IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

LLOYD D FLUHR
Claimant

PROGRESSIVE PROCESSING LLC
Employer

APPEAL NO. 18A-UI-10204-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 09/09/18
Claimant: Appellant (2)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

Lloyd Fluhr filed a timely appeal from the October 1, 2018, reference 01, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on the deputy's conclusion that Mr. Fluhr voluntarily quit on August 17, 2018 without good cause attributable to the employer. After due notice was issued, a hearing was held on October 25, 2018. Mr. Fluhr participated. Carolyn Karettis of Employers Unity represented the employer and presented testimony through Michael Betz and Kari Pollak. Exhibit 1 was received into evidence.

ISSUES:

Whether Mr. Fluhr voluntarily quit the employment without good cause attributable to the employer.

Whether Mr. Fluhr was discharged for misconduct in connection with the employment.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Lloyd Fluhr was employed by Progressive Processing as a full-time industrial maintenance technician from 2016 and last performed work for the employer on August 13, 2018. Mr. Fluhr's work schedule consisted of four consecutive 5:30 p.m. to 6:00 a.m. shifts followed by four days off. Rylie Callahan, Associate Maintenance Engineer, was Mr. Fluhr's immediate supervisor.

On August 13, 2018, Mr. Fluhr reported for work at the scheduled start of his shift, but left work early. Before Mr. Fluhr left the workplace, he notified his supervisor that he was ill and requested to leave. The supervisor approved the early departure. After Mr. Fluhr left the workplace, he re-entered the workplace in search of his cell phone. Mr. Fluhr walked through an area of the plant that required personal protective gear, but did not don personal protective gear. Hours later, a coworker alleged to a supervisor that Mr. Fluhr had smelled of alcohol, had been staggering, had hit a curb while driving his car, and had for an hour been asleep in his car outside the workplace.

On August 14, Michael Betz, Human Resources Manager, learned of the alleged alcohol issue and commenced an investigation. Mr. Betz summoned Mr. Fluhr to a meeting at the workplace. During that discussion, Mr. Betz told Mr. Fluhr about the information he had received. Mr. Fluhr denied that he had been under the influence of alcohol at the workplace and asserted that the alleged stagger was attributable to injuring his tailbone in connection with a fall. The employer

alleges that Ms. Fluhr admitted later in the conversation that he had come to the workplace while intoxicated on August 13. Mr. Fluhr concedes that he had consumed alcohol on the morning of August 13, but denies he was intoxicated at work on August 13 or that he admitted to such during the meeting on August 14.

During the meeting on August 14, Mr. Betz smelled alcohol in the room and asked Mr. Fluhr whether he was under the influence of alcohol. Mr. Fluhr denied that he was. Though the employer has a written alcohol and drug testing policy that includes reasonable suspicion drug and alcohol testing, Mr. Betz did not ask Mr. Fluhr to submit to alcohol testing. The employer had Mr. Fluhr sign to acknowledge the employer's Drug and Alcohol Free Workplace policy in 2016, in 2017 and again on February 28, 2018. Under the policy, an employee who is subjected to alcohol testing for a first-time violation was supposed to be provided an opportunity for rehabilitation. However, the policy also stated that in the absence of an alcohol test, an employee found to be under the influence of alcohol in violation of the policy would be subject to discipline "up to and including discharge." During Mr. Betz's tenure as Human Resources Manager, the employer had not allowed any employee to participate in the alcohol abuse rehabilitation program. Instead of requesting an alcohol test, Mr. Betz notified Mr. Fluhr that he was suspended pending the outcome of the employer's investigation. Though Mr. Betz asserts he mentioned the employer would be in contact with Mr. Fluhr within in 24 to 28 hours, Mr. Fluhr heard no such utterance.

On August 16, the employer made one phone call to Mr. Fluhr's phone number in an attempt to summon him to a discharge meeting. On August 17, the employer made two more attempts to contact Mr. Fluhr by telephone. Mr. Fluhr was unaware of the calls. On August 17, the employer deemed Mr. Fluhr to have abandoned the employment.

During the period when Mr. Fluhr understood he was suspended from the employment, he was dealing with alcohol withdrawal issues. On August 20, Mr. Fluhr was admitted to the hospital in connection with the alcohol withdrawal issues. Mr. Fluhr's brother contacted the employer to give notice of Mr. Fluhr's hospitalization. Mr. Fluhr was discharged from the hospital on August 23, 2018.

On August 24, 2018, Mr. Fluhr went to the workplace to inquire about the status of his employment. At that time, Mr. Betz told Mr. Fluhr that the employer deemed him to have abandoned the employment. Mr. Betz told Mr. Fluhr that if Mr. Fluhr had made earlier contact, the employer would have informed him that he was discharged from the employment for appearing at work in an intoxicated state.

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. Iowa Administrative Code rule 871-24.1(113)(c). A quit is a separation initiated by the employee. Iowa Administrative Code rule 871-24.1(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 Iowa Administrative Code rule 871-24.25.

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 Ct. 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.*

The weight of the evidence fails to support the employer's assertion that Mr. Fluhr voluntarily quit the employment through job abandonment. The evidence indicates instead that employer suspended Mr. Fluhr on August 14, that the employer decided on or before August 16, 2018 to discharge Mr. Fluhr from the employment. The weight of the evidence further indicates that the employer on August 17, 2018 intentionally mischaracterized the separation as job abandonment. The evidence provides no indication that Mr. Fluhr, by word or deed, communicated an intention to sever the employment relationship.

Iowa Code section 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 disqualification shall continue 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 this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See *Lee v. Employment Appeal Board,*

616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also *Greene v. EAB*, 426 N.W.2d 659, 662 (Iowa App. 1988).

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. See 871 IAC 24.32(4).

The weight of the evidence establishes a discharge for no disqualifying reason. The weight of the evidence establishes bad faith on the part of the employer in implementing its alcohol policy and in addressing its concern that Mr. Fluhr may have been under the influence of alcohol in the workplace on August 13 and/or August 14, 2018. The weight of the evidence establishes that the employer intentionally bypassed the alcohol testing provision of its own policy to avoid having to comply with the alcohol rehabilitation provision contained its own policy and to bypass the requirements of Iowa Code section 730.5(9)(g) regarding rehabilitation in the context of first-time alcohol violations. The weight of the evidence establishes that Mr. Fluhr would have qualified for such rehabilitation opportunity, if the employer had acted in good faith, had subjected him to testing, and if the test result had been positive. The weight of the evidence in the record fails to support the employer's assertion that Mr. Fluhr was intoxicated in the workplace on August 13, 2018. The employer presented no testimony from any person the employer alleges observed Mr. Fluhr to be intoxicated on that date. The weight of the evidence also fails to establish that Mr. Fluhr was intoxicated on August 14, 2018. The employer had the ability to clarify that issue on August 14, but made a conscious decision not to seek clarity at that time. Mr. Fluhr is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The October 1, 2018, reference 01, decision is reversed. The claimant was discharged on August 17, 2018 for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/rvs