IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DOUGLAS EWING
Claimant

JDM MANAGEMENT LLC
Employer

APPEAL NO. 13A-UI-02727-LT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/13/13
Claimant: Respondent (1)

Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

The employer filed an appeal from the February 26, 2013 (reference 01) decision that allowed benefits. After due notice was issued, a hearing was held by telephone conference call on April 3, 2013. Claimant participated. Employer participated through building co-owners. Joe and Dodi Wolfgram, and was represented by Stuart Cochrane, Attorney at Law. The administrative law judge took judicial notice of the administrative record.

ISSUE:

Did claimant voluntarily leave the employment with good cause attributable to employer or did employer discharge 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 was employed full time as an apartment manager from April 30, 2011 and was separated from employment on November 7, 2012. His last day of work was November 2. Claimant did not tell tenants he was intending to quit. The employer did not call tenants to testify or offer written statements. The parties agree that claimant was not paid for and did not seek payment for any work performed during the week of November 5.

Claimant spoke to Wolfgram on November 3 or 4 and notified him he would not be able to attend the November 5 meeting at 1:00 p.m. because of personal issues at home and the death of family friend. Wolfgram told him to handle the issues and they would meet on November 12. Claimant had been working off and on at a Webster City hospital site salvaging various items for Wolfgram to use in other buildings. He worked there from November 6 through 9 even though Wolfgram did not specifically ask him to do so. Claimant did not tell Wolfgram he worked on the side for another company doing hospital salvage in Webster City.

Wolfgram believed him to be a no-call/no-show on November 5, 6 and 7, 2012 but has no written policy about how that situation is treated. Claimant did not receive voice mails from Wolfgram on November 5. There was no communication between the parties on November 6.

On November 7 Wolfgram called claimant at 12:15 p.m. and got no answer so left a voice message for him to return the call right away. Fifteen minutes later Dodi Wolfgram shut off service to claimant's company phone. On November 8 claimant left Wolfgram a voice mail apologizing for "everything" and left a new phone number.

Claimant followed through on Wolfgram's request sometime during that week to bring him beer, keys and financial books to a work site where Wolfgram was tending a bonfire. Continued work was available on November 5 but on November 7 when Wolfgram said he scheduled the meeting with claimant for November 12 he decided claimant could no longer work for him based upon the no-call/no-show absences. (Hearing recording at 12:08.) At the November 12 meeting Wolfgram asked claimant if he was capable of running the building. Claimant said he was not quite ready to do so since he still had a few issues to resolve. Wolfgram said he would run the building until the first of the year, told claimant to get his problems taken care of and call him when he was ready to return to work. Claimant resolved his personal issues and attempted to reach Wolfgram but did not receive return calls so he left a message with Dodi Wolfgram in late November or early December 2012. He also had his son call Wolfgram once and his wife texted Wolfgram in early January 2013 asking him to call claimant. Wolfgram did not contact the claimant after their last communication on November 12.

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.

871 IAC 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:
>
> (21) The claimant was compelled to resign when given the choice of resigning or being discharged. This shall not be considered a voluntary leaving.

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:
>
> 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.

871 IAC 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.

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). The Iowa Supreme Court has ruled that if a party has the power to produce more explicit and direct evidence than it chooses to present, the administrative law judge may infer that evidence not presented would reveal deficiencies in the party's case. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976).

Mindful of the ruling in *Crosser*, it is permissibly inferred that tenants' statements or testimony were not submitted because they would not have been supportive of the employer's position that claimant quit. *Id.* Inasmuch as the employer did not have a rule about no-call/no-show absences, the separation must be determined by other means. Because there was unclear communication between claimant and employer about the timing and interpretation of both parties' statements about the status of the employment relationship; the issue must be resolved by an examination of witness credibility and burden of proof. Since most members of management are considerably more experienced in personnel issues and operate from a position of authority over a subordinate employee, it is reasonably implied that the ability to communicate clearly is extended to discussions about employment status. Wolfgram was markedly inconsistent in his testimony with respect to various issues:

Joe Wolfgram fact-finding interview statement: "He told me he was not capable of running the building and I told him to let me know when he was ready."

Hearing recording at 37:40:
ALJ: "Did you ever tell Mr. Ewing that when he got his issues resolved, he could call you and go back to work?"
Joe Wolfgram: "No."

Wolfgram also charged claimant with having been a no-call/no-show on November 5 but accused him of drinking on November 5, which prompted him to reschedule the meeting for November 12.

Wolfgram also recalled meeting claimant at one of the work sites in Webster City on November 7 to pick up the keys and set a time to talk with him on November 12. However, Wolfgram testified in contradiction that he had no communication with claimant on November 7 as he considered him a no-call/no-show on that date and shut off his phone access at 12:30 p.m.

Claimant's recollection about various dates was confused at times but was not self-contradictory. His testimony is considered credible as to disputes of fact.

Claimant's apologetic phone call on November 8 and his attempts to reach Wolfgram as directed after he resolved his issues are indicative of his intention to continue working. His interpretation of Wolfgram's failure to return his calls as a discharge was reasonable and the burden of proof falls to the employer.

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. Inasmuch as claimant reasonably communicated his need for time off and that request was granted with the invitation to return to work when he was able, employer changing his mind about allowing that leave does not meet the burden of proof to establish that claimant engaged in misconduct. Benefits are allowed.

DECISION:

The February 26, 2013 (reference 01) decision is affirmed. Claimant did not quit but was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

dml/css