IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

RICK L IVIE
Claimant

JACK HOOD TRANSPORTATION INC
Employer

APPEAL NO. 16A-UI-05784-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 04/24/16
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the May 18, 2016, reference 02, decision that allowed benefits to the claimant, provided he was otherwise eligible and that held the employer's account could be charged for benefits, based on an agency conclusion that the claimant had been discharged on April 26, 2016 for no disqualifying reason. After due notice was issued, a hearing was held on June 8, 2016. Claimant Rick Ivie participated. Mark Lose represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and of the fact-finding materials.

ISSUES:

Whether the claimant separated from the employment for a reason that disqualifies him for benefits or that relieves the employer's account of liability for benefits.

Whether the claimant is overpaid benefits.

Whether the claimant must repay benefits.

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Rick Ivie was employed by Jack Hood Transportation, Inc. as a full-time straight truck driver from November 2015 and last performed work for the employer during an overnight shift that started on April 26, 2016. The employer is headquartered in Indiana. Mr. Ivie worked out of the employer's Des Moines dock facility. Mark Lose, Area Manager, was Mr. Ivie's immediate supervisor. The employer runs three routes from its Des Moines location. The routes run daily, Sunday through Thursday. One route delivers mail to a facility located in Minneapolis, Minnesota. A second route delivers mail to a facility in Minneapolis and to another in St. Paul. The third route delivers mail to a facility in Omaha. The drivers start their shifts at the Des Moines dock site and return to the Des Moines site at the end of each shift. The drivers rotate

through the three routes. The Minneapolis route leaves the dock at 7:15-7:30 p.m. The Minneapolis/St. Paul route leaves the dock at 7:30-7:45 p.m. The Omaha route leaves the dock at 7:45-8:00 p.m.

On April 26, 2016, Mr. Ivie was assigned to drive the Omaha route. Before Mr. Ivie left Des Moines facility that night, Mr. Lose asked Mr. Ivie to try the new fuel card that the corporate office had provided to make sure the card worked. The Des Moines staff had been experiencing problems with fuel cards previously provided by the employer's corporate office. The corporate office had provided back-up fuel cards as a stop-gap measure and then provided new fuel cards that the drivers were to commence using. Mr. Ivie indicated he would use the new fuel card. Mr. Ivie drove the Omaha route that evening, but used the back-up fuel card instead of the new fuel card.

At 11:25 a.m. on April 27, Mr. Lose sent Mr. Ivie a text message asking whether the new fuel card worked. At 12:57 p.m., Mr. Ivie responded with a text message stating, "The old worked. Didn't try the new one." At 12:59 a.m., Mr. Lose sent Mr. Ivie a text message stating, "I told you last night to try it so I can let them know." At 1:03 p.m., Mr. Ivie sent a response: "Yeah, let them know tonight because I'm sick of this dumb shit."

At 6:30 p.m. on April 27, Mr. Ivie appeared for work to drive his route. When Mr. Ivie entered the office, a coworker told Mr. Ivie, "We thought you quit." Mr. Ivie then spoke to another work who made the same statement and who told Mr. Ivie that he needed to go talk to Mr. Lose. Mr. Lose had told the other staff that Mr. Ivie had quit and had assigned himself the April 27 Omaha route. When Mr. Ivie made contact with Mr. Lose and asked him what was going on. Mr. Lose told Mr. Ivie that Mr. Ivie had quit. Mr. Ivie said he had not quit and was standing there, meaning that Mr. Ivie was reporting for work. Mr. Lose told Mr. Ivie that he had spoken to owner Chris Hood and that Mr. Hood said Mr. Ivie was done. At that point, Mr. Ivie demanded his last paycheck and said he had a house payment due. Mr. Ivie thereafter sent increasingly angry text messages demanding his final check. Mr. Lose did not respond to the text messages.

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. 871 IAC 24.1(113)(c). A quit is a separation initiated by the employee. 871 IAC 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 871 IAC 24.25.

It is the duty of the administrative law judge as the trier of fact, 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. State v. Holtz, 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. State v. Holtz, Id.

The administrative law judge is confronted with a he-said, he-said situation. Mr. Ivie and Mr. Lose were the only witnesses to the discussion that occurred between the two men at the start of Mr. Ivie's April 26 shift. The administrative law judge concludes that the text message correspondence that took place between Mr. Lose and Mr. Ivie between 11:25 a.m. and 1:03 p.m. is inconsistent with an April 26 voluntary quit and undermines the employer's assertion that Mr. Ivie voluntarily quit on April 26. Mr. Ivie's appearance for work as scheduled on April 27 is also inconsistent with the employer's assertion that Mr. Ivie voluntarily quit on April 26. The administrative law judge notes the absence of a written voluntary quit along with the absence of documentary evidence showing that the employer documented a voluntary quit on or about April 26. The administrative law judge also notes the absence of an overt act on the part of Mr. Ivie demonstrating an intent to leave the employment. The weight of the evidence indicates a discharge, not a voluntary quit.

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:
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> 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 a discharge 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). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

Continued failure to follow reasonable instructions constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See Woods v. Iowa Department of Job Service, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See Endicott v. Iowa Department of Job Service, 367 N.W.2d 300 (Iowa Ct. App. 1985).

An employer has the right to expect decency and civility from its employees and an employee's use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct disqualifying the employee from receipt of unemployment insurance benefits. Henecke v. Iowa Department of Job Service, 533 N.W.2d 573 (Iowa App. 1995). Use of foul language can alone be a sufficient ground for a misconduct disqualification for unemployment benefits. Warrell v. Iowa Dept. of Job Service, 356 N.W.2d 587 (Iowa Ct. App. 1984). An isolated incident of vulgarity can constitute misconduct and warrant disqualification from unemployment benefits, if it serves to undermine a superior's authority. Deever v. Hawkeye Window Cleaning, Inc. 447 N.W.2d 418 (Iowa Ct. App. 1989).

The weight of the evidence in the record establishes a discharge based on a single incident wherein Mr. Ivie failed to comply with the employer's reasonable directive that he use the new fuel card. The evidence fails to provide a reasonable basis for failing to follow the directive. However, the evidence does not establish a pattern of Mr. Ivie unreasonably failing to follow reasonable employer directives. The evidence also establishes a discharge based on a text message outburst wherein Mr. Ivie referred to the employer's fuel card issues as "dumb shit." That expression of frustration did not rise to the level of misconduct. The employer alleges additional inappropriate conduct after the employer told Mr. Ivie the employment was done. That post-discharge conduct could not have factored in the discharge and cannot serve as a basis for disqualifying Mr. Ivie for benefits.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Ivie was discharged for no disqualifying reason. Accordingly, Mr. Ivie is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The May 18, 2016, reference 02, decision is affirmed. The claimant was discharged on April 27, 2016 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/pjs