

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MICHAEL S PECKHAM
Claimant

APPEAL NO. 09A-UI-03017-E2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

MC 3619 INC
BONANZA STEAKHOUSE #619
Employer

OC: 02/01/09
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated February 20, 2009, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on March 20, 2009. Employer participated by Mickey Moor, General Manager. Claimant failed to respond to the hearing notice and did not participate.

ISSUES:

The issues in this matter are whether claimant was discharged for misconduct and or voluntary quit without good cause.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: Claimant last worked for the employer January 18, 2009. The claimant was a part-time dishwasher who started employment on November 5, 2008. He would generally work weekends. The claimant got into arguments with other employees. He was verbally warned on January 4, 2009 and received a written warning on January 11, 2009 informing him if he continued his conduct of arguing with employees he would be suspended. On January 18, 2009 the claimant got into an argument. Ms Moor told the house manager that the claimant should go home for the day. This was approximately two hours before the end of his shift. The claimant, before leaving, went and spoke to Ms. Moor. Ms Moor told the claimant he needed to correct his behavior. The claimant did not accept this criticism well and left the office and slammed the door. Two days later the claimant called and talked to Ms Moor about his job. He stated "I don't suppose I have a job." Ms. Moor told him he was no longer an employee.

REASONING AND CONCLUSIONS OF LAW:

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.

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.

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 indicates that the employee wanted to maintain his employee relationship with his employer. The employer was justified in warning him about his conduct. The warning of January 11, 2009 stated that he would be suspended the next time he had a similar incident. The employer's progressive discipline policy was if, after suspension, another incident occurred the employee was discharged. The claimant had been suspended for the rest on the day on January 18, 2009. He was upset at being suspended when he left on January 18, 2009. He called his employer to determine if he still had a job. The evidence does not support a conclusion that the claimant quit.

The administrative law judge holds that the evidence has failed to establish that claimant quit. In fact he was discharged by the employer.

The next issue is whether the claimant committed misconduct which would disqualify him from benefits.

Iowa Code section 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.

871 IAC 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.

The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. The employer had a progressive disciplinary policy. The claimant received a written warning that the next incident could lead to a suspension. It not a notice that he would be discharged. The conduct of the claimant was evidence he could not perform the job to the satisfaction of the employer. No evidence was provided that the arguments were affecting customers, or the arguments involved threatening, obscene or cursing language. The claimant's inability to get along with co-workers is not disqualifying misconduct. The employer's progressive disciplinary policy is evidence of the seriousness on the conduct in question. The claimant had not reached the termination stage. The claimant's argument with employees on January 18, 2009 does not appear to be substantially different than his prior incidents. While the employer may be justified in terminating the claimant they have not shown misconduct that would disqualify the claimant from unemployment. The employer maintained the claimant quit.

The administrative law judge holds that the evidence has failed to establish that claimant was discharged for an act of misconduct.

DECISION:

The decision of the representative dated February 20, 2009, reference 01, is reversed. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements.

James Elliott
Administrative Law Judge

Decision Dated and Mailed

jfe/pjs