IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

IAN M RICKETTS Claimant **FLAGGER PROS USA LLC** Employer	**APPEAL 17A-UI-13011-NM-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 05/14/17** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the December 15, 2017, (reference 03) unemployment insurance decision that denied benefits based on his voluntary quit from temporary employment. The parties were properly notified of the hearing. A telephone hearing was held on January 12, 2018. The claimant participated and testified. The employer participated through Human Resource Assistant Kaleena Middendorf.

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 flagger from September 8, 2017, until this employment ended on November 29, 2017, when he was discharged.

On November 26, 2017, claimant was staying at a hotel, provided to him by the employer, while working on a job site. Monday morning claimant woke up and noticed red bumps on his body, but went to work as usual. That evening he went to sleep and noticed more red bumps immediately the following morning, but again went to work. On Wednesday, November 29, claimant spoke with the employer after he was advised by a doctor that his bumps were bedbug bites. Claimant informed the employer that his hotel had bedbugs and asked to have the rest of the week off to heal and to treat his clothing and personal belongings for the bedbugs. The employer told claimant to ask the hotel for another room and claimant indicated that was not an acceptable solution. Claimant testified by the end of the conversation he was of the understanding he could have Thursday and Friday off. Middendorf, who was not part of the conversation, testified the employer was of the impression that claimant had agreed to work the remainder of the week, as there was no one to replace him.

On Thursday, November 30, 2017, claimant was driving home when he received a call from his on-site supervisor, Victoria. Victoria informed claimant she had expected him at the job site. Claimant explained the situation with the bedbugs to Victoria and also informed her there was a coworker he was not comfortable working with, as he had been swearing at claimant and treating him in a hostile manner. Claimant also explained he was under the impression that the employer had agreed he did not have to work the remainder of the week. Victoria indicated she would call claimant back. Claimant was never told if he did not return to the job site he would be discharged. No one from the employer ever called the claimant back, leading him to believe he had been discharged from employment. The employer did not contact claimant further because it assumed he had quit when he did not return to the job site on Thursday, November 30.

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.

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). Where a claimant walked off the job without permission before the end of his shift saying he wanted a meeting with management the next day, the Iowa Court of Appeals ruled this was not a voluntary quit because the claimant's expressed desire to meet with management was evidence that he wished to maintain the employment relationship. Such cases must be analyzed as a discharge from employment. *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438 (Iowa Ct. App. 1992).

The testimony given by both parties indicates there was confusion on claimant's employment status on November 30, 2017. Because there was unclear communication between claimant and employer about the interpretation of both parties' statements about the status of the employment relationship; the issue must be resolved by an examination of witness credibility and burden of proof. Since most members of management are considerably more experienced in personnel issues and operate from a position of authority over a subordinate employee, it is reasonably implied that the ability to communicate clearly is extended to discussions about employment status. Here, claimant provided credible testimony that he explained to the employer why he was not at the job site and he believed he had been granted the remainder of the week off work. This shows claimant did not intend to quit and his separation must be analyzed as a discharge from employment and the burden of proof falls to the employer.

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). 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). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to assess points or impose discipline up to or including discharge for the incident under its policy. An employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the

reason for the separation, employer incurs potential liability for unemployment insurance benefits related to that separation.

The claimant was discharged after he failed to finish his work assignment for the week. Claimant did not complete his work assignment because the hotel provided to him by the employer had a bedbug infestation. Claimant's request to have the remainder of the week off to allow his bites to heal and remove the bedbugs from his personal belongings was a reasonable request. The only solution offered to the claimant was to try a different room in the same infested hotel. Such a solution is not reasonable under the circumstances. The employer has failed to show claimant engaged in any misconduct.

Even if the employer could establish claimant had engaged in misconduct, 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. Claimant was never advised that if he did not return to the worksite he would be discharged from employment. Inasmuch as employer had not previously warned claimant about the issue leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. Inasmuch as the employer has not met the burden of proof to establish that claimant engaged in misconduct, benefits are allowed, provided claimant is otherwise eligible.

DECISION:

The December 15, 2017, (reference 03) decision is reversed. Claimant did not quit but was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

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Nicole Merrill
Administrative Law Judge

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Decision Dated and Mailed

nm/rvs