IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

JORGE I PEREZ Claimant	**APPEAL 16A-UI-09380-JP-T**
	ADMINISTRATIVE LAW JUDGE DECISION
DEROCHER CONSTRUCTION PC Employer	
	OC: 01/03/16 **Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the August 17, 2016, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on September 26, 2016. Claimant participated. Hilario Soto, Pedro Ramirez, and Charles Gitp registered as witnesses on behalf of claimant, but claimant elected to not have them contacted to testify. Employer participated through manager/owner Patrick DeRocher.

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?

Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a general labor (seasonal) from 2013, and was separated from employment on July 27, 2016.

On July 27, 2016, the crew claimant was on came to an agreement with the foreman (claimant's father) that they were going to start taking two fifteen minute breaks (one around 9:00 a.m.) and a thirty minute break for lunch. Prior to July 27, 2016, the employer had given the crew an hour lunch break, but decided that it was not fair to the other employees. The crew had been getting an hour lunch break for years.

On July 27, 2016, the foreman left for an appointment prior to 9:00 a.m. The foreman had told the employees that it was ok for them to take the fifteen minute breaks. At around 9:00 a.m. claimant set/programed the computer so that the cement will not go to waste while he and the crew were on their fifteen minute break. Mr. DeRocher came up to claimant and asked what they were doing. Claimant stated the foreman told them they could take a fifteen minute break. Mr. DeRocher told him that they could not take a fifteen minute break. Claimant and Mr. DeRocher went back and forth about the break. Mr. DeRocher told claimant several times to get back to work or to go home. Claimant told Mr. DeRocher he was waiting for the foreman. Mr. DeRocher told claimant to leave the work area because he was disrupting work. Claimant told Mr. DeRocher he was not in the way. Mr. DeRocher continued to tell claimant to get back to work or go home. Mr. DeRocher told claimant he was going to call the sheriff and he also told claimant to get the "f**k out" of here. Claimant felt Mr. DeRocher was trying to intimidate him. Claimant stepped out of the shop and waited for his father.

Claimant had no prior disciplinary warnings.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant 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 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:
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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 unemployment insurance law disqualifies claimants who voluntarily quit employment without good cause attributable to the employer or who are discharged for work-connected misconduct. Iowa Code §§ 96.5(1) and 96.5(2)a. A voluntary quitting of employment requires that an employee exercise a voluntary choice between remaining employed or terminating the employment relationship. *Wills v. Emp't Appeal Bd.*, 447 N.W.2d 137, 138 (Iowa 1989); *Peck v.*

Emp't Appeal Bd., 492 N.W.2d 438, 440 (Iowa Ct. App. 1992). 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 employer clearly initiated the communication with claimant to complain about claimant and the crew taking a fifteen minute break. The employer repeatedly told claimant to get back to work or go home. Claimant told the employer the foreman told them they could take the break. Finally, Mr. DeRocher told claimant to get the "f**k out" of here. Mr. DeRocher also had told claimant he was going to contact the sheriff. Claimant did not go back to work, instead he left the shop and waited for his dad (the foreman). Because there was unclear communication between claimant and employer about the 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. Mr. DeRocher initially testified the incident occurred on August 27, 2016, but then corrected his testimony and stated the incident occurred on July 25, 2016. Whereas claimant consistently testified the incident occurred on July 27, 2016. The administrative law judge finds claimant's recollection of the events more credible. Claimant's interpretation of the conversation as a discharge was reasonable given Mr. DeRocher's statement to get the "f**k out" of here and his statement he was going to contact the sheriff. Furthermore, claimant only left after he was told to by the owner. Because this separation is considered a discharge, the burden of proof falls to the employer.

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.
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> (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).

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 July 27, 2016, the crew, with approval from the foreman, decided to take two fifteen minute breaks during the day, along with only a thirty minute lunch. When the crew, including claimant, started their fifteen minute break around 9:00 a.m. on July 27, 2016, Mr. DeRocher asked claimant what they were doing. Claimant told Mr. DeRocher they were taking a fifteen minute break. Mr. DeRocher repeatedly told claimant they could not take a fifteen minute break and told him to go back to work or go home. Claimant explained that he was waiting for the foreman, because the foreman had instructed the crew that they could take the break. Finally, Mr. DeRocher told claimant that he would call the sheriff and to get the "f**k out" of here.

It was reasonable for claimant to conclude that by Mr. DeRocher's language and his indication that law enforcement was going to be called that he was being discharged. It was also reasonable for claimant to rely on the foreman's approval to take a fifteen minute break until the foreman's approval was revoked when the owner told them they did not get a fifteen minute break. However, claimant's desire to wait for the foreman to return before returning to work was reasonable given the confusion on whether they were allowed a fifteen minute break. Furthermore, claimant had no prior disciplinary warnings.

The conduct for which claimant was discharged (trying to take a fifteen minute break) 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.

As benefits are allowed, the issues of overpayment, repayment, and the chargeability of the employer's account are moot.

DECISION:

The August 17, 2016, (reference 01) unemployment insurance decision is affirmed. 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/pjs