IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

NIKITA BAKER
Claimant

BCDG LP
Employer

APPEAL NO. 12A-UI-00383-WT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 04/10/11
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct
Section 96.5-1 – Voluntary Quit

STATEMENT OF THE CASE:

Claimant filed an appeal from a fact-finding decision dated December 30, 2011, reference 04, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on April 10, 2012. Claimant participated personally. Employer participated by hearing representative, Jackie Nolan. Mr. Larry Brown, CEO and President of BCDG, LP, also participated.

ISSUE:

The issue in this matter is whether claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds:

The employer is BCDG, LP. On the hearing notice, the employer is listed as Brown Customer Delight Group, Inc. This is the wrong employer. Mr. Larry Brown is the CEO and President of both companies. Claimant was employed by BCDG, LP, which is the McDonalds franchise on Des Moines Street in Des Moines, Iowa. Liz, Mario and Roger are claimant's supervisors. Claimant was employed as a part-time crew member (22 to 28 hours per week). She was discharged on November 5, 2011, for allegedly not reporting for work. She was not at work on November 8-10, 2011.

REASONING AND CONCLUSIONS OF LAW:

The initial question raised in this case is the nature of the separation. Separations are categorized into four separate categories under Iowa law.

> 24.1(113) Separations. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.
>
> a. Layoffs. A layoff is a suspension from pay status initiated by the employer without prejudice to the worker for such reasons as: lack of orders, model changeover, termination of seasonal or temporary employment, inventory-taking, introduction of labor-saving devices, plant breakdown, shortage of materials; including temporarily furloughed employees and employees placed on unpaid vacations.
>
> b. Quits. A quit is a termination of employment initiated by the employee for any reason except mandatory retirement or transfer to another establishment of the same firm, or for service in the armed forces.
>
> c. Discharge. A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.
>
> d. Other separations. Terminations of employment for military duty lasting or expected to last more than 30 calendar days, retirement, permanent disability, and failure to meet the physical standards required.

See Iowa Administrative Code 871—24.1.

The nature of a separation is generally determined by ascertaining which party initiated the separation. If the employer initiated the separation, with intent to permanently sever the employment relationship, then the separation is generally considered a termination or layoff. If the claimant initiated the separation, with intent to permanently sever the employment relationship, then the separation is generally considered a quit.

It is the employer's initial burden to prove the nature of the separation. This is often extremely significant in many cases because the burden rests with the party who initiated the separation. If the employer initiated the separation, the employer then must prove misconduct (or another basis for disqualification). If the claimant initiated the separation, then the claimant must prove good cause attributable to the employer.

When an employee misses three days in a row without calling pursuant to established rule, this is considered a voluntary quit by operation of law. Iowa Code 871 Iowa Administrative Code 24.25(4). In this case, the employer did have such a rule. The fighting issue is why the claimant failed to report for work on November 8-10.

In October 2011, the McDonald's store in question was undergoing significant renovations. Claimant's hours were cut significantly. She testified credibly that there were weeks in October where she was getting virtually no hours. At the beginning of November, the employer stopped offering hours to Ms. Baker altogether and she reopened a prior claim.

Mr. Brown had little or no knowledge of Ms. Baker's communication with her supervisors. It is found that she continued to maintain contact with her managers until February 2012, when she was told that she was terminated for not reporting to work. The fact that the hands-on managers did not testify is crippling to the employer's case. Ms. Baker is found credible that she maintained regular contact with her supervisors and this testimony is unrebutted. As such,

the employer has not met its burden of proof to demonstrate that the claimant violated the employer's three-day no-call/no-show policy. Therefore, 871 IAC 24.25(4) is inapplicable. It is found that the employer initiated the separation by not offering the claimant hours on the schedule in November.

Iowa Code section 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.

The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation.

In this matter, the evidence fails to establish that claimant was discharged for an act of misconduct. It appears that initially the claimant's hours of work declined due to construction at the store where she was employed. The employer failed to have the manager or managers with first-hand knowledge of the claimant's employment testify at hearing and there was no documentation presented at hearing which established that misconduct occurred.

DECISION:

The fact-finding decision dated December 30, 2011, reference 04, is reversed. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements.

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Joseph L. Walsh
Administrative Law Judge

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Decision Dated and Mailed

jlw/pjs