IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

BRANDY L LALLY Claimant **WAGGONER SOLUTIONS CO** Employer	**APPEAL 19A-UI-10288-CL-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 11/18/18** **Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

On December 27, 2019, the claimant filed an appeal from the December 19, 2019, (reference 05) unemployment insurance decision that denied benefits based on a separation from employment. The parties were properly notified about the hearing. A telephone hearing was held on January 22, 2020. Claimant participated personally and through witness John Crossen. Employer participated through president Kevin Waggoner and vice president Michelle Waggoner. Claimant's Exhibit A was received.

ISSUE:

Did claimant voluntarily leave the employment with good cause attributable to employer or did employer discharge claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for employer in approximately 2015. Claimant last worked as a full-time laborer.

Claimant has been periodically laid off during the last year because work has been slow. When employer has work, it occasionally calls claimant to come in and perform the work.

Employer is happy with claimant's work performance, but is unhappy with his negative attitude at work. For that reason, employer does not always recall claimant when it has work available. However, employer has never disciplined claimant for his poor attitude and has never told him that his employment was terminated.

Claimant has never told employer that he quit.

Throughout the last year, employer has paid claimant's health insurance premiums and kept him on its group policy. Claimant is supposed to pay a portion of the premiums, but for the most part, has failed to do so.

In August 2019, employer recalled claimant to work for about two weeks. Claimant performed the work. Employer has not recalled claimant since that time.

In September 2019, employer contacted claimant to ask if he would like to stay on the group insurance policy and letting him know he needed to pay his portion of the premiums. Claimant asked for the insurance coverage to be discontinued.

REASONING AND CONCLUSIONS OF LAW:

The first issue is whether claimant resigned or was discharged by employer. The employer has the burden to establish the separation was a voluntary quitting of employment rather than a discharge. Iowa Code § 96.6(2). A 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).

In this case, claimant did not end the employment relationship. It was employer who ended the relationship when it chose not to recall claimant back to work. Although employer contacted claimant in September 2019, it was contacting claimant about insurance premiums, not offering him additional work. Employer failed to establish claimant resigned.

Because employer ended the employment relationship, the next issue is whether it did so because of claimant's job-related misconduct.

Iowa Code § 96.5(2)a provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 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.

The employer has the burden to prove the claimant was discharged for job-related misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer made the correct decision in ending claimant's employment, 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). Misconduct justifying termination of an employee and misconduct warranting denial of unemployment insurance benefits are two different things. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988).

Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence is not 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). 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).

Based on the description provided by management and a co-worker, claimant's attitude toward work was less than desirable. It is understandable that employer was unhappy. However, employer never disciplined claimant for his attitude. Employer never told claimant he could be terminated for his behavior. Employer never told claimant it was ending his employment because of his behavior. Employer decided it was easier not to bother with it and not recall claimant back to work. That is a business decision and employer has every right to make it, but because of it, the administrative law judge cannot find claimant's employment was ended because of his misconduct.

Inasmuch as employer had not previously warned claimant about the issue leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Training or general notice to staff about a policy is not considered a disciplinary warning.

In short, employer failed to let claimant know his poor attitude was going to lead to termination. Therefore, employer failed to establish claimant was discharged for misconduct.

DECISION:

The December 19, 2019, (reference 05) unemployment insurance decision is reversed. Claimant was separated for no disqualifying reason. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements.

Christine A. Louis
Administrative Law Judge
Unemployment Insurance Appeals Bureau
1000 East Grand Avenue
Des Moines, Iowa 50319-0209
Fax (515)478-3528

January 24, 2020
Decision Dated and Mailed

cal/scn