

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

TODD J ENDORF
Claimant

FLAGGER PROS USA LLC
Employer

APPEAL 15A-UI-12013-JCT
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 01/04/15
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 an appeal from the October 22, 2015 (reference 05) unemployment insurance decision that allowed benefits based upon separation. The parties were properly notified about the hearing. A telephone hearing was held on November 17, 2015. The claimant participated personally. The employer participated through Victoria Benson, Human Resources. Employer's Exhibits One through Three and Claimant's Exhibits B, C, L, and M were admitted into evidence. The administrative law judge took official notice of the administrative record, including fact-finding documents.

ISSUES:

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

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 reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full time as a certified flagger and was separated from employment on September 26, 2015. The employer asserted that the claimant "self-terminated" when he attempted to walk off the job but that his action while making the attempt was also misconduct.

The claimant was a "flagger" which required him to hold safety flags in construction zones, and exposed him to the motoring public at large. On the claimant's final day of work, he was heckled by a driver who yelled out that the claimant was a "fag." The on-site crew overheard the comment and laughed at him. The claimant became upset and needed a break, and requested a break from Mike, the site superintendent, who was not employed by this employer but rather a subcontractor. The claimant was told he would be removed from the job if he took a

break. The claimant made sure there was adequate coverage and took a break of approximately ten minutes when he went to the gas station next door. The claimant returned to the job site and was told by Mike that he was removed from the job and to leave.

The claimant was upset and went to his car to exit the premises. The claimant had no on-site supervisor with the employer, and didn't know that Mike did not have the authority to remove him from the site. The employer's policies advised employees to call the employer if something happened on site. The employer also had a policy which stated that if an employee walks off a job before the work day ends, they voluntarily terminate their employment (Employer's Exhibit One). The claimant signed the acknowledgment while attending the employee appreciation party (Claimant's Exhibit C).

The claimant intended to leave the premises as directed and then call the employer. Once the claimant was told he was off the job, there was a confrontation between the on-site supervisor, Mike, and the claimant over his time sheet (Claimant's Exhibit B). The claimant refused to give it to Mike because it belonged to the employer (rather than subcontractor), and an argument ensued. Mike blocked the claimant's car so he could not leave and was observed taking photos of his license plate. The claimant waited until Mike moved, and believed he had adequate clearance to steer around Mike. However, while attempting to leave, he struck Mike, and chaos ensued, as Mike directed his employees to surround the car and called 911. No evidence was provided that Mike was injured by the incident. The claimant was subsequently arrested on site for vehicular assault, and unable to contact the employer about what happened. Following the final incident, the claimant contacted the employer's owner president (Employer's Exhibit Two) and separation occurred.

The claimant asserted he did not intend to walk off the job, but rather was directed by Mike, the on-site supervisor, to leave. The claimant planned to call the employer to explain what happened and to be reassigned upon leaving the premises and calming down. The claimant was not permitted to be reassigned based on the arrest. The claimant further testified he did not purposefully try to strike Mike with the vehicle but that he had tried to leave and believed he had adequate space to maneuver. Mike did not attend the hearing or provide a written statement.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$12.17 since filing a claim through the weeks ending October 3, 2015. The administrative record also establishes that the employer did participate in the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

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

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. A voluntary quitting of employment requires that an employee exercise a voluntary choice between remaining employed and 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). 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).

The claimant did not have the option of remaining employed nor did he express intent to terminate the employment relationship. In this case, the claimant was asked to leave by the subcontractor manager, Mike, who told him he was off the job. 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). It was the employer who severed the relationship upon learning of the incident that occurred on September 26, 2015, and therefore, the separation is a discharge for unemployment purposes.

Iowa Code § 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(4) provides:

(4) Report required. The claimant's statement and the employer's statement must give detailed facts as to the specific reason for the claimant's discharge. 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. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

In a discharge case, the employer has the burden of proof to establish the claimant was separated for 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 the 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).

The rules define misconduct as (1) deliberate acts or omissions by a worker that materially breach the duties and obligations arising out of the contract of employment, (2) deliberate violations or disregard of standards of behavior that the employer has the right to expect of employees, or (3) carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent, or evil design. 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 misconduct within the meaning of the statute. 871 IAC 24.32(1).

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 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, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the employer has failed to meet its burden of proof that the claimant was discharged for disqualifying job-related misconduct.

Per the employer's testimony, the manager, Mike, was permitted to tell the claimant he could not take a break at the time requested, and if he did, he would be removed from the site/job assignment, but also that Mike did not have the authority to actually remove the claimant from the assignment. In this case, there was no on-site supervisor available to the claimant. If the claimant experienced an issue, he was expected to call his employer, even though he worked daily with a subcontractor manager. The claimant testified that he was told he was being removed from the assignment, and needed to leave. This placed the claimant in the quandary of following the directives of the on-site subcontractor supervisor, against the employer's policy of calling with an issue rather than walking off the job. The claimant credibly testified that he did not intend to walk off the job and abandon the employment but rather was following directives and intended to call the employer, and ultimately be reassigned.

Due to the confrontation regarding the timecard in question, the claimant was unable to leave and return his timecard to his employer. Mike was aggressive and tried to block the claimant's car. The claimant reasonably waited until he believed he could exit the premises safely before moving the vehicle but inadvertently struck Mike. Cognizant of the employer's concerns when its subcontractor was struck, no evidence was provided that the claimant willfully or intentionally struck Mike as he was trying to leave; as directed. Rather, the first hand evidence provided by the claimant was that he reasonably tried to exit the premises to call the employer and was being provoked while being told to leave.

When the record is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. *Schmitz v. Iowa Dep't Human Servs.*, 461 N.W.2d 603, 607 (Iowa Ct. App. 1990). Both the quality and the quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See, Iowa Code § 17A.14 (1). In making the evaluation, the fact-finder should conduct a common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be fulfilled. *Schmitz*, 461 N.W.2d at 608. The Iowa Supreme Court has ruled that if a party has the power to produce more explicit and direct evidence than it chooses to present, the administrative law judge may infer that evidence not presented would reveal deficiencies in the party's case. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976).

Neither Mike, nor any other witness to the final incident attended the hearing, or offered a written statement in lieu of participation. Given the solemn nature of the proceeding and the employer's allegations resulting in claimant's discharge from employment, the employer's complete reliance on hearsay statements is unsettling. The claimant denied striking Mike with his vehicle on purpose, but was trying to respect the subcontractor's directive to leave the premises. Mindful of the ruling in *Crosser, id.*, and noting that the claimant presented direct, first-hand testimony while the employer relied upon second-hand reports, the administrative law judge concludes that the claimant's recollection of the events is more credible than that of the employer. While the employer may have been justified in discharging the claimant, work-connected misconduct as defined by the unemployment insurance law has not been established in this case.

Nothing in this decision should be interpreted as a condemnation of the employer's right to terminate the claimant for violating its policies and procedures. The employer had a right to follow its policies and procedures. The analysis of unemployment insurance eligibility, however, does not end there. This ruling simply holds that the employer did not meet its burden of proof to establish the claimant's conduct leading separation was misconduct under Iowa law. Since the employer has not met its burden of proof, benefits are allowed.

Because the claimant is eligible for benefits, he has not been overpaid benefits. As a result, the issues of recovery of any overpayment and possible relief from charges are moot.

DECISION:

The October 22, 2015 (reference 05) unemployment insurance decision is affirmed. The claimant did not quit but was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. The claimant has not been overpaid benefits and the employer's account is subject to charge.

Jennifer L. Coe
Administrative Law Judge

Decision Dated and Mailed

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