

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RONALD M MCGRAW
Claimant

APPEAL NO. 12A-UI-11717-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BUSHMAN EXCAVATING INC
Employer

OC: 06/17/12
Claimant: Appellant (2)

Section 96.5(1) – Voluntary Quit

STATEMENT OF THE CASE:

Ronald McGraw filed a timely appeal from the September 18, 2012, reference 06, decision that denied benefits. After due notice was issued, a hearing was held on October 24, 2012. Mr. McGraw participated personally and was represented by Matt Reilly, attorney at law. Dan Bushman represented the employer and presented additional testimony through Kevin Marlow and Al Linne.

ISSUE:

Whether Mr. McGraw's voluntary quit was for good cause attributable to the employer. The administrative law judge concludes that Mr. McGraw voluntarily quit with good cause attributable to the employer due to intolerable and detrimental working conditions.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Ronald McGraw was employed by Bushman Excavating, Inc., as a full-time dump truck driver from May 2012 until August 27, 2012, when he voluntarily quit. There were several incidents that factored into Mr. McGraw's decision to leave the employment. During the first or second week of August, coworker Kevin Marlow decided to smoke a bowl of marijuana in the work truck on the way to the jobsite. When Mr. McGraw raised a concern, Mr. McGraw told him not to worry about it, that it was only a one-hitter. Mr. Marlow's duties included operating heavy equipment in the vicinity where Mr. McGraw would also be working. Mr. McGraw reported the pot smoking incident to Dan Bushman, owner and manager, but Mr. Bushman did not do anything about it.

Mr. McGraw had regular run-ins with Dan Bushman's father, Gary Bushman, who also worked for Bushman Excavating. Gary Bushman was a retired drill sergeant. Gary Bushman had on one occasion threatened "to pound" Mr. McGraw because he thought Mr. McGraw was driving a vehicle too fast. On another occasion, Gary Bushman was filling a fuel tank, had stepped away, and Mr. McGraw came up on a scene with gallons of fuel overflowing from the tank on the ground. When Mr. McGraw approached, Gary Bushman ran out and told him to get the hell out of there and that Mr. McGraw did not know what hell he was doing. On yet another occasion, Mr. McGraw had been directed to help tie down a piece of equipment and Gary Bushman

forcefully removed Mr. McGraw's hand from the equipment. Dan Bushman employed somewhat similar tactics when dealing with Mr. McGraw and yelled at Mr. McGraw when Mr. McGraw made mistakes performing his work.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 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.

In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 698, 612 (Iowa 1980) and Peck v. EAB, 492 N.W.2d 438 (Iowa App. 1992). In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer. See 871 IAC 24.25.

Quits due to intolerable or detrimental working conditions are deemed to be for good cause attributable to the employer. See 871 IAC 24.26(4). The test is whether a reasonable person would have quit under the circumstances. See Aalbers v. Iowa Department of Job Service, 431 N.W.2d 330 (Iowa 1988) and O'Brien v. Employment Appeal Bd., 494 N.W.2d 660 (1993). Aside from quits based on medical reasons, prior notification of the employer before a resignation for intolerable or detrimental working conditions is not required. See Hy-Vee v. EAB, 710 N.W.2d (Iowa 2005).

There is sufficient evidence in the record to establish, by a preponderance of the evidence, that Mr. McGraw voluntarily quit the employment in response to an intolerable and detrimental working conditions that arose from a series of incidents. These included a coworker illegally possessing and smoking marijuana immediately prior to performing safety-sensitive work, along with the employer's cavalier response. The administrative law judge notes that Mr. Marlow admitted to using the one-hitter pipe, as asserted by Mr. McGraw. Mr. Marlow's testimony contradicted the testimony of Mr. Bushman, who erroneously asserted that Mr. McGraw's allegation had been that Mr. Marlow rolled a joint. Mr. Marlow's assertion that he used a one-hitter, a marijuana pipe, to smoke a bowl of regular tobacco is not credible. Both Mr. Marlow and the employer have a motive to distort the facts about that incident. Mr. Marlow's pot smoking exposed Mr. McGraw to the substance in the form of secondhand smoke. It also exposed Mr. McGraw to the risk of prosecution if law enforcement had noted the conduct. It also exposed Mr. McGraw to risk of injury when Mr. Marlow operated heavy equipment at the jobsite.

An employer has the right to expect decency and civility from its employees and an employee's use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct disqualifying the employee from receipt of unemployment insurance benefits. Henecke v. Iowa Department of Job Service, 533 N.W.2d 573 (Iowa App. 1995). Likewise, an employee such as Mr. McGraw had the right to expect a civil and decent work environment. Even if one allows for the nature of the work and the work environment, the conduct of the owner's father was such that a reasonable person would not stand for it. The owner's father threatened, bullied, and verbally abused Mr. McGraw. Mr. McGraw accurately concluded that Dan Bushman was not going to do anything more about that issue than what he

did, which was to tell Mr. McGraw to ignore and stay away from the man. Dan Bushman essentially conceded that he had verbally abused Mr. McGraw when Mr. Bushman was placed under stress by others running the job site.

Despite whatever ill-advised remarks Mr. McGraw made during or after the employment, the evidence indicates intolerable and detrimental working conditions. Mr. McGraw's voluntary quit was for good cause attributable to the employer. Accordingly, Mr. McGraw is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

DECISION:

The Agency representatives September 18, 2012, reference 06, decision is reversed. The claimant voluntarily quit the employment for good cause attributable to the employer. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to the claimant.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw