IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MARK A SHEROD
Claimant

THE UNIVERSITY OF IOWA
Employer

APPEAL NO. 16A-UI-12285-S1-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/09/16
Claimant: Respondent (1)

Section 96.5-1 – Voluntary Quit
Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

The University of Iowa (employer) appealed a representative's November 9, 2016, decision (reference 01) that concluded Mark Sherod (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for December 5, 2016. The claimant participated personally. The employer participated by Mary Eggenburg, Benefits Specialist, and Carmela Lovelace, Manager of financial Analysis and Accounting. The employer offered and Exhibit One was received into evidence. Exhibit D-1 was received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on April 29, 2016, as a full-time engineers and architects senior project manager. The claimant signed for receipt of the employer's handbook on April 29, 2016. The employer did not issue him any warnings. The claimant and his other co-workers had cubicles near a conference room. Co-workers often bumped each other while trying to pass in the hall. Co-worker Michelle made comments about the claimant's age and competency that the claimant found offensive. Once when the claimant left work he said, "My work is done here for the day". The director called the claimant into his office and told him not to tell people he was not busy.

On the night of September 28, 2016, the claimant thought he was having a stroke and spent hours in the emergency room. He was released and not feeling himself the next day. On September 29, 2016, the claimant took some empty boxes to a counter where a co-worker asked him to place them. Co-worker Michelle put them on his chair with a note saying she would be happy to show him how to recycle. The claimant took the boxes to co-worker Michelle

and dropped the boxes on the floor five or six feet from her. The claimant then picked up the boxes and took them to recycling.

On October 3, 2016, the claimant went to a meeting at the request of the interim director. The interim director told the claimant he was not a good fit. He was going to evaluate the situation and get back to the claimant. The claimant asked if he were being fired. The interim director said there were two other circumstances besides the box incident. The claimant asked what they were. The interim director told the claimant he touched a co-worker on the elbow. The claimant did not remember this and thought it may have happened in passing while the hall was crowded. The interim director did not mention a third incident. The interim director told the claimant, "If you don't resign, it won't go well." The claimant asked if he could go back to work. The interim director said, "I don't think it's a good idea". The claimant thought he had no choice but to resign. He wrote out a brief letter of resignation, effective that day.

The claimant filed for unemployment insurance benefits with an effective date of October 9, 2016. The employer participated personally at the fact-finding interview on November 8, 2016, by Mary Eggenburg.

REASONING AND CONCLUSIONS OF LAW:

The first issue is whether the claimant voluntarily quit without good cause attributable to the employer. For the following reasons the administrative law judge concludes he did not.

Iowa Admin. Code r. 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.

If an employee is given the choice between resigning or being discharged, the separation is not voluntary. The claimant had to choose between resigning or being fired. The employer would not let the claimant return to work. The claimant's separation was involuntary and must be analyzed as a termination.

The issue becomes whether the claimant was discharged for misconduct. For the following reasons the administrative law judge concludes he was not.

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).

The employer has the burden of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. Crosser v. Iowa Department of Public Safety, 240 N.W.2d 682 (Iowa 1976). The employer had the power to present testimony but chose not to do so. The employer did not provide first-hand testimony at the hearing and, therefore, did not provide sufficient eye witness evidence of job-related misconduct to rebut the claimant's denial of said conduct. The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

DECISION:

The representative's November 9, 2016, decision (reference 01) is affirmed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/pjs