IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

PERRY J AJAVON Claimant **MIDWESTERN BAG & SUPPLY LLC** Employer	**APPEAL 21A-UI-24575-JC-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 03/22/20** **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/appellant, Midwestern Bag & Supply LLC., filed an appeal from the October 25, 2021 (reference 05) Iowa Workforce Development ("IWD") unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on January 3, 2022. The claimant, Perry J. Ajavon, participated personally. Teewon Ajavon and Chris Sando testified on behalf of the claimant. The employer participated through Brett Roeder, owner. The administrative law judge took official notice of the administrative records. Employer Exhibits 1 and 2 were admitted. 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?
Did 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 reviewed all of the evidence in the record, the administrative law judge finds: The claimant originally began employment through a temporary staffing firm, before being permanently hired on with the employer in January 2020. Claimant worked full-time in warehouse production until March 25, 2020. The evidence is disputed as to whether he quit or was discharged.

In March 2020, the United States declared a public health emergency based on the COVID-19 pandemic. At the time of claimant's separation, his wife was pregnant. As of March 25, 2020, COVID-19 precautions were still being considered, as new information was updated frequently.

Employer stated there were masks available, which claimant disputed, and that employees could work away from each other within the warehouse.

A discussion ensued upon an employee going to a party the prior weekend and disclosing either having COVID-19 like symptoms or someone from the party having symptoms. Claimant reported this employee was coughing and sneezing at the workplace. Claimant became upset during this discussion due to fears that he could contract COVID-19 and possibly transmit it to his pregnant wife. Claimant confronted the employer through Mr. Roeder, and the conversation escalated. Claimant told the employer it did not care about him or human life. Both parties raised voices. Both parties used profanity. Mr. Roeder alleged the claimant removed his sweatshirt or jacket as to initiate fighting. Claimant stated Mr. Roeder got "up in his face". The argument ended when claimant was told to get the "F" off the property or law enforcement would be called. Later that day, employer sent employees home due to COVID-19. Claimant attempted to return to work and was informed by his immediate manager, Rick, that he could not come back. Based on Mr. Roeder's comments and his conversation with Rick, claimant believed he was fired.

Employer disputed firing claimant. Employer stated it sent claimant a letter dated April 16, 2020, recalling claimant to work (Employer Exhibit 1 and 2). Claimant denied receipt of the letter. Employer made no efforts to contact claimant regarding his conduct on March 25, 2020 or employment status before the April 16 letter but denied claimant was discharged.

The administrative record reflects that claimant has received unemployment benefits in the amount of $5,461.04, since filing a claim with an effective date of March 22, 2020.

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. Brett Roeder participated by phone call.

REASONING AND CONCLUSIONS OF LAW:

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

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 department 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 § 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). 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*.

The administrative law judge carefully weighed the testimony, which included claimant being told to get the "F" out on March 25, 2020 and being told by his manager the following the next day, against employer's assertion that claimant quit. Claimant was not sent home with other employees due to COVID-19 as originally asserted by the employer. He was told to leave or law enforcement would be called. Employer may no contact with claimant for weeks until it sent a letter (which he never received) stating he could return. Employer did not initially even reference there had been an argument when presenting its case about claimant's separation, even though it was the triggering event. 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 the claimant's evidence was more credible and that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant is disqualified for benefits pursuant to Iowa Code § 96.5.

The evidence presented does not support claimant intended to leave or took overt action to carry out an intent to leave. Claimant's leaving of the building and the employment was initiated by the employer. The issue then becomes whether claimant's separation was a discharge due to misconduct. Based on the evidence presented, the administrative law judge concludes it was not.

Iowa Administrative Code rule 871-24.32(1)a provides:

> "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).

In an at-will employment environment, 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, it incurs potential liability for unemployment insurance benefits related to that separation. The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 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. IDJS*, 364 N.W.2d 262 (Iowa 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. IDJS*, 425 N.W.2d 679 (Iowa 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 Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

It is true that "[t]he use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct, even in the case of isolated incidents or situations in which the target of abusive name-calling is not present when the vulgar statements are initially made." *Myers v. Emp't Appeal Bd.*, 462 N.W.2d 734 (Iowa Ct. App. 1990). In this case, both claimant and Mr. Roeder engaged in a verbal altercation, with profanity, when claimant became upset with the employer and concerned about COVID-19 exposure following a co-worker's exposure, and in light of claimant's wife being pregnant. The administrative law judge in no way condones claimant being confrontational or disrespectful to his manager (accusing the employer of not caring about human life). The evidence is disputed as to whether either or both individuals also engaged in aggressive behavior (claimant taking off his jacket/sweatshirt and Mr. Roeder getting in claimant's personal space). Given that both parties were heated and engaged in similar conduct, the administrative law judge is not persuaded claimant should be discharged for conduct similar to that engaged by management/ownership.

Based on the evidence presented, the administrative law judge concludes the conduct for which the claimant was discharged was an isolated incident of poor judgment and inasmuch as the employer had not previously warned the claimant about the issue leading to the separation, it has not met the burden of proof to establish that the claimant acted deliberately or with recurrent

negligence in violation of company policy, procedure, or prior warning. 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. Training or general notice to staff about a policy is not considered a disciplinary warning. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given.

The question before the administrative law judge in this case is not whether the employer has the right to discharge this employee, but whether the claimant's discharge is disqualifying under the provisions of the Iowa Employment Security Law. While the decision to terminate the claimant may have been a sound decision from a management viewpoint, for the above stated reasons, the administrative law judge concludes that the employer has not sustained its burden of proof in establishing that the claimant's discharge was due to job-related misconduct. Accordingly, benefits are allowed provided the claimant is otherwise eligible.

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

The parties are reminded that under Iowa Code § 96.6-4, a finding of fact or law, judgment, conclusion, or final order made in an unemployment insurance proceeding is binding only on the parties in this proceeding and is not binding in any other agency or judicial proceeding. This provision makes clear that unemployment findings and conclusions are only binding on unemployment issues, and have no effect otherwise.

DECISION:

The October 25, 2021 (Reference 05) initial decision is affirmed. The claimant was discharged for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. Because the claimant is eligible for benefits, the issues of overpayment and relief of charges are moot.

Jennifer L. Beckman
Administrative Law Judge
Unemployment Insurance Appeals Bureau
Iowa Workforce Development
1000 East Grand Avenue
Des Moines, Iowa 50319-0209
Fax 515-478-3528

January 28, 2022
Decision Dated and Mailed

jlb/mh