

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

STEVEN D WIRTJES
Claimant

CUSTOM-PAK INC - LP2
Employer

APPEAL 20A-UI-06668-BH-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 03/22/20
Claimant: Appellant (2)

Iowa Code section 96.5(1) – Voluntary Quit
Iowa Administrative Code rule 871-24.25 – Voluntary Quit Without Good Cause Attributable to the Employer
Iowa Administrative Code rule 871-24.26 – Voluntary Quit With Good Cause Attributable to the Employer
Iowa Code section 96.5(2)(a) – Discharge for Misconduct
871 Iowa Administrative Code rule 871-24.32(1)(a) – Misconduct

STATEMENT OF THE CASE:

The claimant, Steven D. Wirtjes, appealed the June 18, 2020 (reference 02) unemployment insurance decision that denied benefits based upon a finding Wirtjes voluntarily quit her job with Custom-Pak, Inc. - LP2 (Custom-Pak) without good cause attributable to the employer. The agency properly notified the parties of the appeal and hearing.

The undersigned presided over a telephone hearing on July 27, 2020. Wirtjes participated personally and testified. Custom-Pak participated through Ron Zimmer, who testified.

ISSUES:

Was Wirtjes's separation from employment with Custom-Pak a layoff, discharge for misconduct, or voluntary quit without good cause attributable to the employer?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the undersigned finds the following facts.

Custom-Pak hired Wirtjes on September 27, 1997. He worked full time until May of 2019, when he switched to part time work as a process technician. Wirtjes's employment with Custom-Pak ended on April 27, 2020.

Wirtjes loved his job at Custom-Pak. He liked his work schedule and his pay. Custom-Pak rates Wirtjes as a good employee.

In the spring of 2020, COVID-19 began spreading across the state and nation. The virus spreads easily. It is also more fatal than, for example, the seasonal flu. COVID-19 is more dangerous for individuals over age 65 and those who have other health conditions.

On March 18, 2020, Wirtjes noticed a coworker was working at Custom-Pak despite showing symptoms of COVID-19 and taking his mask on and off. Wirtjes told his coworker he should go home if he was not feeling well. The coworker told Wirtjes to “f-ck off.” Wirtjes told the coworker to come speak to management with him.

Zimmer told Wirtjes that the coworker had allergies and that there were no COVID-19 cases in Scott County. Wirtjes disagreed. Zimmer asked both Wirtjes and the coworker to voluntarily go home for the day to cool off. Wirtjes went home.

Custom-Pak put in place a policy that allowed employees who felt the risk posed by COVID-19 was too high to take a leave of absence. Wirtjes took a leave of absence under the policy because he felt Custom-Pak did not have enough safety measures in place to mitigate the risk that workers would spread the virus while on the job. He also knew that some coworkers partied without social distancing while off duty. Wirtjes felt working at Custom-Pak under the circumstances presented an increased risk to his health.

While Wirtjes was on the leave of absence, Custom-Pak reviewed its policies and procedures. Custom-Pak implemented changes to help reduce the risk to workers posed by COVID-19. Those changes include:

- Requiring return-to-work advice from medical provider instead of accepting employee’s word;
- Removed all doors to eliminate touch points;
- Installed curtains in between work spaces;
- Made masks and face shields available to employees who want them;
- Allowed employees to request single-person work spaces;
- Limited capacity in break rooms and conference rooms to ensure social distancing;
- Converted the entryway to an additional break room to ensure social distancing;
- Have a thermometer for temperature checks;
- Hired additional custodial crew to increase cleaning in the facility;
- Placed hand sanitizer available throughout the plant; and
- Offered tours to employees to show the mitigation measures put in place.

Wirtjes was unaware of the mitigation measures put in place by Custom-Pak. In April, Custom-Pak changed its voluntary work policy. It required employees to return to work on May 4, 2020, unless the employee sought a special review of the employee’s leave for reasons relating to COVID-19, including symptomatic illness, child care issues, or a high-risk health issue.

Vicki Rixen called Wirtjes regarding his leave of absence on or about April 27, 2020. Wirtjes told Rixen he did not believe it was safe to return to work because of the lack of COVID-19 safety protocols in place. Rixen did not inform Wirtjes of the changes Custom-Pak had implemented to mitigate the danger posed by COVID-19 to employees. She told Wirtjes that if he did not return to work on May 4, 2020 Custom-Pak would consider him to have quit his job.

Wirtjes took her statement to mean Custom-Pak was initiating his separation from employment. Wirtjes did not intend to quit his job with Custom-Pak. He loved working for the company. Wirtjes took Rixen's statement to mean Custom-Pak was ending his employment with it because he refused to return to work on May 4, 2020.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the undersigned concludes Wirtjes left employment with Custom-Pak without good cause attributable to the employer under the Iowa Employment Security Law, Iowa Code chapter 96.

Custom-Pak classified Wirtjes's separation as a quit for its internal records. An employer is free to classify an employee's separation however it wishes for its internal records. However, such a classification is not controlling on the legal question of how a claimant's employment ended under Iowa Code section 96.5. Consequently, the analysis of whether Wirtjes is entitled to unemployment benefits must begin by determining how his employment with Custom-Pak ended.

Iowa Code section 96.5(1) disqualifies a claimant from benefits if they voluntarily left employment without good cause attributable to the employer. For a quit to have occurred under section 96.5(1), the claimant must have:

- 1) Intended to leave her employment; and
- 2) Acted to carry out that intent. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980).

Wirtjes credibly testified that he loved working for Custom-Pak and that he did not intend to quit his job there. Consequently, Wirtjes lacked the requisite intent to quit his job under Iowa law. He did not voluntarily leave employment with Custom-Pak. Rather, the evidence establishes Custom-Pak ended the employment relationship between the parties by discharging Wirtjes. The question of Wirtjes's entitlement to benefits therefore hinges on whether Custom-Pak discharged Wirtjes for job-related misconduct.

Under Iowa Code section 96.5(2)(a), an individual is disqualified for benefits if the employer discharges the individual for misconduct in connection with the individual's employment. The statute does not define "misconduct." But Iowa Administrative Code rule 871-24.32(1)(a) does:

"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 Iowa Supreme Court has ruled this definition accurately reflects the intent of the legislature. *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

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).

Under Iowa Administrative Code rule 871-24.32(8):

While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

There is no indication Custom-Pak previously had any issues with Wirtjes as an employee. He worked for the company for over two decades. Wirtjes described Custom-Pak as a great place to work during his hearing testimony. Further, Zimmer described Wirtjes as a good employee and that Custom-Pak had reached out to him as recently as a week and a half before the hearing about potentially returning to work. That the record is devoid of evidence that Wirtjes had committed a past act of misconduct serves to lessen the magnitude of the act that led to Custom-Pak discharging him under rule 871-24.32(8).

Custom-Pak discharged Wirtjes because he refused to return to work on May 4, 2020, because he thought the risk was too great because of COVID-19 and what he believed to be insufficient safety protocols. Wirtjes was acting in good faith. He was apparently unaware of the safety protocols and other changes Custom-Pak had made to make its facility safer for its workers. Wirtjes was ignorant of what the work environment would be if he returned to work.

Wirtjes was acting in good faith when he refused to return to work because of his belief, based on his personal experience from March and ignorant of the subsequent changes Custom-Pak had implemented, that doing so was unsafe. Custom-Pak did not notify him of the changes it had made or his ability to take a tour to view them firsthand until the hearing.

For these reasons, Wirtjes did not commit misconduct under rule 871-24.32(1)(a). Custom-Pak discharged Wirtjes for a nondisqualifying reason. Benefits are allowed, provided Wirtjes is otherwise eligible.

DECISION:

The June 18, 2020 (reference 02) unemployment insurance decision is reversed. Wirtjes did not voluntarily leave employment with Custom-Pak. Rather, Custom-Pak discharged Wirtjes for

a nondisqualifying reason. Wirtjes is entitled to benefits, provided he is otherwise eligible under the law. Any benefits claimed and withheld on this basis shall be paid.



Ben Humphrey
Administrative Law Judge

August 4, 2020
Decision Dated and Mailed

bh/sam