IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

JENNIFER L BERGERON Claimant **GEARHEAD ENTERPRISES INC** Employer	**APPEAL 16A-UI-12232-JP** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 10/16/16** **Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant filed an appeal from the November 10, 2016, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. An in-person hearing was held at 3420 University Avenue, Suite A, in Waterloo, Iowa, on April 27, 2017. Claimant participated. Employer participated through general manager Jason Schmitz.

ISSUES:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant started her employment with the employer in 2012. After claimant returned from a medical leave of absence in August 2016, she was employed part-time as an inventory specialist and was separated from employment on October 11, 2016, when she was discharged.

Approximately two weeks before October 11, 2016, the owner and claimant went around the warehouse and the owner showed her different projects and areas to work on. Claimant was instructed to work on these projects until they were all finished. Claimant wrote down the instructions in a notebook.

On October 11, 2016, claimant decided to work on one of the projects the owner gave her. Claimant finished the project like she thought it was supposed to be done. The owner then came to work while claimant was out in the warehouse working on returns. While claimant was working on returns, she observed the owner get mad and started throwing stuff off the shelves in the area of the project she had finished. Claimant came over to the area and the owner told her not to talk. Mr. Schmitz testified this was a heated conversation. Mr. Schmitz testified it was an ongoing situation, week after week, of claimant doing her own thing since she returned

from her medical leave of absence in August 2016. Around 11:35 a.m., claimant decided to go to lunch because the owner told her not to talk. Claimant then went over to the time clock to clock out for lunch. The owner came over to the time clock and told claimant to take the rest of the week off. The owner then told claimant to not come back at all. Claimant believed the owner was discharging her. At some point during this conversation, the owner told claimant that she was the employee that stressed him out the most. As claimant was leaving, the owner told the bookkeeper to mail claimant her check. Normally the employer hands employees their checks every Friday.

On October 11, 2016, claimant did not tell the employer she was quitting. Claimant denied that the owner said something to the effect that if you clock out you are done or if she clocks out the employer will consider her to have quit. Claimant testified that if the owner had said this to her, she would not have clocked out and left. Mr. Schmitz testified the employer had prior conversations with claimant about not doing her own thing, but she was not given any written warnings and she was not told her job was in jeopardy.

REASONING AND CONCLUSIONS OF LAW:

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

It is the duty of an administrative law judge and 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, as the finder of fact, 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. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). 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 evidence you believe; 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*, 548 N.W.2d 162, 163 (Iowa App. 1996).

This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. This administrative law judge finds claimant's version of events to be more credible than the employer's recollection of those events.

Iowa Code §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 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). Claimant has the burden of proving that the voluntary leaving was for good cause attributable to the employer. Iowa Code § 96.6(2). However, Iowa Administrative Code rule 871-24.25 provides:

> 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 from whom the employee has separated. *The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5.*
> Emphasis added.

Therefore, the employer has the burden of proving the separation was a quit as opposed to a discharge. Iowa Admin. Code r. 871-24.25.

The employer failed to meet its burden of proof to establish claimant's separation was a voluntary quit. The employer's argument that claimant quit on October 11, 2016, is not persuasive. Claimant credibly testified the owner did not tell her that if she clocked out she would be separated (considered to have quit). Claimant further credibly testified that she would not have clocked out if the owner told had her this. Claimant also credibly testified that the owner told her not to come back. Furthermore, the owner's statement to the bookkeeper to mail claimant her check provides credibility to claimant's interpretation that she was being discharged because the employer normally hand delivers employees their paychecks every Friday. Therefore, it was reasonable for claimant to interpret the owner's comments that she should not come back as a discharge and the burden of proof falls to the employer.

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.
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> 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).

Iowa Admin. Code r. 871-24.32(4) provides:

> (4) Report required. The claimant's statement and 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.

The employer has the burden of proof in establishing 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 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). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. 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 Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.,* 391 N.W.2d 731 (Iowa Ct. App. 1986). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

The employer did not meet its burden of proof in establishing disqualifying job misconduct. 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. On October 11, 2016, claimant credibly testified she organized an area she thought the owner wanted her too based off their prior discussion; however, she testified that when the owner arrived, he got mad and started throwing things in the area she had just organized. Claimant's testimony is bolstered by Mr. Schmitz testimony that the subsequent conversation between the owner and claimant was heated. Then when claimant tried to leave the confrontation and take an early lunch, the employer approached her and told her not to come back. Although the employer may have been frustrated with claimant for constantly not being on the same page as the employer, the employer only had discussions with her and it never warned her about her conduct.

The conduct for which claimant was discharged was merely an isolated incident of poor judgment and inasmuch as employer had not previously warned claimant about the issue leading to the separation, it has not met the burden of proof to establish that 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. If an employer expects an employee to conform to certain expectations or face discharge,

appropriate (preferably written), detailed, and reasonable notice should be given. Benefits are allowed.

DECISION:

The November 10, 2016, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

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Jeremy Peterson
Administrative Law Judge

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Decision Dated and Mailed

jp/rvs