**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS**

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

**JEFFREY A LAPOINTE**
Claimant

**TM1 STOP LLC**
Employer

**APPEAL NO. 09A-UI-18056-DT**

**ADMINISTRATIVE LAW JUDGE DECISION**

**Original Claim: 11/01/09**
**Claimant: Respondent (1)**

Section 96.5-2-a – Discharge
Section 96.5-1 – Voluntary Leaving

**STATEMENT OF THE CASE:**

TM1 Stop, L.L.C. (employer) appealed a representative's November 24, 2009 decision (reference 01) that concluded Jeffrey A. LaPointe (claimant) qualified to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on January 12, 2010. The claimant participated in the hearing, was represented by Paul McAndrew, attorney at law, and presented testimony from one other witness, Susan Stiltner. John Burchert appeared on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

**ISSUE:**

Was there a disqualifying separation from employment either through a voluntary quit without good cause attributable to the employer or through a discharge for misconduct?

**FINDINGS OF FACT:**

The claimant started working for the employer on November 19, 2007. He worked full-time as a telephone account manager in the employer's process outsourcing call center. He normally worked a Monday-through-Friday, 8:30 a.m.-to-5:30 p.m. schedule. His last day of work was October 28, 2009.

The claimant had been having some disputes with the employer with regard to being paid for certain work. Prior to October 26, the claimant had obtained an agreement from his immediate supervisor that the claimant would be paid at least a certain amount of the sum in question. However, on October 26 a manager above the claimant's supervisor informed the claimant that he would not be paid the promised amount because the claimant had missed too much work that month. The claimant had been absent from October 13 through October 23 due to illness, which he had called in and reported by leaving messages for his immediate supervisor. Also on October 26 the employer gave the claimant a first-step warning due to his absence.

During the October 26 discussion with the higher manager, the claimant had indicated that if he was not going to be paid the amount he had been seeking, he would be needing to miss some work in order to seek other housing and other sources of funding for his housing. He worked a half-day on October 28, and then left with his immediate supervisor's approval in order to begin his search. He was absent on October 29, October 30, November 2, and November 3. He called in each day and left a message for his immediate supervisor that he would not be in each of those days.

On November 3, after calling in to report he would not be at work, at about 10:00 a.m. the claimant came to the workplace to pick up his regular paycheck, which was to have been issued the prior day. He was met outside the front door by a sales manager. The sales manager told the claimant that he no longer worked there due to being considered to have been a three-day no-call, no-show.

**REASONING AND CONCLUSIONS OF LAW:**

A claimant is not eligible for unemployment insurance benefits if he quit the employment without good cause attributable to the employer or was discharged for work-connected misconduct. Iowa Code §§ 96.5-1; 96.5-2-a.

Rule 871 IAC 24.25 provides that, 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 from whom the employee has separated. A voluntary leaving of employment requires an intention to terminate the employment relationship and an action to carry out that intent. Bartelt v. Employment Appeal Board, 494 N.W.2d 684 (Iowa 1993); Wills v. Employment Appeal Board, 447 N.W.2d 137, 138 (Iowa 1989). The employer asserted that the claimant was not discharged but that he quit by being a three-day no-call, no-show, and that he further told the sales manager that he was no longer working for the company. Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant in fact did not call in or that he told the sales manager that he was no longer working for the company. The administrative law judge concludes that the employer has failed to satisfy its burden that the claimant voluntarily quit. Iowa Code § 96.6-2. As the separation was not a voluntary quit, it must be treated as a discharge for purposes of unemployment insurance. 871 IAC 24.26(21).

The issue in this case is then whether the employer discharged the claimant for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue is not whether the employer was right or even had any other choice but to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate decisions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988). 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. IDJS, 321 N.W.2d 6 (Iowa 1982).

In order to establish misconduct such as to disqualify a former employee from benefits, an employer must establish the employee was responsible for a deliberate act or omission that was a material breach of the duties and obligations owed by the employee to the employer. 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 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 that 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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. 871 IAC 24.32(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

The reason the employer effectively discharged the claimant was his attendance. Excessive unexcused absences can constitute misconduct; however, in order to establish the necessary element of intent, the final incident must have occurred despite the claimant's knowledge that the occurrence could result in the loss of his job. Cosper, supra; Higgins v. IDJS, 350 N.W.2d 187 (Iowa 1984). While the claimant had received a first level warning, he was not aware that if he missed work from October 29 through November 3 that he was going to be discharged. The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

**DECISION:**

The representative's November 24, 2009 decision (reference 01) is affirmed. The claimant did not voluntarily quit; the employer did discharge the claimant, but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

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