

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JEFF B JACKSON

Claimant

REED CONSTRUCTION LLC

Employer

APPEAL 18A-UI-03042-JCT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 01/28/18

Claimant: Respondent (1)

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

Iowa Code § 96.5(1) – Voluntary Quitting

Iowa Code § 96.3(7) – Recovery of Benefit Overpayment

Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed a timely appeal from the March 2, 2018 (reference 04) unemployment insurance decision that allowed benefits. After due notice was issued, a telephone conference hearing was held on April 3, 2018. Claimant participated personally. Employer participated through Brandon Reed, owner. The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct, or did the claimant voluntarily quit the employment with good cause attributable to employer?

Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can any charges to the employer's account be waived?

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: The claimant was employed as a laborer until his separation on February 1, 2018. The evidence is disputed as to whether the claimant or the employer initiated separation.

The claimant was initially hired on a full-time basis but in November 2017, was moved to a part-time basis. The evidence is disputed as to whether the employer initiated the reduction in hours because work was not available or if the claimant had requested to move to part-time due to his schedule which included building up his business of teaching guitar lessons. A review of the claimant's paystubs reflect the claimant did not work full-time for most of his employment (See fact-finding documents/administrative record).

The employer had two full-time employees plus the claimant at the time of the claimant's separation. As such, there was no established procedure or policy of how the claimant would be scheduled once moved to part-time. Sometimes he would request work via text message and be informed of assignments or work not being available, and sometimes the employer would notify the claimant it had work available (See fact-finding documents/administrative record).

On January 29, 2018, during the afternoon, the claimant received a text message from Mr. Reed asking if he wanted to do a few hours of work that day (See fact-finding documents/administrative record). The claimant cares for his disabled wife and had already made plans to pick up their daughter from school and then take her to kung fu. He declined the work. (See fact-finding documents/administrative record). On Wednesday, January 31, 2018, the claimant was frustrated by a lack of work being offered, feeling that he was "chasing down hours" and established his claim for unemployment insurance benefits. The next day, February 1, 2018, the claimant received a text message from Mr. Reed, requesting his tools back (see fact-finding document/administrative record). While Mr. Reed had previously requested tools back in the past if he was on assignment and needing them, the claimant interpreted his actions to mean he was separating the claimant. This was based in part by the lack of work being offered in conjunction with the request.

Mr. Reed opined that the claimant discontinued reporting and requesting work, and had he known the claimant was going to file for unemployment insurance benefits, he would have given him work, because he "hates to pay unemployment." He stated the claimant was supposed to contact him for work. He never contacted the claimant again to notify him that he had an assignment or work available. Mr. Reed did not tell the claimant he was fired or laid off, and the claimant did not tell Mr. Reed he was quitting the employment.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$3,528.00, since filing a claim with an effective date of January 28, 2018. The administrative record also establishes that the employer did participate in the fact-finding interview or make a witness with direct knowledge available for rebuttal. Brandon Reed participated.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant's separation occurred due no disqualifying reason. Accordingly, benefits are allowed, provided he is otherwise eligible.

Disqualification under the employment security law: An unemployed person who meets the basic eligibility criteria receives benefits unless they are disqualified for some reason. Iowa code 96.4. Generally, disqualification from benefits is based on three provisions of the unemployment insurance law that disqualify claimants until they have been reemployed and they have been reemployed and have been paid wages for insured work equal to ten times their weekly benefit amount. An individual is subject to such a disqualification if the individual (1) "has left work voluntarily without good cause attributable to the individual's employer" Iowa Code 96.5(1) or (2) is discharged for work –connected misconduct, Iowa Code 96.5(2) a, or (3) fails to accept suitable work without good cause, Iowa Code 96.5(3).

The first two disqualifications are premised on the occurrence of a separation of employment. To be disqualified based on the nature of the separation, the claimant must either have been fired for misconduct or have quit but not for good cause attributable to the employer. Generally,

the employer bears the burden of proving disqualification of the claimant. Iowa Code 96.6(2). Where a claimant has quit, however, the claimant has “the burden of proving that a voluntary quit was for good cause attributable to the employer pursuant to Iowa Code section 96.5(1). Since the employer has the burden of proving disqualification, and the claimant only has the burden of proving the justification for a quit, the employer also has the burden of providing that a particular separation was a quit. The Iowa Supreme Court has thus been explicitly, “the employer has the burden of proving that a claimant’s departure from employment was voluntary.” *Irving v. Employment Appeal Board*, 883, NW 2d 179, 210 (Iowa 2016).

Quit not shown: 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.

A voluntary quitting of employment requires that an employee exercise a voluntary choice between remaining employed or terminating the employment relationship. *Wills v. Emp’t Appeal Bd.*, 447 N.W.2d 137, 138 (Iowa 1989); *Peck v. Emp’t Appeal Bd.*, 492 N.W.2d 438, 440 (Iowa Ct. App. 1992). Generally, a quit is defined to be a “termination of employment initiated by the employee for any reason except mandatory retirement or transfer to another establishment of the same firm, or for service in the armed forces.” Furthermore, 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). The employer has the burden of providing that the claimant is disqualified for benefits pursuant to Iowa Code sections 96.5.

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). Administrative agencies are not bound by the technical rules of evidence. *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 630 (Iowa 2000). 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.* Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the claimant’s testimony was credible, inasmuch as he denied an intent to quit, based on his communications with the employer. Further, the credible evidence presented does not support that the claimant took an overt act to carry out any intention of quitting. The evidence presented supports that both the claimant requested work and the employer would offer it. The administrative law judge is not persuaded the claimant’s action of not requesting work after January 29, 2018, alone would support an overt act to sever employment.

Rather, the employer did not offer the claimant additional work, and has not established a pattern or practice of how the claimant would know he must request work in order to remain employed. While the employer did offer the claimant work on January 29, 2018, with short notice, the evidence presented also support the claimant had been told previously upon request that work was not available by Mr. Reed (See fact-finding document/administrative record). The

administrative law judge is persuaded that the claimant did not call to request more work because he genuinely believed employment had ended based on Mr. Reed requesting his tools back on February 1, 2018 (See fact-finding documents/administrative record). While the employer may have interpreted the claimant's failure to call after January 31, 2018, as a quit due to job abandonment, the claimant did not call because he believed he had already been discharged or laid off due to a lack of work.

Mutual Mistake in this Case not Disqualifying: Even accepting the employer's position that the claimant abandoned his employment by failing to call and request work again, thereby quitting, the separation in this case would not be disqualifying. At issue is a case of mutual mistake: the employer thought the claimant had quit and the claimant believed he had been terminated. However, when considered the rules of separation include "all terminations of employment" which are "generally classifiable as layoffs, quits, discharges, or other separations" 871 IAC 24.1

The administrative law judge concludes that a separation by mistake does not fall squarely into the definition of a quit or discharge, and therefore the claimant cannot be disqualified by the separation under the circumstances of this case. Unlike the case of *La Grange v. IDJS (LaGrange v. Iowa Department of Job Service)*, (Unpublished Iowa Appeals 1984).), where a claimant "unreasonably assumed" he had been fired, but has not been, this can be a disqualifying quit. However, the case at hand does not fall into this category. The employer has failed to prove the claimant unreasonably assumed he was fired or that additional work was offered to him after he informed the employer he could not perform work on short notice on January 29, 2018. Further, the employer failed to show the claimant quit and failed to prove that the claimant was discharged for reasons that constitute misconduct. Therefore, benefits must be allowed.

Because the claimant is eligible for benefits, the issues of overpayment and relief of charges are moot.

DECISION:

The March 2, 2018, (reference 04) decision is affirmed. The claimant was not separated from employment in a manner that would disqualify the claimant from benefits. The claimant is allowed benefits, provided he is otherwise eligible. The claimant is not overpaid benefits. The employer's account is not relieved of charges.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/scn