IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

ADAM R EASTON Claimant **THE AMERICAN BOTTLING COMPANY** Employer	**APPEAL 15A-UI-06359-KC-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 05/10/15** **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 May 29, 2015, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on July 8, 2015. The claimant participated. The employer participated through Lucas Gray, Human Resources Manager.

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?

REASONING AND CONCLUSIONS OF LAW:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a merchandiser/transition driver from May 11, 2011, and was separated from employment on May 13, 2015, when he quit when given the choice to resign or be terminated.

On May 13, Josh Rubida, Branch Manager, called the claimant and told him that due to violation of the attendance policy and accrual of a certain number of points, he could resign or be terminated. The claimant did not want to resign but was pressured by Rubida who told him it would be better to resign. Rubida was angry. Rubida suggested that the claimant apply for Family Medical Leave Act coverage in the same conversation in which he told the claimant to resign. The claimant was told to meet district manager Brandon Smith in a parking lot and turn in his uniform. The claimant told Smith that he did not want to resign; he would rather be terminated. Smith talked him into resigning and assured him that he would check into

unemployment benefits and do what was best for the claimant. Smith directed the claimant to write a resignation letter. The claimant provided Smith with a handwritten statement that he was resigning effective May 13, 2015.

The claimant had been working 60-hour weeks for several months because the business was short one driver. Department of Transportation regulations prohibit driving more than 60 hours per week. He took time off to recuperate and avoid going over the maximum hours per week. He also had been sick and developed symptoms of anxiety. The claimant felt overworked. He used five sick days in one year. The claimant also had one absence identified as a no-call/no-show, however, his brother had called in for him because he was too sick to call. He had three late starts. On May 2, 2015, he did not finish all the scheduled stops but the employer was short-handed with drivers and the claimant had to cover extra stops. The claimant was feeling sick and previously he had been able to complete Saturday deliveries on the following Monday. He went to the hospital after work. The claimant attempted to get treatment for anxiety through the company program but was unsuccessful because the providers were more than 60 miles away.

Smith verbally warned the claimant one or two weeks before the separation that if he accrued one more point under the employer's point system he would be terminated. The claimant did not understand that his job was in jeopardy before that warning because he had not received a written warning in three years. The claimant was not late or absent after he received the verbal warning from Smith.

A few days before the separation, Smith told the claimant that his failure to complete all the scheduled stops on May 2, 2015 would involve a write-up. The claimant did not receive a write-up about that issue.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the 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.

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:
>
> (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.

Iowa Admin. Code r. 871-24.32(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.

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).

Since the 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 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*, and noting that the claimant presented direct, first-hand testimony while the employer relied upon a second-hand witness, the administrative law judge concludes that the employer has not met its burden of proof. It is permissible to infer that the records were not submitted because they would not have been supportive of the employer's position. See, *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976). The sole testimony provided by the employer was from Mr. Gray who did not have direct contact with the claimant and did not participate in the meetings the claimant had with management. The employer had the opportunity to provide Rubida and Smith as witnesses, but chose not to do so. The employer submitted a copy of the claimant's handwritten resignation letter but no other employer records including those that would document the claimant's absences and any disciplinary actions against him.

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." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). 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 claimant's failure to complete all the stops on May 2, 2015, due to illness and covering additional work because of being short-staffed does indicate wrongful intent.

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.

Inasmuch as the claimant was warned weeks before the separation that if he incurred one more point for attendance he would be terminated and he had no additional attendance issues thereafter, and the employer identified attendance and accrual of points as the basis of the separation, the employer has not met the burden of proof to establish that the claimant engaged in misconduct. Benefits are allowed.

DECISION:

The May 29, 2015, (reference 01) decision is reversed. The 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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Kristin A. Collinson
Administrative Law Judge

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Decision Dated and Mailed

kac/pjs