

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

MATTHEW R DRIJE
Claimant

LJPS INC
Employer

APPEAL NO. 18A-UI-07404-B2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 04/08/18
Claimant: Appellant (2)

Iowa Code § 96.5-1 – Voluntary Quit
Iowa Code § 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated July 9, 2018, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on July 27, 2018. Claimant participated and was represented by Greg Drije. Employer participated by Matt Sinnwell. Claimant's Exhibits A-C were admitted into evidence.

ISSUES:

Whether claimant quit for good cause attributable to employer?

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: Claimant worked for employee as a salaried executive chef. As such, claimant did not have specific days off or times he was supposed to be working. Claimant normally took Sundays and Mondays off from work, but was asked to check out food quality for the buffet offered on Sunday afternoon.

Claimant came into the restaurant on Sunday, March 18, 2018. Employer alleged through hearsay testimony that claimant was intoxicated and requested an extraordinary meal that meant paying customers were unable to get prime rib as a part of their meals. One of the cooks working at the time came out to where claimant was eating and told claimant that he and the other worker's order caused paying customers not to be able to have prime rib. The coworker believed claimant to have been intoxicated on that day. Claimant took that worker outside, and although claimant wasn't working, claimant told the cook that he was terminated for his actions of confronting claimant in the business. (Claimant stated that he'd just sent the worker home for the day, and would discuss termination at a later date.)

Employer met with claimant on March 20, 2018 (claimant didn't work on March 19) to discuss the incident and to discuss claimant's not paying bar and food tabs. Claimant did work the rest of his shift on March 20, 2018 after discussing the issue with employer. Employer stated that this was a last chance warning to claimant and that he would be terminated upon further inappropriate actions.

Claimant normally works on Wednesdays, but did not show for work on March 21, 2018. Claimant stated that as a salaried executive chef that he did not have to work specific hours, but rather worked as needed as long as he got in 50 hours per week. Claimant stated that he called another manager working on March 21, 2018 to alert her of his not coming into work, and also stated that he'd called and texted the business owner. Claimant did not forward any of these alleged texts to the administrative law judge.

On March 22, 2018 claimant stated that he was in to work and was told by the other manager on duty that he'd been terminated. Employer stated that claimant never came in to work on March 22, 2018. Employer stated that claimant hadn't shown for work on March 21, 22, 23, or 24 and as a result claimant was terminated from his employment. Claimant showed administrative law judge a text he'd sent to employer on March 24, 2018 wherein he referenced being at work on March 22, 2018 and further referenced previously reaching out to owner to try and discuss the employment situation. Claimant stated that no calls or texts had been returned.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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).

Initially, the administrative judge determines that this is a case of termination rather than a voluntary quit. This is determined because claimant is believed to have shown up for work on March 22, 2018. Claimant created a text of Thursday, March 24, 2018 (Cl. Ex. A) that references claimant's hearing of his termination while at work and attempting to contact employer, to no avail. This strongly indicates that claimant believed he'd been terminated and did not quit. Whereas employer included the days of March 24 and 25, 2018 in his testimony as the days of no-call/no-show, employer's argument must fail as employer was on notice, at least by March 24, 2018, that claimant believed himself to have been fired. If employer was trying to have claimant continue to work, employer could easily have texted or called to clear up the confusion.

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982), Iowa Code § 96.5-2-a.

In order to establish misconduct as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. Rule 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa Ct. App. 1986). The conduct must show a 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 the employee's duties and obligations to the employer. Rule 871 IAC 24.32(1)a; *Huntoon* supra; *Henry* supra.

The employer bears the burden of proving that a claimant is disqualified from receiving benefits because of substantial misconduct within the meaning of Iowa Code section 96.5(2). *Myers*, 462 N.W.2d at 737. The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. Because our unemployment compensation law is designed to protect workers from financial hardships when they become unemployed through no fault of their own, we construe the provisions "liberally to carry out its humane and beneficial purpose." *Bridgestone/Firestone, Inc. v. Emp't Appeal Bd.*, 570 N.W.2d 85, 96 (Iowa 1997). "[C]ode provisions which operate to work a forfeiture of benefits are strongly construed in favor of the claimant." *Diggs v. Emp't Appeal Bd.*, 478 N.W.2d 432, 434 (Iowa Ct. App. 1991).

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 Ct. 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*, 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. *State v. Holtz*, Id. Here, employer did not have specific remembrances of claimant's attempted calls and texts. Employer's hesitancy in his testimony indicates a lack of decisive memory as to the contacts or lack of contacts between claimant, his co-workers and management around the time of job separation.

The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. In looking step-by-step through the actions which led to the dismissal, it can be determined whether one or all of the actions amounted to misconduct under the Iowa Code such that unemployment benefits should be denied. Initially, claimant stated that he was asked to oversee the Sunday operations as claimant was told that they were not being run properly. This is what claimant stated prompted him to go to the restaurant on March 18, 2018. At the restaurant, claimant was stated by unsupported hearsay testimony to have been intoxicated. Claimant denied this. Employer averred that claimant's intoxication was a factor in claimant wanting free food, not paying his bar tab, and in claimant's suspension/termination of a cook who was working that day. Employer met with claimant on March 20, 2018 and did not terminate claimant for this action, but rather gave a harsh, final warning to him.

Claimant is believed by the administrative law judge to have finished his shift on March 20, 2018. Claimant did not work on March 21, 2018. Claimant stated that he spoke with the other manager on duty about his not working that day. Employer did not present any specific notification that claimant was to make when he did not come into work, and further did not present the other manager on duty to refute claimant's statement that he did alert employer that he was not going to be in at work that day. As it appears that claimant had no set hours of work, the administrative law judge cannot see this action as misconduct.

Claimant stated that he came into work on March 22, 2018 and spoke with coworkers about his being terminated. In claimant's text to employer on March 24, 2018 he mentioned that he'd tried to contact employer on March 22, 2018 to inquire about his employment status. This lends credence to claimant's statement that he was told he was terminated on March 22, 2018. Employer's statement that he didn't see claimant at work on March 22, 2018 was also weakened by the fact that claimant was to arrive before employer normally arrives and by claimant's reference in his March 24, 2018 text.

In this matter, the evidence fails to establish that claimant was discharged for an act of misconduct when claimant violated employer's policy concerning failure to show for work. Claimant was not warned concerning this policy.

The last incident, which brought about the discharge, fails to constitute misconduct because claimant's last act of absenteeism was not proven through employer's testimony. The administrative law judge holds that claimant was not discharged for an act of misconduct and, as such, is not disqualified for the receipt of unemployment insurance benefits.

DECISION:

The decision of the representative dated July 9, 2018, reference 01, is reversed. Unemployment insurance benefits are allowed provided claimant is otherwise eligible.

Blair A. Bennett
Administrative Law Judge

Decision Dated and Mailed

bab/rvs