IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

JOE M FOX Claimant **ACADEMY ROOFING & SHEET METAL OF** Employer	**APPEAL 22A-UI-03738-AR-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 01/24/21** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the January 19, 2022, (reference 01) unemployment insurance decision that denied benefits based upon the determination that claimant was discharged for fighting on the job. The parties were properly notified of the hearing. A telephone hearing was held on March 11, 2022. The claimant, Joe M. Fox, participated personally. The employer, Academy Roofing & Sheet Metal, participated through testifying witness Brian Krumm, with Amparo Ramus, who did not testify.

ISSUE:

Did the claimant voluntarily quit employment without good cause attributable to the employer, or was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a laborer from May 16, 2016, until this employment ended on December 23, 2021, when he was discharged.

Claimant frequently brought concerns to various supervisory personnel at the employer. These concerns varied from allegations of harassment to general personality clashes. The employer moved claimant around to try to address his concerns, but claimant never felt his concerns were addressed adequately.

On December 22, 2021, claimant witnessed his supervisor urinating on the ladder used by the crew. He reported this to various people, including the foreman and the safety manager. They said they would “take care of it.” The following day, on December 23, 2021, he felt the issue was not being attended to in a serious manner. At midday, claimant left the worksite. He told his foreman that he was not quitting. He denies telling anyone that he was quitting. He did make a complaint to the jobsite, and they forwarded the complaint to Iowa OSHA.

Claimant was not scheduled to work the following days. On December 27, 2021, claimant presented to Krumm's office to inquire about where he would be scheduled to work that day. Krumm told claimant he was "done" after he walked off the worksite on December 23, 2021.

Claimant had received warnings in the past for walking off the worksite. On May 18, 2021, claimant received a warning for failing to wear a hardhat. At the time, claimant had staples in his head. He was told either to wear the hardhat or go home. Claimant elected to go get the staples out because they were due to be removed that day anyway. He left the jobsite in order to get the staples removed. On August 2, 2021, claimant received a written warning after he walked off the worksite without permission. However, claimant testified that he had heatstroke that day, and told the foreman that he needed to leave because he was close to passing out. At the time that the warning was presented to him, he was threatened with discharge if he did not sign the warning.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant did not quit but was discharged from employment for no disqualifying reason.

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.

Iowa unemployment insurance law disqualifies claimants who voluntarily quit employment without good cause attributable to the employer or who are discharged for work-connected misconduct. Iowa Code §§ 96.5(1) and 96.5(2)a. The burden of proof rests with the employer to show that the claimant voluntarily left the employment. *Irving v. Emp't Appeal Bd.*, 883 N.W.2d 179 (Iowa 2016). A voluntary quitting of employment requires that an employee exercise a voluntary choice between remaining employed or terminating the employment relationship. *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438, 440 (Iowa Ct. App. 1992); *Wills v. Emp't Appeal Bd.*, 447 N.W.2d 137, 138 (Iowa 1989). It 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). Where there is no expressed intention or act to sever the relationship, the case must be analyzed as a discharge from employment. *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438 (Iowa Ct. App. 1992).

The decision in this case rests, at least in part, on the credibility of the witnesses. 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, 394–95 (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, reviewing the exhibits submitted by the parties, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the claimant's version of events to be more credible than the employer's recollection of those events. The claimant's testimony was clear and consistent. He denied having announced that he quit when he left the jobsite. According to the employer's testimony, there was a history of similar conduct by the claimant, but this was the first time the employer considered him separated from employment. The difference was that the employer testified that claimant announced he quit during the December 23, 2021. Claimant denies having done so. The testimony that most bolsters claimant's version of events is that claimant returned to the employer at the time he would have been scheduled to work next and inquired about where he was assigned. If claimant intended to quit employment, he would not have inquired about where he was assigned to work. The employer has not carried its burden of demonstrating that the separation constituted a voluntary quit. The separation is a discharge.

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.

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 Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). 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). 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). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.*

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 assess points or impose discipline up to or including discharge for the incident under its policy.

An employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, employer incurs potential liability for unemployment insurance benefits related to that separation. 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. 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.

Though claimant had received at least one previous warning about leaving the jobsite, he indicated that the circumstances that preceded that warning were sufficiently different than those that preceded the incident resulting in separation. He indicated that he had heatstroke on the day he left the jobsite, and he told his foreman that before he left. Additionally, claimant testified that the warning he received did not contain an explicit warning that future similar conduct could result in his discharge. Instead, he was warned that if he did not sign the warning, he would be discharged. Accordingly, the circumstances between the two incidents were sufficiently different and no explicit warning indicating that claimant's employment would be in jeopardy was issued, and the employer has not met the burden of establishing that claimant acted with deliberate indifference to its policies or a prior warning. No disqualification is imposed.

DECISION:

The January 19, 2022, (reference 01) unemployment insurance decision is reversed. Claimant did not quit but was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible.

Alexis D. Rowe
Administrative Law Judge

March 25, 2022
Decision Dated and Mailed

ar/kmj