IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

JOSEPH J WEISS
Claimant

DIAMOND JO WORTH LLC
Employer

APPEAL NO. 18R-UI-07734-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/14/18
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

This matter is before the administrative law judge pursuant to an Employment Appeal Board remand for a new hearing. Claimant Joseph Weiss filed a timely appeal from the May 21, 2018, reference 07, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on the Benefits Bureau deputy's conclusion that Mr. Weiss was discharged on April 27, 2018 for violation of a known company rule. After due notice was issued, a hearing was held on August 8, 2018. Mr. Weiss participated. Susen Zevin of Equifax represented the employer and presented testimony through Kathy Anderson and Becky Santee. Exhibits 1, 2 and 3 were received into evidence.

ISSUE:

Whether Mr. Weiss separated from the employment for a reason that disqualifies him for unemployment insurance benefits or that relieves the employer's account of liability for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Joseph Weiss was employed by Diamond Jo Worth, L.L.C., as a part-time valet/parking attendant at the employer's casino located alongside Interstate Highway 35 in northern Iowa, near Northwood and about 23 miles north of Clear Lake. Mr. Weiss has at all relevant times resided in Britt, Iowa, about 45 miles from the workplace. The IowaWorks Center nearest to Mr. Weiss' home is located in Mason City, about 30 miles from Britt. Mr. Weiss has held a valid Iowa driver's license at all relevant times. Mr. Weiss was not an on-call employee, but instead was regularly scheduled to work Mondays, from noon to 8:00 p.m. Mr. Weiss duties involved parking and retrieving customers' vehicles on the employer's casino grounds. Mr. Weiss began the employment in May 2017 and last performed work for the employer on April 23, 2018. Effective April 27, 2018, the employer removed Mr. Weiss from his valet duties and position based on information that appeared in his motor vehicle record.

Mr. Weiss' initial contact with the employer was a job fair. While at that job fair, Mr. Weiss completed an online application for employment without specifying the type of position he was

applying for. The employer subsequently assigned Mr. Weiss to a valet position. As part of the online application process, Mr. Weiss provided his driver's license information, clicked on a computer screen box to indicate that he had read and understood the "Authorized Driver Request" information, and provided a "digital signature" to authorize the employer to obtain his motor vehicle report. Mr. Weiss did not receive a copy of the authorization. The authorization included the following:

> Return to Candidate profile.
>
> AUTHORIZED DRIVER REQUEST
> By signing below I authorize Boyd Gaming Corporation and its subsidiaries, now and periodically as necessary, to run a Motor Vehicle Report to determine my eligibility to operate Company vehicles.
>
> I understand that the results of my Motor Vehicle Report may have an effect on my position with the Company. I further understand that any traffic stop, driving-related criminal proceedings or Department of Motor Vehicles administrative action resulting in a written warning, citation, suspension or revocation of driving privileges must be reported immediately to my supervisor or Human Resources. Failure to disclose may result in disciplinary action, up to and including termination.

On April 23, 2018, the employer had Mr. Weiss complete and sign a hardcopy "Authorized Driver Request Annual Renewal" form to authorize the employer to obtain an updated copy of his motor vehicle report. The form included the same language that had appeared in the digital material Mr. Weiss responded to as part of his only application at the job fair that preceded his employment. Mr. Weiss did not mention "any traffic stop, driving-related criminal proceedings or Department of Motor Vehicles administrative action resulting in a written warning, citation, suspension or revocation of driving privileges" to the employer in connection with completing the authorization form on April 23, 2018.

On April 27, 2018, Dionna Calderon, a Las Vegas, Nevada based Background Investigator affiliated with the employer's parent company, Boyd Gaming Corporation, sent a cursory email message to human resources personnel and security department personnel at the Diamond Jo Worth Casino. The subject line of the email stated, "MVR NO Recommendation – Diamond Jo – Worth." The text of the email message stated as follows:

> The following person is NOT permitted to operate company vehicles:
>
> Joseph Weiss (Valet) Reason: Three or more incidents over a three year period

The personnel at the Diamond Jo Worth Casino received no information from Boyd Gaming Corporation regarding what alleged incidents appeared on Mr. Weiss' motor vehicle report. The personnel at the Diamond Jo Worth Casino received no information indicating that employer's insurance carrier had declined to continue coverage of Mr. Weiss' operation of vehicles on behalf of the employer. Mr. Weiss had not received any citations or warnings related to his operation of vehicles on behalf of the employer. The employer did not question Mr. Weiss in response to the email message to see what motor vehicle infractions he may have incurred during the period of the employment. Mr. Weiss advises that during the period of the employment, he had received two speeding tickets and a ticket for failure to wear a seatbelt, all while operating his personal vehicle and while off-duty. Mr. Weiss paid the tickets, thereby tendering a guilty plea in each matter. Mr. Weiss retained his driving privileges despite these matters.

After receipt of the April 27, 2018 email, Diamond Jo Worth personnel notified Mr. Weiss not to appear for further valet shifts and directed him to contact Becky Santee, Human Resources Specialist to request transfer to a different department. Mr. Weiss called Ms. Santee on April 30, 2018. Ms. Santee told Mr. Weiss that he needed to access the Boyd Gaming website, locate a new position he was interested in, and apply for a transfer. Ms. Santee told Mr. Weiss that the company was in the process of changing the application process and that Mr. Weiss would not be able to access the system until 7:00 p.m. that evening. Ms. Santee offered to assist Mr. Weiss with the online transfer request. Such assistance would require that Mr. Weiss travel to the workplace. Ms. Santee told Mr. Weiss that he had a week to choose another job or the employer would have to let him go from the employment.

Mr. Weiss elected to travel to the Mason City IowaWork's Center to access and review the Diamond Jo Worth posting of open positions. Mr. Weiss did not apply to transfer to another position. The employer did not offer Mr. Weiss another position. Mr. Weiss thought an open groundskeeper position looked interesting, but concluded that the duties would include operating a Kubota vehicle and that he would be precluded from operating the Kubota. Though Mr. Weiss had worked in other employment as a security officer, he assumed such duties for Diamond Jo Worth would involve periodic operation of a vehicle and that he would be precluded from doing that. Mr. Weiss saw openings in the housekeeping department, but was not interested in those duties.

On Friday, May 4, 2018, Mr. Weiss contacted Ms. Santee to request information regarding his paycheck. At that time, Ms. Santee reminded Mr. Weiss that he needed to apply for a transfer to another position by Monday, May 7, 2018. Mr. Weiss told Ms. Santee that it was "a beautiful day to be unemployed." Aside from participating in unemployment insurance proceedings, the parties did not have further contact.

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.

The weight of the evidence in the record establishes that the employer discharged Mr. Weiss from the employment by removing him from his valet duties effective April 27, 2018.

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:

> 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 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).

In *Cook v. Iowa Department of Job Service*, 299 N.W.2d 698 (Iowa 1980), the Iowa Supreme Court held that when a truck driver lost his insurability because of traffic tickets he accumulated, and thereby lost his ability to perform his driving duties, the loss was self-inflicted and constituted misconduct. In *Cook*, the claimant's employment required that he be able to operate motor vehicles. Through commission of traffic offenses and resulting convictions, the claimant rendered himself incapable of continuing in the employment. In the present case...

The weight of the evidence in the record establishes a discharge for no disqualifying reason. At the time the employer removed Mr. Weiss from his valet duties, he continued to possess a valid driver's license. The evidence fails to establish that the insurance carrier declined to extend insurance coverage to the employer for Mr. Weiss' operation of vehicles on the employer's behalf. At the time the employer removed Mr. Weiss from his valet duties, the Diamond Jo Worth personnel had no idea what was on Mr. Weiss' motor vehicle report. That information had not been shared by the out-of-state representative of the parent company and the employer had not asked Mr. Weiss what might be on the report. Prior to April 23, 2018, the employer had taken insufficient steps to put Mr. Weiss on notice of his obligation to inform the employer of non-work related motor vehicle incidents. The online process at the job fair, absent evidence that Mr. Weiss received a copy of that material, would not constitute reasonable notice of such a requirement. The weight of the evidence indicates that the employer provided appropriate notice of the reporting requirement on April 23, 2018 in connection with having Mr. Weiss complete the hard-copy authorization, but then removed Mr. Weiss from the valet duties shortly thereafter. Because the evidence in the record establishes a discharge for no disqualifying reason, Mr. Weiss is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

The outcome of this case would be the same if the administrative law judge had concluded that Mr. Weiss voluntarily quit the employment by failing to request a transfer to a new position. Such transfer would of necessity involved a substantial change in the conditions of the employment.

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.

"Change in the contract of hire" means a substantial change in the terms or conditions of employment. See *Wiese v. Iowa Dept. of Job Service*, 389 N.W.2d 676, 679 (Iowa 1986). Generally, a substantial reduction in hours or pay will give an employee good cause for quitting. See *Dehmel v. Employment Appeal Board*, 433 N.W.2d 700 (Iowa 1988). In analyzing such cases, the Iowa Courts look at the impact on the claimant, rather than the employer's motivation. *Id.* An employee acquiesces in a change in the conditions of employment if he or she does not resign in a timely manner. See *Olson v. Employment Appeal Board*, 460 N.W.2d 865 (Iowa Ct. App. 1990).

Mr. Weiss' decision not to acquiesce in substantial changes in the conditions of the employment would not disqualify him for benefits or relieve the employer's account of liability for benefits. However, the employer did not offer Mr. Weiss any particular new position. During Ms. Santee's testimony, she initially made it sound like Mr. Weiss would have his choice of any number of 50 plus open positions. Upon further questioning, Ms. Santee clarified that Mr. Weiss was invited

to *apply* for other positions, but that the employer would later determine whether the position was appropriate.

DECISION:

The May 21, 2018, reference 07, 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/rvs