence also indicates that Mr. Westhoff's outburst was in response to Ron Conrad, Senior's, outburst in which he erroneously blamed Mr. Westhoff for the bedbug infestation. The weight of the evidence fails to establish a "current act" of misconduct or a pattern of negligence indicating willful disregard of the employer's interests.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Westhoff was discharged for no disqualifying reason. Accordingly, Mr. Westhoff is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The Agency representative's December 18, 2012, reference 01, decision is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he 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/pjs