IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

ADDERAHIM KOLBANE Claimant **SWIFT PORK COMPANY** Employer	**APPEAL 17A-UI-03350-JC** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 03/05/17** **Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(7) – Excessive Unexcused Absenteeism
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant filed an appeal from the March 23, 2017, (reference 01) unemployment insurance decision that denied benefits based upon separation. The parties were properly notified about the hearing. An in-person hearing was held from Des Moines on May 2, 2017. The claimant participated personally, through Moroccan-Arabic interpreter, Baleed, and was represented by Philip F. Miller, attorney at law. The employer participated through Nicolas Aguirre, human resources manager. Claimant exhibits A, B, C, and D, and Employer exhibits 1, 2, 3, 4 and 5 were admitted into evidence over objection. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Did the claimant quit the employment with good cause attributable to the employer or was he discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a laborer beginning in 2010, and was separated from employment on February 25, 2017. The evidence is disputed as to whether the claimant quit the employment or was discharged by the employer. The undisputed evidence is that the claimant neither told the employer he resigned or quit, nor did the employer give the claimant a document stating he had been fired, discharged or terminated.

Employer witness, Nicolas Aguirre, did not handle the claimant's separation and contact because the claimant worked second shift, and another human resources member, Elizabeth Tellez, handled communications with the claimant's shift. Mr. Aguirre was also new to the employer location where the claimant worked, at the time of the claimant's separation. The administrative law judge had to evaluate the employer's testimony in the absence of Ms. Tellez,

who was no longer employed, not subpoenaed by either party and did not furnish a written statement in lieu of participation.

The employer has a policy which provides that three days of consecutive no call/no show can be deemed a voluntary quit due to job abandonment. The employer also has an attendance policy which designates point values to attendance infractions and upon receipt of 9 points in a rolling twelve month period, an employee can be discharged. The employer requires employees notify the employer of an absence by calling the attendance hotline 30 minutes prior to a shift start. The claimant demonstrated through his history with the employer, that he knew how to call off properly.

Beginning November 18, 2016 until February 22, 2017, the claimant was absent from work and properly reported his absences (Employer exhibit 2). The claimant was provided a leave of absence in response to his swelling of hands, legs and edema (Claimant exhibit B). The claimant returned to work on February 22, 2017 without restrictions per his personal doctor (Employer exhibit 3). On the claimant's first evening back to work, he went to visit worksite/occupational nurse, Chelle Kriegel, (Claimant exhibit C), stating his finger and back hurt (Claimant exhibit C). According to Ms. Kriegel's notes, the claimant declined care for the finger (Claimant exhibit C). Ms. Kriegel did not attend the hearing or provide a written statement in lieu of attending the hearing.

According to the claimant, he worked on February 23, 2017, without incident. On February 24, 2017, the claimant reinjured himself, and went to human resources representative, Ms. Elizabeth Tellez. He asked to see a worker's compensation doctor, indicating his hand had been injured. She denied the request and told him he would have to visit his personal doctor. The claimant visited his personal physician on February 25, 2017. In the doctor's notes, provided in Claimant exhibit A, are references to the claimant's hand pain beginning "more than 1 week ago" (Claimant exhibit A). The claimant visited Dr. Wille on February 25, 2017, but had only returned to work on February 22, 2017, less than one week prior to his doctor's visit. Dr. Wille also noted in the section of his notes regarding the claimant's back that his work was aware but (the employer) did not feel it was work related (Claimant exhibit A)."

The claimant was provided the doctor's note on February 25, 2017, which stated he could return to work effective February 25, 2017, at 50/50, with no knife or skinner duties until further notice (Claimant exhibit A). When he presented the note to Ms. Tellez, she told the claimant to wait in her office. He stated approximately an hour later, she told him the note would not be accepted, and to go home. The claimant speaks Moroccan Arabic as his primary language but does understand some English. The claimant also understood Ms. Tellez told him that he was fired.

Based on the discussion with Ms. Tellez, the claimant believed separation had occurred. The employer reported that the claimant had not been discharged, and employer witness, Nicholas Aguirre, was unaware that the claimant had furnished the February 25, 2017 doctor's note to Ms. Tellez, as he had not seen it. At the hearing, Mr. Aguirre stated that even if the employer believed the claimant's injury was personal versus work related, he would have been eligible for FMLA if the employer would not honor the restrictions. No leave of absence of FMLA was offered to the claimant.

Because the claimant believed he could not return to work, the claimant discontinued reporting absences each day. The employer asserted at the hearing that the claimant was still employed after February 25, 2017 until March 16, 2017, and that he failed (more than three times) to report his absences per the employer's no call/no show policy. The employer did not check with the claimant after he discontinued working and was not calling off his absences and did not

separate him after three no call/no shows because it was low priority compared to other employee separations.

The claimant then established his unemployment claim with an effective date of March 5, 2017. Between the dates the fact-finding interview notice was mailed to the parties and the interview was conducted, the employer by way of Ms. Tellez, called the claimant. She told him he had not been calling in to report his absences and he responded because he had been fired by the employer on February 25, 2017. A separation notice was then prepared by the employer but not furnished to the claimant, stating his separation occurred as a result of no call/no shows on March 13, 14, and 15, 2017 (Employer exhibit 1). The document also has a notation, "3/16: call TM explained needed to call said he gave us doctors note explained still needed to call in daily as was told at meet in HR when note given. NC/NS. E.Z" (Employer exhibit 1). It is unclear why the call was made March 16, 2017 after the listed dates leading to separation were March 13, 14 and 15. The remarks section was prepared by former, assistant human resources manager, Elizabeth Tellez. Employer witness, Nicolas Aguirre, also indicated the original dates of no call/no shows listed had been "whited out" and rewritten.

REASONING AND CONCLUSIONS OF LAW:

Disqualification under the employment security law: An unemployed person who meets the basic eligibility criteria receives benefits unless they are disqualified for some reason. Iowa code 96.4. Generally, disqualification from benefits is based on three provisions of the unemployment insurance law that disqualify claimants until they have been reemployed and they have been reemployed and have been paid wages for insured work equal to ten times their weekly benefit amount. An individual is subject to such a disqualification if the individual (1) "has left work voluntarily without good cause attributable to the individual's employer" Iowa Code 96.5(1) or (2) is discharged for work –connected misconduct, Iowa Code 96.5(2) a, or (3) fails to accept suitable work without good cause, Iowa Code 96.5(3).

The first two disqualifications are premised on the occurrence of a separation of employment. To be disqualified based on the nature of the separation, the claimant must either have been fired for misconduct or have quit but not for good cause attributable to the employer. Generally, the employer bears the burden of proving disqualification of the claimant. Iowa Code 96.6(2). Where a claimant has quit, however, the claimant has "the burden of proving that a voluntary quit was for good cause attributable to the employer pursuant to Iowa Code section 96.5(1). Since the employer has the burden of proving disqualification, and the claimant only has the burden of proving the justification for a quit, the employer also has the burden of providing that a particular separation was a quit. The Iowa Supreme Court has thus been explicitly, "the employer has the burden of proving that a claimant's department from employment was voluntary." *Irving v. Employment Appeal Board*, 883, NW 2d 179, 210 (Iowa 2016).

Quit not shown: Iowa Code section 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.

A voluntary quitting of employment requires that an employee exercise a voluntary choice between remaining employed or terminating the employment relationship. *Wills v. Emp't Appeal Bd.*, 447 N.W.2d 137, 138 (Iowa 1989); *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438, 440 (Iowa Ct. App. 1992). Generally, a quit is defined to be a "termination of employment initiated by the employee for any reason except mandatory retirement or transfer to another establishment of the same firm, or for service in the armed forces." Furthermore, 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). The employer has the burden of providing that the claimant is disqualified for benefits pursuant to Iowa Code sections 96.5.

This case rests on the credibility of the parties. 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). Administrative agencies are not bound by the technical rules of evidence. *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 630 (Iowa 2000). A decision may be based upon evidence that would ordinarily be deemed inadmissible under the rules of evidence, as long as the evidence is not immaterial or irrelevant. *Clark v. Iowa Dep't of Revenue*, 644 N.W.2d 310, 320 (Iowa 2002). Hearsay evidence is admissible at administrative hearings and may constitute substantial evidence. *Gaskey v. Iowa Dep't of Transp.*, 537 N.W.2d 695, 698 (Iowa 1995).

The administrative law judge had the ability to observe both witnesses' appearance and conduct in person during the hearing. 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*.

Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the claimant's testimony was credible, inasmuch as he denied an intent to quit, based on his communications with the employer.

In this case, the claimant, who speaks Moroccan-Arabic, was told to wait in the human resources office upon presenting a doctor's note to Ms. Tellez, and then was told it would not be accepted. From the evidence presented, the claimant was not informed why it was not accepted, what he needed to do to return to work or why the employer would not allow him to work within the restrictions imposed by his doctor. Rather, Ms. Tellez told him to go home and that he was fired. For these reasons, the administrative law judge cannot conclude the claimant displayed an intent to quit the employment. Further, he displayed an intent to remain employed inasmuch when he was told to visit his personal doctor by Ms. Tellez, he did and then brought her the documentation (which she rejected for unknown reasons.) It was also unclear why the claimant was not offered a leave of absence at his discussion with Ms. Tellez

When the record is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. *Schmitz v. Iowa Dep't Human Servs.*, 461 N.W.2d 603, 607 (Iowa Ct. App. 1990). Both the quality and the quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See, Iowa Code § 17A.14 In light of being the primary contact with the claimant, Ms. Tellez did not attend the hearing, was not subpoenaed by either party, and did not furnish any written statement regarding her communications with the claimant.

The credible evidence presented does not support that the claimant intended to quit the employment, and that the employer would not allow him to continue working, based on the doctor's note stating he had restrictions. It is entirely possible that when Ms. Tellez told the claimant to "go home" and that she would not accept his restrictions, that he did not understand the terms of which he needed to meet, in order to return and preserve his employment. The claimant had demonstrated that he knew he should call and had previously called to further report absences. The reason the claimant did not return to work was because Ms. Tellez told him to go home and communicated that he was fired, so he would have no need to call in. The administrative law judge is persuaded that the claimant did not call or show between the dates of February 26 and March 16, 2017 because he genuinely believed employment had ended based on his conversation with Ms. Tellez.

Clearly, the employer did not follow its own policy of terminating an employee after three no call/no shows because several weeks went by without any contact with the claimant in light of his alleged no call/no shows. It was not until a notice of fact-finding interview was mailed to the employer that Ms. Tellez first contacted the claimant on March 16, 2017 and told him he must call off daily if he's going to miss work. What is unclear is why Ms. Tellez would call the claimant if her notes on the same document (Employer exhibit 1) indicated the claimant had been separated already based on no call/no shows on March 13, 14 and 15. While the employer may have interpreted the claimant's failure to call off his shifts after February 26, 2017 as a quit due to job abandonment, the claimant did not call because he believed he had already been discharged.

Mutual Mistake in this Case not Disqualifying: Even accepting the employer's position that the claimant abandoned his employment by failing to call and report his absences (after February 25, 2017), thereby quitting, the separation in this case would not be disqualifying. At issue is a case of mutual mistake: the employer thought the claimant had quit and the claimant believed he had been terminated. However, when considered the rules of separation include "all terminations of employment" which are "generally classifiable as layoffs, quits, discharges, or other separations" 871 IAC 24.1

The administrative law judge concludes that a separation by mistake does not fall squarely into the definition of a quit or discharge, and therefore the claimant cannot be disqualified by the separation under the circumstances of this case. Unlike the case of La Grange v. IDJS (*LaGrange v. Iowa Department of Job Service*), (Unpublished Iowa Appeals 1984).), where a claimant "unreasonably assumed" he had been fired, but has not been, this can be a disqualifying quit. However, the case at hand does not fall into this category. The employer has failed to prove the claimant unreasonably assumed he was fired, and the administrative law judge cannot ignore the fact the claimant and Ms. Tellez spoke different languages, thereby making a miscommunication a real possibility. Further, the employer failed to show the claimant quit and failed to prove that the claimant was discharged for reasons that constitute misconduct. Therefore, benefits must be allowed.

DECISION:
The March 23, 2017 (reference 01) decision is **REVERSED.** The claimant was not separated from employment in a manner that would disqualify the claimant from benefits. The claimant is allowed benefits provided he is otherwise eligible. The benefits claimed and withheld shall be paid, provided he is otherwise eligible.

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Jennifer L. Beckman
Administrative Law Judge

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Decision Dated and Mailed

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