IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

DAVID LATHROP Claimant **SULLY TRANSPORT, INC.** Employer	**APPEAL 21A-UI-08826-WG-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 11/29/20** **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/appellant filed an appeal from the March 23, 2021 (reference 03) unemployment insurance decision that disallowed benefits based upon a finding that claimant voluntarily quit his employment. The parties were properly notified of the hearing. A telephone hearing was held on May 26, 2021. The claimant, David Lathrop, participated personally. The employer, Sully Transport, Inc., participated through its representative and co-owner, Brent VanderLeest.

ISSUE:

Did the claimant quit the employment without good cause attributable to the employer or was he discharged for reasons related to job misconduct sufficient to warrant a denial of unemployment benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a semi-trailer mechanic. Claimant was employed from February 2020 until November 29, 2020, when he was discharged from employment.

Claimant and the employer's representative, Brent VanderLeest, offer significantly varying testimony in this case. Claimant asserts that he contracted Covid-19, was off work for a period of time, and had residual respiratory effects when he returned to work. His physician released him to return to work but required that claimant be allowed to have breaks to use a nebulizer.

Claimant testified that he was having difficulties breathing at work on November 19, 2020. He went to his supervisor, Brent VanderLeest, and requested a break and use of the break room to use his nebulizer. He testified that Mr. VanderLeest instructed him to leave work and return to his physician. He further testified that the employer instructed him not to return to work until he obtained a full medical release for work from his physician. After leaving work on November 29, 2020, he received a call and Mr. VanderLeest purportedly notified claimant that he was no longer employed. Claimant asserts that the employer told him that he was not a good employee and that no one in the shop liked him so he was being let go.

Mr. VanderLeest contends that he granted claimant permission to use the break room to use his nebulizer on November 29, 2020. However, Mr. VanderLeest testified that he used that opportunity (claimant coming in short of breath) to advise claimant that he was being moved into the main shop. Mr. VanderLeest testified that he told claimant he needed to "button-down" and earn his wages. He testified that claimant was not a good worker, that he talked too much on the job, and that he had a habit of leaving work.

Mr. VanderLeest testified that he granted claimant permission to use the break room to use his nebulizer. Mr. VanderLeest testified that claimant questioned why he had not been fired if he was not a good worker and became agitated and was yelling at Mr. VanderLeest for a period of 15-20 minutes. Mr. VanderLeest testified that he told claimant he would not fire him but would instead "make a man" out of claimant and teach him how to work. According to Mr. VanderLeest, instead of using his nebulizer following this exchange, claimant cleaned out his belongings and left the premises without permission. As a result, Mr. VanderLeest testified that he called claimant and indicated that he considered claimant to have voluntarily quit his position by leaving the premises without permission.

Mr. VanderLeest also testified that all employees were required to get his permission to leave the premises. I have a difficult time rectifying Mr. VanderLeest's testimony that claimant had a habit of leaving work and the fact that he was required to obtain permission to leave the premises. If leaving work was an offense sufficient to justify termination or considered a voluntary quit, claimant should have been disciplined prior, not just on the day he experienced and reported respiratory symptoms. It is also odd that Mr. VanderLeest would use the opportunity of an employee coming in to request time to use a nebulizer for respiratory difficulties as a time to "dress down" the employee about their work habits and to notify the employee that he was being moved into a different location where he could be watched more closely.

Ultimately, the truth in this situation likely lies somewhere between the diametrically opposed versions of events offered by Mr. Lathrop and Mr. VanderLeest. However, weighing the consistency of the testimony and credibility of the witnesses, I ultimately find that Mr. Lathrop did not voluntarily quit his employment or leave the work premises without permission or instruction to do so. Instead, I find that claimant was instructed to leave the work premises on November 29, 2020 and not to return until he received a full work release. I further find that claimant was discharged by the employer for insufficiently proven reasons. Certainly, I do not find any intentional conduct or misconduct by the claimant was the cause of his discharge.

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.

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 quitting means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer and requires an intention

to terminate the employment. *Wills v. Emp't Appeal Bd.*, 447 N.W. 2d 137, 138 (Iowa 1989); *see also* Iowa Admin. Code r. 871-24.25(35). 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). Where a claimant walked off the job without permission before the end of his shift saying he wanted a meeting with management the next day, the Iowa Court of Appeals ruled this was not a voluntary quit because the claimant's expressed desire to meet with management was evidence that he wished to maintain the employment relationship. Such cases must be analyzed as a discharge from employment. *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438 (Iowa Ct. App. 1992).

In this case, I found that Mr. Lathrop did not leave employment or his job site. Instead, he was instructed to leave by the employer and not return until he obtained a full medical release. Therefore, claimant did not demonstrate an intention to quit his employment. I conclude that this is not a voluntary quit but must be evaluated as a discharge situation.

Iowa Code § 96.5(2)a provides:

> An individual shall be disqualified for benefits:
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> 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).

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."

A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to assess points or impose discipline up to or including discharge for the incident under its policy.

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, employer incurs potential liability for unemployment insurance benefits related to that separation.

It is my duty, as the 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).

I assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using my own common sense and experience. Ultimately, I believe the truth is likely somewhere between the two version of events testified to by claimant and Mr. VanderLeest. However, I accept and find claimant's testimony most credible on the issue of why he left work on the date of separation. Specifically, I find that the employer instructed him to leave work, to seek further medical care, and to only return to work when he was at 100% or had a full duty release to work from his physician.

Having a respiratory ailment and needing accommodation or breaks as a result of the need for treatment for that respiratory ailment is not misconduct. Inasmuch as claimant was discharged without evidence of misconduct, the employer has not met its burden of proof. Benefits are allowed.

DECISION:

The March 23, 2021, (reference 03) decision is reversed. Claimant did not quit but was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. Any benefits withheld shall be paid to claimant.

William H. Grell
Administrative Law Judge

June 11, 2021
Decision Dated and Mailed

whg/scn