IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

DAVID P KALINA Claimant **DAY MECHANICAL SYSTEMS INC** Employer	**APPEAL 15A-UI-14262-LJ-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 10/25/15** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant, David P. Kalina, filed an appeal from the December 18, 2015, (reference 03) unemployment insurance decision that denied benefits based upon discharge for insubordination. The parties were properly notified of the hearing. A telephone hearing was held on January 20, 2016. The claimant participated. The employer, Day Mechanical Systems Inc., participated through Job Superintendent Mike Grecian and Vice President Dennis McCollough. Employer's Exhibits A and B were admitted.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a pipefitter/welder apprentice from February 2, 2015, until this employment ended on November 19, 2015, when he was discharged.

Claimant was employed by the employer through an apprenticeship program. The employer was working on a project for the University of Iowa. Because of a lack of parking on the campus, the employer would transport all the employees working on this project from its shop in Cedar Rapids to Iowa City each day. On November 19 around 8:30 a.m., Grecian (who was supervising the job site) asked all the employees to work late that night in order to meet a deadline for the project. Claimant said he would not stay late. While Grecian testified that claimant did not provide a reason for refusing to stay, claimant testified that he told Grecian he needed to transport his girlfriend to the hospital for surgery immediately after work. During the hearing, claimant explained that he needed to pick up his girlfriend in Cedar Rapids that day and transport her to Waterloo for surgery.

After claimant refused to stay late, Grecian contacted McCollough, his boss, and asked him what to do. McCollough instructed Grecian to give claimant an ultimatum: stay late that night or go to the training center, indicating he would be terminated from his employment and either reassigned through his apprenticeship program to another employer or terminated from the program entirely. Claimant said he would return to the training center, rather than work late that night. Grecian was upset with claimant for refusing to stay late. He drove claimant back to the employer's location in Cedar Rapids, where claimant's car was parked, and claimant was terminated by the owner, Thomas Day.

Claimant had worked overtime for the employer in the past. In June 2015, the employees were working on a school building that needed to be finished before the beginning of the school year. During this project, overtime was mandatory: employees were scheduled to work ten-hour days Monday through Friday and eight-hour days on Saturday. Claimant had also worked short-notice non-mandatory overtime in June or July 2015. On the University of Iowa project, the employees had not worked overtime in two months. Claimant testified that the employees on that project knew (within a 15-minute window) when they would be returned to their cars at the employer's shop each day.

Claimant had a conversation with McCullough about the mandatory overtime requirement in June 2015. During this conversation, McCullough gave him the ultimatum of working overtime or returning to the training center. Claimant agreed to work the mandatory overtime.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant did not quit but was discharged from employment for no disqualifying reason. Benefits are allowed.

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.

Iowa Code § 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:
>
> 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.

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).

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); *see also* Iowa Admin. Code r. 871-24.25(35). 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). In this case, claimant did not voluntarily demonstrate any intention to terminate the employment relationship. While he desired to remain employed with the employer, he also needed to drive his girlfriend to the hospital for surgery. Given the circumstances surrounding claimant's decision to return to the training center, rather than commit to working overtime, his separation is appropriately categorized as a discharge, the burden of proof falls to the employer, and the issue of misconduct is examined.

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *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). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000).

An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Training or general notice to staff about a policy is not considered a disciplinary warning.

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 claimant the most credible. His explanation for needing to depart at his normally-scheduled time was clear and sensible, and it aligned with the timeline for getting his girlfriend from Cedar Rapids to Waterloo for surgery.

In this case, all parties agree that claimant was first informed he needed to work overtime on November 19 after reporting to work and being transported to the jobsite that day. While the employer had previously expressed to him that he needed to be available for overtime work generally, he had not worked overtime in the past two months while assigned to the University of Iowa project. Additionally, claimant credibly testified that he had notified the employer about his girlfriend's surgery and his commitment to transport her to the hospital. It is unreasonable for an employer to expect employees to keep their after-work schedules indefinitely free in case overtime may be required. The employer has not met the burden of proof to establish that claimant engaged in misconduct when he refused to work overtime on November 19 in order to transport his girlfriend to the hospital. Benefits are allowed.

DECISION:

The decision of the representative dated December 18, 2015 (reference 03) is reversed. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements. The benefits withheld based upon this separation shall be paid to claimant.

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Elizabeth A. Johnson
Administrative Law Judge

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Decision Dated and Mailed

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