

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

NATHAN J WILLIES
Claimant

**DES MOINES INDEPENDENT COMMUNITY
SCHOOL DISTRICT**
Employer

APPEAL NO. 20A-UI-03556-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 06/16/19
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the April 23, 2020, reference 04, decision that allowed benefits to the claimant provided he met all other eligibility requirements and that held the employer's account could be charged for benefits, based on the deputy's conclusion that the claimant was discharged on February 4, 2020 for no disqualifying reason. After due notice was issued, a hearing was held on June 3, 2020. Claimant Nathan Willies participated and presented additional testimony through Rossi Frith. Rhonda Wagoner represented the employer and presented additional testimony through Sheila Mason and Naki Allen. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant (DBRO and KPYX). Exhibits 1, 2, 3, A and B were received into evidence.

ISSUES:

Whether the claimant voluntarily quit the employment without good cause attributable to the employer.

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the claimant quit in lieu of being discharged from the employment.

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Nathan Willies was employed by Des Moines Independent Community School District as a full-time Security Class 1 (security officer) from December 23, 2019 until February 4, 2020. Mr. Willies' work hours were 3:00 p.m. to 11:00 p.m., Tuesday through Saturday. Mr. Willies' duties involved patrolling any and all Des Moines Independent Community School District facilities to ensure they were secure and had not been vandalized.

On the evening of January 28, 2020, Mr. Willies made his first-ever patrol of the District's main administrative building located at 2100 Fleur Drive in Des Moines. The two-story office building houses multiple departments, including the superintendent's office, the finance department, the curriculum department, the Office of Schools, and the human resources department. Mr. Willies

entered the building through the main entrance at 8:06 p.m., immediately after he notified the security dispatcher of his location per protocol. Mr. Willies had never before been beyond the lobby of the building and was unfamiliar with the layout of the building. Mr. Willies was in the building for about half an hour. At about 8:15 p.m., Mr. Willies and an evening custodian, Toni, encountered one another in the vicinity of a human resources work area. The employer asserts, though not credibly, that it does not know Toni's last name. Toni and Mr. Willies were at opposite ends of an area of cubicles when they first became aware of each other's presence. Toni subsequently alleged to the building's custodial department chief, Candy Hollingshead, that she was alerted to the presence of Mr. Willies by the sound of papers being shuffled. Mr. Willies denies that he shuffled any papers and asserts that what Toni perceived as shuffling papers was likely the approximate 150 work keys that Mr. Willies was required to carry on his person as he performed his duties. After Mr. Willies identified himself as a new security employee, he and Toni engaged in casual banter. One or the other brought up the name of Denise Johnson, an Executive Assistant in the human resources department. Ms. Johnson had been involved in onboarding Mr. Willies to the employment. Toni later alleged that Mr. Willies asked whether Ms. Johnson worked in the building and what Toni thought of Ms. Johnson. Toni also later alleged that Mr. Willies had commented that Ms. Johnson was rude and had used an aggressive tone with him. Mr. Willies asserts that Ms. Johnson's name came up only after Toni commented that the people who worked in the building were lazy. Toni gave Mr. Willies a brief tour of the main floor of the building. Toni offered to give Mr. Willies a tour of the second floor, but Mr. Willies declined. Mr. Willies subsequently patrolled the second floor before departing from the building. Mr. Willies notified the dispatcher upon leaving the building, per protocol. After Toni's interaction with Mr. Willies, she contacted Ms. Hollingshead that same evening to raise a concern about Mr. Willies and to make the allegations referenced above.

On or about February 2, 2020, Sheila Mason, Director of Human Resources for non-certified staff, learned of Toni's allegations concerning her encounter with Mr. Willies. Ms. Mason then conferred with Naki Allen, Human Resources Manager for classified staff. The pair decided to interview Mr. Willies on February 4, 2020. The employer asserts, though not credibly, that neither Ms. Mason nor Ms. Allen spoke directly with Toni about the allegations she made concerning the January 28 encounter. The employer had not requested that Toni provide a written statement regarding the January 28 encounter. Ms. Mason and/or Ms. Allen arranged for a union representative to be present for the interview.

On February 3, 2020, Mr. Willies learned about the February 4 meeting when Rossi Frith, President of AFSCME Local 2048, contacted Mr. Willies. Ms. Frith told Mr. Willies that the meeting might lead to discipline. Ms. Frith told Mr. Willies that she would attend the meeting. Ms. Frith advised Mr. Willies to contact his supervisor to learn the purpose of the meeting. Mr. Willies called his supervisor, David Murillo. Mr. Murillo hung up as soon as Mr. Willies identified himself. Mr. Murillo then called back to say he did not know the purpose of the meeting.

On February 4, 2020, Mr. Willies and Ms. Frith appeared as directed for the meeting with Ms. Mason and Ms. Allen. When the employer stated the basis for the meeting was Mr. Willies' January 28, 2020 patrol of 2100 Fleur Drive, Ms. Frith asked for a break to discuss the matter with Mr. Willies. After the break, Ms. Mason questioned Mr. Willies regarding his patrol of the building and his encounter with Toni. Mr. Willies denied that he had shuffled any papers and indicated that he had been in the walkway between two work areas when he first encountered Toni. After additional questioning, Ms. Willies stated, "Ok, ok, I did go in every nook and cranny." The employer perceived this utterance as Mr. Willies changing his story. Ms. Willies stated that he had not been in a cubicle, as alleged by Toni, but had been along a wall in the same area when he and Toni first saw each other over an area of cubicles. During a

subsequent break in the interview, Ms. Mason and Ms. Allen enlisted a colleague to re-enact the situation Mr. Willies had described as the moment when he and Toni each became aware of the other. Ms. Mason and Ms. Allen concluded the first encounter could have not have taken place the way Mr. Willies described it. Ms. Mason denied Ms. Frith's request to allow her and Mr. Willies to perform the same sort of re-enactment. During another break in the interview, Ms. Frith spoke with Ms. Mason. At that time, Ms. Mason stated the employer could "not get past" the re-enactment the employer had performed. Based on the employer emphasizing the point, and based on Ms. Frith's years as a union representative, Ms. Frith concluded that the employer would likely discharge Mr. Willies that day. Ms. Frith conveyed this belief to Mr. Willies and encouraged him to resign rather than face discharge from the employment and the negative impact on his future work search. Ms. Willies had been visibly upset during the interview and was further upset with the apparent choice between resigning or being discharged from the employment. Mr. Willies explained to Mr. Frith that he had hoped to become a police officer in the future. This became a factor in their lengthy discussion about resigning in lieu of being discharged. Up to this point, the employer had not stated to Mr. Willies what action the employer intended to take following the meeting. While Ms. Mason and Ms. Allen conferred with a colleague to discuss next steps, Ms. Frith arrived at Ms. Mason's office and said that Mr. Willies wished to resign from the employment. Ms. Mason provided Ms. Frith with a resignation memo. Ms. Frith returned to the meeting room, where she and Mr. Willies completed the form. After Mr. Willies signed the resignation form, Ms. Mason returned the completed form to Ms. Mason. Ms. Frith and Mr. Willies then exited the building. As they exited the building, Ms. Frith and Mr. Willies each took note that Toni was with Ms. Mason and Ms. Allen as that group observed Mr. Willies leaving the building.

Within three days of the separation, Mr. Willies contacted the District administration to complain that he had been treated unfairly and had been coerced into resigning from the employment. The District declined to allow Mr. Willies to rescind the resignation.

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.

Iowa Administrative Code Rule 871-24.26(21) 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:

- (21) The claimant was compelled to resign when given the choice of resigning or being discharged. This shall not be considered a voluntary leaving.

In analyzing quits in lieu of discharge, the administrative law judge considers whether the evidence establishes misconduct that would disqualify the claimant for unemployment insurance benefits.

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 Ct. 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.*

In considering an understanding or belief formed, or a conclusion drawn, by an employer or claimant, the administrative law judge considers what a reasonable person would have concluded under the circumstances. See *Aalbers v. Iowa Department of Job Service*, 431 N.W.2d 330 (Iowa 1988) and *O'Brien v. Employment Appeal Bd.*, 494 N.W.2d 660 (1993).

The weight of the evidence in the record establishes a quit in lieu of discharge. Ms. Frith reasonably concluded from the employer's comments on February 4, 2020, and from her years of interacting with Ms. Mason in similar situations, that Mr. Willies faced imminent discharge that day. Mr. Willies reasonably concluded from Ms. Frith's comments that he was faced with the choice of resigning from the employment or being discharged from the employment that day. Mr. Willies elected to resign in lieu of being discharged. The administrative law judge finds reason to discount the employer's assertion that it had not made a decision about discharge at the time Ms. Frith indicated Mr. Willies would resign. The administrative law judge finds reason to discount other assertions made by the employer. The administrative law judge is troubled by the employer's decision to manufacture in May 2020 for use at the appeal hearing a document that on its face purports to be a contemporaneous business record of the February 4, 2020 disciplinary meeting. That document indicates an element of bad faith on the employer's part in connection with the unemployment appeal proceeding. The administrative law judge notes the May 2020 creation of the exhibit was not brought forth by the employer, but came to light only after the claimant challenged the document during his testimony. The employer implausibly asserted it did not know the last name of its employee, Toni, who provided the information that led to the disciplinary meeting with Mr. Willies. The employer implausibly asserted that neither Ms. Mason nor Ms. Allen had spoken with Toni prior to the disciplinary meeting with Mr. Willies. A reasonable person would expect human resources personnel as senior and as experienced as Ms. Mason and Ms. Allen would not have met with Mr. Willies for a disciplinary meeting without first speaking with the complainant, Toni. Toni's presence with Ms. Mason and Ms. Allen in the gathering that looked on as Mr. Willies and Ms. Frith exited the building on February 4 immediately after the meeting further undermines the employer's assertion of no prior contact with Toni regarding the matter. The weight of the evidence in the record indicates that the employer created an atmosphere at the February 4 meeting that a reasonable person in Mr. Willies' position would experience as highly stressful. Though some of the evidence Mr. Willies presented indicates an inclination toward melodrama, Mr. Willies was clearly upset by the February 4 meeting and the employer was aware of his upset state. It was in this context that Ms. Mason told Ms. Frith that she could not get past the re-enactment and it was in this context that Mr. Willies executed the resignation form that the employer provided and that Ms. Frith encouraged him to sign. Mr. Willies' quit was not voluntary.

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).

The weight of the evidence in the record establishes a discharge for disqualifying reason. The employer presented insufficient evidence, and insufficiently direct and satisfactory evidence, to rebut Mr. Willies' testimony regarding his actions at the main administrative building on January 28, 2020. The employer presented insufficient evidence to prove that Mr. Willies took any action on January 28, 2020 contrary to the employer's interests or outside the scope of his security duties. Mr. Willies' indication during the February 4 disciplinary meeting that he had taken time to familiarize himself with the facility was not an indication of misconduct. Mr. Willies' recollection of how and when he first encountered Toni and the employer's inability to re-enact that moment with exactitude was not an indication of misconduct. The evidence provides no reasonable basis to give greater weight to the hearsay assertions attributed to Toni than to the testimony of Mr. Willies. Mr. Willies is eligible for benefits, provided he meets all other eligibility requirements. The employer's account may be charged for benefits.

DECISION:

The April 23, 2020, reference 04, decision is affirmed. The claimant involuntarily quit in lieu of discharge on February 4, 2020. The effective discharge was for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.



James E. Timberland
Administrative Law Judge

June 15, 2020
Decision Dated and Mailed

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