

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CARL D BAKER

Claimant

APPEAL NO. 11A-UI-12083-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HARNEY INDUSTRIES INC

Employer

OC: 12/06/09

Claimant: Respondent (5-R)

Section 96.5(1) – Voluntary Quit

STATEMENT OF THE CASE:

The employer filed a timely appeal from the September 8, 2011, reference 05, decision that allowed benefits. After due notice was issued, a hearing was held on October 7, 2011. Claimant Carl Baker participated. Tim Harney, President and owner, represented the employer and presented additional testimony through Kevin Calderon and Dave Cooper.

ISSUE:

Whether Mr. Baker separated from the employment for a reason that disqualifies him for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The employer is a concrete construction contractor. Carl Baker was employed by Harney Industries, Inc., as a full-time concrete finisher/laborer from about July 4, 2011 and last performed work for the employer on August 4, 2011. Tim Harney is President and owner of Harney Industries and heads a small concrete construction crew. Mr. Baker was part of that crew. Mr. Baker's starting wage was \$12.00 per hour. Mr. Baker's wage later rose to \$14.00 per hour. There was some discussion between Mr. Baker and Mr. Harney about Mr. Baker's wage eventually going to \$16.00 if and when Mr. Harney thought Mr. Baker worthy. The employer never found Mr. Baker worthy of \$16.00 per hour.

The employment relationship was volatile. On August 2, Mr. Baker carelessly tripped over a construction string line twice. The string line took hours to set up and cost the employer several hundred dollars to set. After Mr. Baker tripped over the line multiple times, Mr. Harney became enraged. Mr. Harney told Mr. Baker that he was "fucking stupid" and that that was "the stupidest thing" he "ever fucking saw." Mr. Harney further antagonized and baited Mr. Baker by saying, "What you got to say, boy—you got something to fucking say." Mr. Baker responded with, "Fuck you" and Mr. Harney discharged him. The next day, Mr. Baker was back working as part of the crew.

On Thursday, August 4, Mr. Harney decided to use a backhoe to carry and dump cement. Mr. Harney made this decision, in part, because the crew, including Mr. Baker, did not want to haul and dump the cement using wheelbarrows. Early in the day, Mr. Harney accidentally hit Mr. Baker from behind with the backhoe and knocked him to his hands and knees on the ground. Mr. Baker asked to go to the doctor for evaluation and Mr. Harney approved the request. The doctor told Mr. Baker to take three days off. Mr. Baker notified the employer that day that he was sore, that nothing was broken, that he was to take three days off, and return to the doctor. The doctor visit also revealed a non-work-related bulging disk.

Mr. Baker did not return to work the next Monday. Instead, when the employer called that morning, Mr. Baker indicated he had not been released to return to work. The following Friday, August 12, 2011, crew member Kevin Calderon met Mr. Baker at a Des Moines metro bank to give him his paycheck. Mr. Baker said he would be back at work the following Monday.

Mr. Baker did not return to work or make further contact with the employer. A week after Mr. Calderon had met Mr. Baker to provide him his check, Mr. Calderon called Mr. Baker. Mr. Baker did not immediately recognize who the caller was and mistook Mr. Calderon for someone else. Mr. Calderon clarified who he was and asked Mr. Baker why he had not called back about returning to work. Mr. Baker said he had found a better job laying carpet.

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. 871 IAC 24.1(113)(c). A quit is a separation initiated by the employee. 871 IAC 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 871 IAC 24.25.

The weight of the evidence establishes that Mr. Baker voluntarily quit the employment and was not discharged. The employer continued to have work for him. Mr. Baker initially indicated that he would return to work and then, a week later, notified the employer that he had accepted other employment. The weight of the evidence establishes that Mr. Baker voluntarily quit the employment on August 15, 2011, when he elected not to return to the employment.

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.

Quits due to intolerable or detrimental working conditions are deemed to be for good cause attributable to the employer. See 871 IAC 24.26(4). The test is whether a reasonable person would have quit 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). Aside from quits based on medical reasons, prior notification of the employer before a resignation for intolerable or detrimental working conditions is not required. See Hy-Vee v. EAB, 710 N.W.2d (Iowa 2005).

Notwithstanding the fact Mr. Baker worked as part of a concrete construction crew where a reasonable person might expect to encounter a fair measure of profanity on a regular basis, the weight of the evidence establishes that Mr. Baker had good cause to leave the employment. The first was what Mr. Harney himself describes as his “meltdown.” Had Mr. Baker engaged in behavior comparable to Mr. Harney, the employer would have had good reason to discharge him from the employment. The employer’s verbal abuse on that day justified a voluntary separation from the employment. Within two days of that big blow up, the employer operated a piece of heavy equipment in an unsafe manner and carelessly hit Mr. Baker with the piece of heavy equipment. The impact was sufficient for both parties to support medical evaluation. The two detrimental experiences within the span of a few days would have been enough to prompt a reasonable person to leave the employment. Mr. Baker voluntarily quit the employment for good cause attributable to the employer. Accordingly, Mr. Baker is eligible for benefits, provided he is otherwise eligible. The employer’s account may be charged for benefits paid to Mr. Baker.

The evidence raises the issue of whether Mr. Baker has met the work ability and availability requirements of Iowa Code § 96.4(3) since he reopened his claim for benefits effective August 14, 2011. Mr. Baker may or may not have a health issue that impacts on his ability to work. Mr. Baker may have new employment, though Mr. Baker has reported no wages since he reopened his claim for unemployment insurance benefits. This matter will be remanded to the Claims Division for investigation and adjudication of Mr. Baker’s ability to work and availability for work.

DECISION:

The Agency representative’s September 8, 2011, reference 05, decision is modified as follows. The claimant quit the employment for good cause attributable to the employer. The claimant is eligible for benefits, provided he is otherwise eligible. The employer’s account may be charged for benefits paid to the claimant.

This matter is remanded to the Claims Division for investigation and adjudication of whether the claimant has been able to work and available for work since he reopened his claim for benefits effective August 14, 2011.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs