IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

JASON W MILLER Claimant **RAFFERTY CONSTRUCTION INC** Employer	**APPEAL 17A-UI-00185-DB-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 12/11/16** **Claimant: Appellant (1)**

Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant/appellant filed an appeal from the December 27, 2016 (reference 01) unemployment insurance decision that held claimant ineligible for unemployment insurance benefits. The parties were properly notified about the hearing. A telephone hearing was held on January 27, 2016. Claimant, Jason W. Miller, participated personally. Employer, Rafferty Construction Inc., participated through witnesses Jerry Rafferty; Jeff Proctor; Brent Huldeen; and Kim Gill. Claimant's Exhibit A was admitted without objection.

ISSUES:

Did claimant voluntarily quit the employment with good cause attributable to employer?
Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed as a full-time site superintendent from August 22, 2016 and was separated from employment on December 5, 2016, when he voluntarily quit. Claimant's job duties included traveling to different job sites to oversee sub-contractors and install equipment. Claimant's weekly schedule for work changed from day-to-day depending on the job site needs. Mr. Proctor was claimant's immediate supervisor. Mr. Rafferty is President of the company.

On November 28, 2016 claimant was scheduled to travel to Texas to work on a job. Claimant had just finished a job in Urbandale, Iowa. Claimant was to travel to Texas for several weeks. Claimant needed additional time between jobs to get his personal affairs in order, including winterizing his home. Claimant was upset with Mr. Rafferty when he was not told the specific details as to where he would be staying while in Texas. Mr. Rafferty responded to claimant and answered the questions about the job site and the accommodations which claimant had concerns over.

Claimant was upset with the fact that the company would not reimburse him for travel expenses so that he could travel home for the Christmas and New Year's holidays and because he was

told by Mr. Rafferty that he would have to work on Christmas and New Year's Day. Claimant told Mr. Rafferty that he was taking a week off to think about whether or not he wanted to remain employed with the company. Claimant told Mr. Rafferty he would advise him of his decision regarding employment on Friday, December 2, 2016. Mr. Rafferty did not receive a response from claimant on this date. On Monday, December 5, 2016, the two entered into a lengthy text message exchange regarding how Christmas Day and New Year's Day would be handled as well as reimbursement of travel expenses.

Claimant believed that he would be required to work on Sunday, December 25, 2016 and Sunday, January 1, 2017 because Mr. Rafferty sent him a text message stating that those two holidays would be observed on Monday, December 26, 2016 and Monday, January 2, 2017. Claimant had entered into a written employee agreement, which stated that paid holidays as follows: New Year's Day, 4th of July, Thanksgiving Day and Christmas Day. See Exhibit A. Claimant believed that he would have to be on the job site on Christmas Day and New Year's Day since Mr. Rafferty texted him that Rafferty Construction employees would be working on all other days besides December 26, 2016 and January 2, 2017 as it regarded those two holidays. Claimant had been required to work on a few Saturdays and Sundays in the past, but it was as the job site required.

The two also continued to argue through text message about reimbursement of travel expenses for claimant to return home from Texas for the two holidays. Claimant was requesting that the company reimburse him for his travel expenses home for these two holidays and Mr. Rafferty stated that the company would not do that. The claimant's employment agreement specifically states that "[m]ileage will only be reimbursed for one trip to and one trip from the place of work during each project. Should the employee choose to leave the place of work for personal reasons (i.e. trip home, weekend travel, long weekend) then the employee will not be reimbursed for mileage or any related expenses." See Exhibit A. The agreement further provides that the employee can request reimbursement of such trips but that the extent of reimbursement is at the sole discretion of Rafferty Construction, Inc. and may be none, or a portion of direct travel costs. See Exhibit A.

Mr. Rafferty sent claimant a text message stating that if he was not happy with the terms of the employee agreement then he would accept claimant's resignation. Claimant never stated to Mr. Rafferty that he was quitting, however, he did not return to work for any further shifts to travel to Texas as he was instructed to do. Continuing work was available to the claimant if he had not voluntarily quit his employment.

Claimant also testified that Mr. Rafferty used profanity at him. Mr. Rafferty admitted to using profanity at the claimant via text message on one occasion.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant voluntarily quit employment without good cause attributable to the employer. Benefits are denied.

Iowa Code §96.5(1) provides:

An individual shall be disqualified for benefits:

> 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.

First it must be determined whether claimant quit or was discharged from employment. A voluntary quitting means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer and requires an intention to terminate the employment. *Wills v. Emp't Appeal Bd.*, 447 N.W. 2d 137, 138 (Iowa 1989). A voluntary leaving of employment 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); *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438 (Iowa Ct. App. 1992).

The decision in this case rests, at least in part, upon the credibility of the parties. The issue must be resolved by an examination of witness credibility and burden of proof. 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.* 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*. After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds that the Mr. Rafferty's testimony is more credible than claimant's testimony.

Claimant had an intention to quit and carried out that intention by failing to travel to Texas as he was instructed to do the week of November 28, 2016. A claimant who confronts his employer and demands that he be discharged and is subsequently discharged actually quits his employment. Job insurance benefits "are not determinable by the course of semantic gymnastics." *Frances v. IDJS*, (Unpublished Iowa App 1986). Where an individual mistakenly believes that he is discharged and discontinues coming to work (but was never told he was discharged), the separation is a voluntary quit without good cause attributable to the employer. *LaGrange v. Iowa Department of Job Service*, (Unpublished Iowa Appeals 1984).

Because claimant voluntarily quit, claimant has the burden of proving that the voluntary leaving was for good cause attributable to the employer. Iowa Code § 96.6(2). "Good cause" for leaving employment must be that which is reasonable to the average person, not the overly sensitive individual or the claimant in particular. *Uniweld Products v. Indus. Relations Comm'n*, 277 So.2d 827 (Fla. Dist. Ct. App. 1973). In this case claimant voluntarily quit because he believed there was a change in the contract of hire and he was subjected to intolerable or detrimental working conditions.

Iowa Admin. Code r. 871-24.26(1) provides:

> Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:
>
> (1) A change in the contract of hire. An employer's willful breach of contract of hire shall not be a disqualifiable issue. This would include any change that would jeopardize the worker's safety, health or morals. The change of contract of hire must be substantial in

> nature and could involve changes in working hours, shifts, remuneration, location of employment, drastic modification in type of work, etc. Minor changes in a worker's routine on the job would not constitute a change of contract of hire.

In general, a substantial pay reduction of 25 to 35 percent or a similar reduction of working hours creates good cause attributable to the employer for a resignation. *Dehmel v. Emp't Appeal Bd.*, 433 N.W.2d 700 (Iowa 1988). A notice of an intent to quit had been required by *Cobb v. Emp't Appeal Bd.*, 506 N.W.2d 445, 447-78 (Iowa 1993), *Suluki v. Emp't Appeal Bd.*, 503 N.W.2d 402, 405 (Iowa 1993), and *Swanson v. Emp't Appeal Bd.*, 554 N.W.2d 294, 296 (Iowa Ct. App. 1996). Those cases required an employee to give an employer notice of intent to quit, thus giving the employer an opportunity to cure working conditions. However, in 1995, the Iowa Administrative Code was amended to include an intent-to-quit requirement. The requirement was only added to rule 871-24.26(6)(b), the provision addressing work-related health problems. No intent-to-quit requirement was added to rule 871-24.26(4), the intolerable working conditions provision. Our supreme court concluded that, because the intent-to-quit requirement was added to Iowa Admin. Code r. 871-24.26(6)(b) but not 871-24.26(4), notice of intent to quit is not required for intolerable working conditions. *Hy-Vee, Inc. v. Emp't Appeal Bd.,* 710 N.W.2d 1 (Iowa 2005).

The change to the terms of hire must be substantial in order for the claimant to establish that his voluntary quit was with good cause attributable to the employer. In this case, the claimant has failed to establish that there was a substantial change in the contract of hire. The employment agreement between the parties specifically states that mileage will only be reimbursed for one trip to and one trip from the place of work during each project. The employee has a right to request reimbursement but claimant's requests were denied. As such, claimant has failed to establish any change in the contract of hire, let alone a substantial change in the contract of hire, as it relates to his travel expenses being reimbursed in order to travel back to Iowa for the Christmas and New Year's holidays.

Claimant has also failed to establish there was a substantial change in circumstances as it relates to the paid holidays he would receive. While the employer did change the dates that the holidays would be observed by the company, this change from Sunday to Monday for each holiday is not a *substantial* change. As such, claimant has failed to establish any substantial change in the contract of hire which would necessitate a good cause reason for his quitting. Lastly, claimant argues that Mr. Rafferty's use of profanity with claimant on one occasion via text message created an intolerable or detrimental working environment.

Iowa Admin. Code r. 871-24.26(4) provides:

> Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:
>
> (4) The claimant left due to intolerable or detrimental working conditions.

Mr. Rafferty's use of profanity with claimant on one occasion via text message did not create an intolerable or detrimental working environment. Thus, the separation was without good cause attributable to the employer. Benefits are denied.

DECISION:

The December 27, 2016 (reference 01) unemployment insurance decision is affirmed. The claimant voluntarily left the employment without good cause attributable to the employer. Unemployment insurance benefits shall be withheld in regards to this employer until such time as claimant is deemed eligible.

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Dawn Boucher
Administrative Law Judge

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Decision Dated and Mailed

db/