IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

DANA C OBRECHT Claimant **UG2 LLC** Employer	**APPEAL 19A-UI-03759-NM-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 04/07/19** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

On May 7, 2019, the claimant filed an appeal from the April 30, 2019, (reference 01) unemployment insurance decision that denied benefits based on his voluntary quit. The parties were properly notified about the hearing. A telephone hearing was held on May 30, 2019. Claimant participated and testified. Employer participated through Facilities Director John Harris.

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 began working for employer on June 20, 2018. Claimant last worked as a part-time flooring specialist. Claimant was separated from employment on April 12, 2019, when he was discharged.

Claimant's normal work schedule was 5:30 p.m. to 10:30 p.m., Monday through Friday. April is a particularly busy time of year for the employer, so claimant was asked to work some weekends, which he agreed to do. On April 12, 2019, claimant was asked by his manager, Pedro Contreras, to come in at 7:00 p.m., rather than 5:30. Claimant agreed and understood he would be working until midnight that night and the next, as there were floors that needed to be heavily cleaned. When claimant got to work Contreras instructed him to start working on the cafeteria floors first. Claimant followed this directive and began working.

Around 10:00 p.m. claimant noticed Contreras standing in the hallway. Claimant asked Contreras if he needed anything. Contreras responded that he was just standing there trying to figure out what claimant was doing, but he used an expletive while asking the question.

Claimant responded that he was following Contreras' directive. Contreras' then began to degrade claimant by telling him was stupid, worthless, and that he did not do any work. Contreras also continued to use expletives towards the claimant. Contreras then informed claimant he would have to finish all of the floors that night, amounting to a ten-hour shift. Claimant believes Contreras was upset with him about a report he made to upper management several weeks prior and that this behavior was retaliation for that report. The complaint involved an allegation that Contreras was falsely reporting safety meetings and was investigated. Claimant had never before been asked to work a ten-hour shift. Claimant explained that he was not able to work for the next ten hours and that he was only supposed to be there until midnight. Contreras responded by telling claimant if he left before all the floors were done, he would consider him to have voluntarily resigned.

Claimant informed Contreras he would not be staying and Contreras told him not to come back. Claimant was then met by security and asked for his badge, keys, and timecard, before being escorted out. Contreras reported a different version of events to the employer, stating claimant knew he was supposed to work ten hours and was complaining about having to stay late. Contreras also reported that claimant was the one using inappropriate language. Based on Contreras' version of events, the employer considered claimant to have voluntarily resigned by walking out of his shift early. Claimant had no prior disciplinary action and was considered by the employer to be a good employee.

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.

The decision in this case rests, at least in part, on the credibility of the witnesses. 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 claimant in this matter provided testimony based on his direct, first-hand knowledge of the circumstances leading to his separation. The employer, on the other hand, only provided secondary testimony and no first-hand witness was made available. The employer's witness was able to corroborate certain aspects of claimant's testimony, such as the fact that he had never before been asked to work a ten hour shift and the Contreras had been the subject of an investigation based on a complaint made by the claimant. After assessing the credibility of the witnesses who testified during the hearing, reviewing the exhibits submitted by the parties, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the 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:
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> 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.

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).

Iowa Admin. Code r. 871-24.26(21) provides:

> Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:
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> (21) The claimant was compelled to resign when given the choice of resigning or being discharged. This shall not be considered a voluntary leaving.

Contreras told claimant that if he did not stay and work the entire ten hours he would be considered to have voluntarily resigned and would not be allowed to return. The fact that claimant's badge, keys, and timecard were taken when he left support that he was not going to be allowed to return to work. Since claimant would not have been allowed to continue working had he not resigned, the separation was a discharge, the burden of proof falls to the employer, and the issue of misconduct is examined.

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).

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 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 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."

Here, the claimant was discharged after he failed to follow his manager's directive to work a ten-hour shift. Claimant had never before been asked to work a ten-hour shift and told the employer he was not able to do so. 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. Essentially, claimant was discharged for insubordination when he refused to follow the directive to work ten hours. This directive was not reasonable, for the reasons noted above. Inasmuch as claimant was

reasonable in refusing to follow the directive given by Contreras, the employer has not met the burden of proof to establish that claimant engaged in misconduct. Benefits are allowed.

To the extent that the claimant is deemed to have voluntarily resigned, he has shown it was with good cause attributable to the employer.

Iowa Admin. Code r. 871-24.26(4) provides:

> Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:
>
> (4) The claimant left due to intolerable or detrimental working conditions.

"The 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). Inasmuch as an employer can expect professional conduct and language from its employees, claimant is entitled to a working environment without being the target of abusive, obscene, name-calling. An employee should not have to endure bullying or a public dressing down with abusive language directed at them, either specifically or generally as part of a group, in order to retain employment any more than an employer would tolerate it from an employee. Contreras' behavior on April 12, 2019, created an intolerable work environment for claimant that gave rise to a good cause reason for leaving the employment. Benefits are allowed.

DECISION:

The April 30, 2019, (reference 01) 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.

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Nicole Merrill
Administrative Law Judge

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Decision Dated and Mailed

nm/rvs