

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

MARK A WILSON
Claimant

NPC INTERNATIONAL INC
Employer

APPEAL 16A-UI-12928-SC-T
ADMINISTRATIVE LAW JUDGE
DECISION

OC: 09/11/16
Claimant: Respondent (2)

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
Iowa Admin. Code r. 871-26.4(7) – Reopening the Hearing Record

STATEMENT OF THE CASE:

NPC International, Inc. (employer) filed an appeal from the November 23, 2016, (reference 03) unemployment insurance decision that allowed benefits based upon the determination Mark A. Wilson (claimant) voluntarily quit after a change in his contract of hire which is a good cause reason attributable to the employer. The parties were properly notified about the hearing. A telephone hearing was scheduled for December 21, 2016 at 2:00 p.m. The morning of December 21, 2016, the claimant contacted the Appeals Bureau to notify it that his aunt had passed away and her funeral was being held that afternoon. Both parties and the witness were contacted, the employer did not object to a postponement and all individuals agreed they were available for the hearing at 10:00 a.m. on December 30, 2016. New notices were sent for the hearing.

On December 30, 2016 at 10:00 a.m., the administrative law judge contacted the parties for the hearing. The claimant was not available at the phone number he registered for the hearing and he did not participate. The employer participated through Tyka Johnston Unemployment Insurance Consultant with Equifax Workforce Solutions and General Manager Danyelle Cole. No exhibits were offered or received into the record. Official Notice was taken of the administrative record, specifically the fact-finding documents. The hearing record closed at 10:24 a.m.

At 11:23 a.m., the claimant contacted the Appeals Bureau. At 11:30 a.m., the administrative law judge contacted the claimant via telephone. There was no testimony taken from the claimant on the merits of the case. The claimant requested the record be reopened. He explained he had missed the phone call as his phone was on vibrate and he lost track of the time as he was working around the house.

ISSUES:

Has the claimant shown good cause to reopen the record?
Did the claimant voluntarily leave the employment with good cause attributable to the employer or did the employer discharge the claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?
Has the claimant been overpaid unemployment insurance benefits?
Can the repayment of those benefits to the agency be waived?
Can charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed part-time as a Delivery Driver beginning on November 13, 2013, and was separated from employment on September 17, 2016. The claimant had reported to General Manager Danyelle Cole since she started at his store in June 2016.

Earlier in September 2016, the claimant's driver's license was suspended. He was required to submit his motor vehicle record to the corporate office. It determined he was no longer eligible to drive for the employer. However, his code in the time tracking system did not change immediately from "driver" and he was allowed to continue making deliveries. Cole showed the claimant the email about his motor vehicle record and told him at some point he would not be allowed to work as a delivery driver.

On September 17, 2016, the claimant clocked in for his shift and noticed his code had been changed to "cook"; however, he still had driving authority until midnight that night. The claimant was upset and asked Cole why his code had changed. She reminded him of their discussion earlier that month and that the change had taken affect. She offered him a position as a cook or server. The claimant declined her offers and yelled at her using profanity.

The claimant continued to use profanity and berate Cole throughout the day due to the situation. She became upset by his comments and told him that he needed to stop. The claimant had his wife and children come in to the store to ask Cole why she was terminating him. Cole explained she could not discuss it with his wife. Around 4:00 p.m., the claimant was yelling at a new employee about how awful the employer is based on his situation. He then went back to the dishwashing room where Cole was working. She told him that there was nothing she could do as he refused to take a new position and he was making her feel like garbage. He told her that she was garbage and "a piece of shit." She told him to clock out and leave. The claimant returned ten minutes later crying and asking for his job back, but she told him that he no longer had a position with the employer.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$822.00, since filing a claim with an effective date of September 11, 2016, for the four weeks ending October 8, 2016. The administrative record also establishes that the employer had a third-party representative participate in the fact-finding interview. The third-party representative did not have any first-hand information, provide the contact information for a first-hand witness, or submit documentation that without rebuttal would have resulted in a disqualification for benefits. The documents provided on behalf of the employer state that the claimant was discharged due to a violation of a reasonable and known policy; however, it did not provide the date of the incident, specifics as to what occurred, or a copy of the policy the claimant violated. The third-party representative who participated in the fact-finding interview

stated the claimant had voluntarily resigned after declining a new position within the company on September 19, 2016.

REASONING AND CONCLUSIONS OF LAW:

Has the claimant shown good cause to reopen the record?

For the reasons that follow, the administrative law judge concludes the claimant has not shown good cause to reopen the record and his request is denied.

Iowa Admin. Code r. 871-26.14(7) provides:

(7) If a party has not responded to a notice of telephone hearing by providing the appeals section with the names and telephone numbers of its witnesses by the scheduled time of the hearing, the presiding officer may proceed with the hearing.

a. If an absent party responds to the hearing notice while the hearing is in progress, the presiding officer shall pause to admit the party, summarize the hearing to that point, administer the oath, and resume the hearing.

b. If a party responds to the notice of hearing after the record has been closed and any party which has participated is no longer on the telephone line, the presiding officer shall not take the evidence of the late party. Instead, the presiding officer shall inquire as to why the party was late in responding to the notice of hearing. For good cause shown, the presiding officer shall reopen the record and cause further notice of hearing to be issued to all parties of record. The record shall not be reopened if the presiding officer does not find good cause for the party's late response to the notice of hearing.

c. Failure to read or follow the instructions on the notice of hearing shall not constitute good cause for reopening the record.

At issue is a request to reopen the record made after the hearing had concluded. The request to reopen the record is denied because the party making the request failed to participate by being available at the number provided after agreeing to the time and date of the hearing.

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

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct. Benefits based upon wages credited from this employer's account are denied.

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 his employment. *Irving v. Empl. App. Bd.*, 15-0104, 2016 WL 3125854, (Iowa June 3, 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).

In this case, at the time the claimant left his shift on September 17, 2016, he no longer had the option of remaining employed. Cole made the decision the claimant needed to leave work and could not return as the claimant had called her “garbage” and a “piece of shit.” Therefore, the separation is deemed a discharge.

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). Iowa regulations define misconduct, stating:

“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.

Iowa Admin. Code r. 871-24.32(1)a. 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).

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). Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). “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 claimant failed to maintain his driver's license which was required for his position and was then insubordinate and used profanity towards his supervisor when offered a new position. He continued to do this throughout the day despite being told to stop. The employer has an interest in maintaining a hostility-free work environment. The claimant's conduct could have created a hostile environment toward the supervisor and he used profanity in a disrespectful and name-

calling context. This is disqualifying misconduct even without prior warning. Benefits based upon wages credited from this employer's account are denied.

Has the claimant been overpaid unemployment insurance benefits; if so, can the repayment of those benefits to the agency be waived and can charges to the employer's account be waived?

Because the claimant's separation was disqualifying, benefits were paid to which he was not entitled. The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. Iowa Code § 96.7. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. Iowa Admin. Code r. 871-24.10(1). The employer will not be charged for benefits if it is determined that they did participate in the fact-finding interview. Iowa Code § 96.3(7), Iowa Admin. Code r. 871-24.10. Iowa regulations state that to participate, at a minimum the employer or its representative, "must identify the dates and particular circumstances of the incident or incidents." Iowa Admin. Code r. 871- 24.10. Specifically, if the claimant was discharged it must describe the act or omission of the claimant and provide a copy of the specific rule or policy violated. *Id.* If the employee quit, the employer must provide the stated reason for quitting. *Id.*

In this case, the claimant has received benefits but was not eligible for those benefits. However, the employer did not participate in the fact-finding interview. Its third-party representative provided conflicting information regarding the reason for the separation and did not adequately provide information regarding the specific incidents that led to the claimant's separation. Since the employer did not participate in the fact-finding interview the claimant is not obligated to repay to the agency the benefits he received and the employer's account shall be charged.

DECISION:

The claimant's request to reopen the record is denied.

The November 23, 2016 (reference 03) unemployment insurance decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits based upon wages credited from this employer's account 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.

The claimant has been overpaid unemployment insurance benefits in the amount of \$822.00, but is not obligated to repay the agency those benefits. The employer did not participate in the fact-finding interview and its account shall be charged.

Stephanie R. Callahan
Administrative Law Judge

Decision Dated and Mailed

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