IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

ARTHUR C VESEY Claimant **REMEDY INTELLIGENT STAFFING INC.** Employer	**APPEAL 22A-UI-03357-CS-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 12/05/21** **Claimant: Appellant (2)**

Iowa Code §96.5(2)a - Discharge/Misconduct
Iowa Code §96.5(1) - Voluntary Quitting
Iowa Code § 96.5(1)j – Voluntary Quitting – Temporary Employment

STATEMENT OF THE CASE:

On January 24, 2022, the claimant/appellant filed an appeal from the January 11, 2022 (reference 02) unemployment insurance decision that denied benefits based on claimant failing to notify the temporary employment firm. The parties were properly notified about the hearing. A telephone hearing was held on March 8, 2022. Claimant participated. Employer participated through Vicky Matthias. Administrative notice was taken of claimant's unemployment insurance benefits records.

ISSUE:

I. Was the separation a layoff, discharge for misconduct, or voluntary quit without good cause?

II. Did the claimant quit by not reporting for an additional work assignment within three business days of the end of the last assignment?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for employer on January 20, 2020. The employer is a temporary staffing agency that provides temporary workers to clients. Claimant was assigned to work at General Mills. Claimant last worked as a full-time system team lead. Claimant was separated from employment on November 18, 2021, when he was terminated.

Claimant worked the overnight shift that began on November 17, 2021 and ended at 6:30 a.m. on November 18, 2021. Claimant worked as the team lead and was responsible for covering the breaks for employer's employees working at General Mill. The employer had a rule that only one employee of the employer can take break at a time due to coverage issues. When claimant worked on the evening of November 17, 2021, only one employee took a break at a time while he covered. While the claimant was working the line it was shut down by maintenance due to maintenance issues.

During the shift claimant reported to a General Mills superior that they needed more employees to work the line. The superior refused to get more workers to help work on the line. Later on claimant was notified that he was moving to a different department. When claimant left the department he walked past the office glass of the General Mills superior and tapped on the glass, smiled, and gave the superior a thumbs up. The superior responded by smiling and putting his fists up. Claimant was trying to notify the superior that the line was working and they were keeping up even though they would not supply more employees to work the line.

Claimant's shift was over at 6:30 a.m. on November 18, 2021. At approximately 8:00 a.m. claimant was called by the employer and notified that his assignment at General Mills had been terminated because he was acting aggressively towards the superior and because he was allowing too many employees to take breaks at the same time so it lead to the line being stopped. Employer notified claimant that John Metz would conduct an investigation and they would contact him in a week or two to let him know the results. The employer also asked claimant to provide a statement and a list of witnesses. Claimant provided a statement and a list of witnesses.

The employer determined on November 18, 2021, that claimant was terminated for violation of their harassment and bullying policy. The employer determined that claimant acted aggressively towards the superior when he tapped on the glass of the superior's office. The employer viewed this incident as a form of harassment and bullying. Because of this policy violation the employer would no longer consider sending him to other assignments for clients to perform work and they terminated him from employment. The employer did not call claimant to inform him of their decision. Claimant waited two weeks to see if an investigation was complete. When claimant called the employer they informed him that he was terminated for violation of their harassment and bullying policy.

The employer did not provide the language of the harassment and bullying policy. Claimant did acknowledge receipt of the policy on January 9, 2021. Claimant did not have any previous verbal or written warnings.

The employer did not provide a witness with first-hand knowledge of the events or a witness that performed the investigation in this matter.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

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).

Iowa Admin. Code r. 871-24.32(4) provides:

> (4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. 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. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

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). In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy. However, if the employer fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. 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). 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 impose discipline up to or including discharge for the incident under its policy.

Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). The focus of the administrative code definition of misconduct is on deliberate, intentional or culpable acts by the employee. *Id.* When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be

disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.,* 391 N.W.2d 731 (Iowa Ct. App. 1986). Further, 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). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000).

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 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*. After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the Administrative Law Judge finds that claimant's testimony more credible than the employer's second-hand hearsay testimony.

The Iowa Supreme Court has ruled that if a party has the power to produce more explicit and direct evidence than it chooses to present, the administrative law judge may infer that evidence not presented would reveal deficiencies in the party's case. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976). Mindful of the ruling in *Crosser*, and noting that the claimant presented direct, first-hand testimony while the employer presented only hearsay evidence, the administrative law judge concludes that it is permissible to infer that Mr. Metz's testimony was not provided because it would not have been supportive of employer's position. *See id.*

In this case there was no final act of misconduct that the claimant committed that would disqualify him from receiving benefits. Claimant explained how he was not responsible for the shutdown of the production line and how it was not in his power to allow more than one employee to take breaks at a time. Additionally, the employer did not provide a witness with first-hand knowledge of the incident with the General Mills superior and claimant involving tapping the glass. Claimant denied that he was acting aggressively but instead was trying to inform the superior that the line was able to function appropriately with the manpower provided. The General Mills superior and Mr. Metz did not testify regarding his investigations and no written statements were submitted by these witnesses. Additionally, the claimant did not receive any prior verbal or written warnings from the employer. The employer did not prove that claimant was in violation of any rule or policy that established job-related misconduct that disqualifies claimant from benefits.

The next issue is whether claimant failed to make a timely request for another job assignment. For the reasons stated below the Administrative Law Judge finds claimant did make a timely request for another job assignment.

Iowa Code § 96.5(1)j 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. But the individual shall not be disqualified if the department finds that:

j. (1) The individual is a temporary employee of a temporary employment firm who notifies the temporary employment firm of completion of an employment assignment and who seeks reassignment. Failure of the individual to notify the temporary employment firm of completion of an employment assignment within three working days of the completion of each employment assignment under a contract of hire shall be deemed a voluntary quit unless the individual was not advised in writing of the duty to notify the temporary employment firm upon completion of an employment assignment or the individual had good cause for not contacting the temporary employment firm within three working days and notified the firm at the first reasonable opportunity thereafter.

(2) To show that the employee was advised in writing of the notification requirement of this paragraph, the temporary employment firm shall advise the temporary employee by requiring the temporary employee, at the time of employment with the temporary employment firm, to read and sign a document that provides a clear and concise explanation of the notification requirement and the consequences of a failure to notify. The document shall be separate from any contract of employment and a copy of the signed document shall be provided to the temporary employee.

(3) For the purposes of this lettered paragraph:

(a) "Temporary employee" means an individual who is employed by a temporary employment firm to provide services to clients to supplement their work force during absences, seasonal workloads, temporary skill or labor market shortages, and for special assignments and projects.

(b) "Temporary employment firm" means a person engaged in the business of employing temporary employees.

Iowa Admin. Code r. 871-24.26(19) 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:

(19) The claimant was employed on a temporary basis for assignment to spot jobs or casual labor work and fulfilled the contract of hire when each of the jobs was completed. An election not to report for a new assignment to work shall not be construed as a voluntary leaving of employment. The issue of a refusal of an offer of suitable work shall be adjudicated when an offer of work is made by the former employer. The provisions of Iowa Code § 96.5(3) and rule 24.24(96) are controlling in the determination of suitability of work. However, this subrule shall not apply to substitute school employees who are subject to the provisions of Iowa Code § 96.4(5) which denies benefits that are based on service in an educational institution when the individual declines or refuses to accept a new contract or reasonable assurance of continued employment status. Under this circumstance, the substitute school employee shall be considered to have voluntarily quit employment.

The purpose of the statute is to provide notice to the temporary agency employer that the claimant is available for and seeking work at the end of the temporary assignment. In this case the employer notified claimant that his job assignment had been terminated and that an investigation was being done regarding his employment with the employer. The employer was aware that claimant's job assignment had ended and that claimant was available for more work. Claimant called the employer and requested more work; however, the employer informed claimant they would not assign him to another client because they found he had violated the company's harassment and bullying policy. Since the employer notified him his job assignment ended and claimant requested reassignment and the employer would not assign him more work, no disqualification is imposed. Benefits are allowed.

DECISION:

The January 11, 2022, (reference 02) unemployment insurance decision is REVERSED. Claimant 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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Carly Smith
Administrative Law Judge

March 23, 2022

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Decision Dated and Mailed

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