IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

Appeal Number: 06A-UI-02585-R
OC: 02/05/06 R: 02
Claimant: Respondent (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

TRENTON R ROHRDANZ
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BRISTOL WINDOWS/SIDING OF IOWA INC
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RICK SCHMIDT
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_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct
Section 96.5-1 – Voluntary Quitting
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Bristol Windows/Siding of Iowa, Inc., doing business as Legend Windows, filed a timely appeal from an unemployment insurance decision dated February 27, 2006, reference 01, allowing unemployment insurance benefits to the claimant, Trenton R. Rohrdanz. After due notice was issued, an in-person hearing was held in Des Moines, Iowa, at the employer's request, on March 28, 2006, with the claimant participating. The claimant was represented by Rick Schmidt, Attorney at Law. Douglas Carpenter, Owner, and Dean Allen, Installer, participated in the hearing for the employer. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time installer from May of 2003 until he separated from his employment on February 8, 2006. When the claimant was first hired, he was informed that the employer sold windows all over the state of Iowa and that he would be working all over the state of Iowa. The claimant was single at the time but told Mr. Carpenter that he would need notice of an overnight trip. Mr. Carpenter told the claimant that he would receive notice. If an employee was working at a job site out of town and at some significant distance from the employer's location in Newton, for example three hours away, the employer would pay all motel and food expenses so that the employees could spend the night and avoid a long commute back in the evening and another long commute back in the morning. However, whenever the employees were facing an overnight trip, they learned of the overnight stay at least before the day of work requiring an overnight stay that night. Employees ride in an employer's vehicle to job sites and return in the employer's vehicle. If an employee wishes not to spend the night, the employee can drive himself to the job site and then return home at the end of the day, and then drive back to the job site the next day. Employees customarily go first to the employer's office in Newton, Iowa, to gather materials and find out where the job site is that day.

On February 8, 2006, the claimant went to the office at 7:00 a.m. as usual. He learned that the work site was going to be in Arlington, Iowa, approximately three hours away from Newton, Iowa. At first the claimant thought the employees were going to go to the job site, complete the job, and return to Newton, Iowa, that day. Then he learned that the employees were going to be spending the night in or near Arlington, Iowa. At that point, between 7:30 a.m. and 8:00 a.m., the claimant called the owner, Douglas Carpenter, and informed Mr. Carpenter that he did not have clothes to be out of town and he needed more notice. The claimant explained that his son was sick. Mr. Carpenter knew that the claimant had a young son, who was still a baby. The exact details of the conversation are uncertain. The claimant expressed concerns about being away overnight when his son was ill. Mr. Carpenter eventually told the claimant that the claimant knew what the nature of his job was and that if he did not go to Arlington, Iowa, he could resign. The claimant justifiably believed that he was being told that if he did not go to Arlington, Iowa, he would be treated as resigning. The claimant chose not to go to Arlington, Iowa. The employer treated this as a voluntary quit. The claimant believed that he was forced to quit or be discharged for not going to Arlington, Iowa.

The claimant did not go to Arlington, Iowa, because he did not want to leave his fiancée alone with his baby child. At the time, the claimant's child was six months old and seriously ill with a diagnosis of RFD, which is borderline pneumonia. The baby was on a nebulizer. Before talking with Mr. Carpenter, the claimant had called his fiancée to see if she would be able to obtain transportation for the baby to go to the hospital if necessary. The claimant's fiancée does not drive. His fiancée informed him that she would have no way of getting the baby to the hospital. The claimant then determined not to go to Arlington, Iowa, in case his infant son required such transportation. The claimant did not fully inform Mr. Carpenter of these matters, but merely informed Mr. Carpenter that his son was ill. At the time, the claimant had accumulated vacation time. The claimant lives 12 miles from Newton, Iowa.

The claimant had no attendance problem with the employer and had received no relevant warnings or disciplines. The claimant had worked out of town on numerous occasions for the employer before, but on all of those occasions, the claimant had had at least one day's notice. The claimant never expressed any concerns to the employer about his working conditions,

including, and in particular, working out of town. Pursuant to his claim for unemployment insurance benefits filed effective February 5, 2006, the claimant has received unemployment insurance benefits in the amount of $1,620.00 as follows: Zero benefits for the benefit week ending February 11, 2006 (wages and vacation pay $750.00); and $324.00 per week for five weeks from the benefit week ending February 18, 2006 to the benefit week ending March 18, 2006.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was not.

2. Whether the claimant is overpaid unemployment insurance benefits. He is not.

Iowa Code section 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 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, (7) provide:

> 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 Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

> (7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

The first issue to be resolved is the character of the separation. The employer maintains that the claimant voluntarily left or quit his employment. The claimant maintains that he was forced to quit or be discharged because he could not work out of town on February 8, 2006. Although it is a close question, the administrative law judge concludes that the claimant justifiably believed that he would be forced to quit or face discharge. When an individual is forced to resign or face discharge, the quit is not considered voluntary but rather a discharge and misconduct must be decided. See 871 IAC 24.26(21).

The resolution of this issue depends upon the telephone conversation between the claimant and the employer's witness, Douglas Carpenter, Owner, on March 8, 2006 between 7:30 a.m. and 8:00 a.m. The claimant called Mr. Carpenter at that time to express concerns about an overnight trip to Arlington, Iowa. At the time, the claimant's baby son was six months old and quite ill, being diagnosed with RFD, which is borderline pneumonia. The claimant's baby was on a nebulizer. The claimant informed Mr. Carpenter that he did not have clothes for an overnight trip and that his son was ill. In some way, Mr. Carpenter insisted that the claimant nevertheless travel to the job site in Arlington, Iowa. Although Mr. Carpenter did not specifically tell the claimant that if he did not make the trip he would be discharged, Mr. Carpenter himself conceded that he told the claimant that the claimant knew the nature of the job and if he did not go to Arlington, Iowa, he should resign. Although the claimant's version of the conversation differs in many respects from that of Mr. Carpenter, the claimant conceded that Mr. Carpenter told him that if he did not go and stay overnight he should resign. The administrative law judge is constrained to conclude here that the claimant was justified in believing that he would be discharged if he did not go on the trip and because the claimant did not feel that he could go on the trip, he quit. Although the claimant did not fully explain the medical condition of his infant son to Mr. Carpenter, Mr. Carpenter was aware that the claimant had an infant child and Mr. Carpenter had no evidence that the child was not seriously ill. The evidence also establishes that the claimant had accumulated vacation time. The administrative law judge concludes that the claimant had a valid reason for not going on the trip, and the employer could have accommodated the claimant by allowing him to take a vacation day. However, the employer seemed to insist that the claimant go on the trip and stay overnight, and the claimant could not do this, and quit. The administrative law judge concludes that the claimant left his employment voluntarily rather than face a discharge, which was imminent and, even if not imminent, the claimant was justified in believing that it was imminent. Accordingly, the administrative law judge concludes that the claimant was, in effect, discharged.

In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. Excessive unexcused absenteeism is disqualifying misconduct and includes tardies and necessarily requires the

consideration of past acts and warnings. Higgins v. IDJS, 350 N.W.2d 187 (Iowa 1984). It is well established that the employer has the burden to prove disqualifying misconduct, including, excessive unexcused absenteeism. See Iowa Code section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was, or was going to be, discharged for disqualifying misconduct, including, excessive unexcused absenteeism. The only reason possible for the claimant's imminent discharge was his failure and refusal to go on an overnight trip to a job site in Arlington, Iowa. However, as noted above, the administrative law judge concludes that the claimant was justified in refusing such trip because his infant son, six months old, was seriously ill and his wife fiancée had no means of transportation to take the baby to the hospital if that became necessary. The claimant's refusal to go on the trip was justified and therefore was not disqualifying misconduct nor was his absence excessive unexcused absenteeism. The evidence is clear that the claimant did not have an attendance problem with the employer and he had received no relevant warnings or disciplines. Accordingly, the administrative law judge concludes that the claimant was discharged or faced imminent discharge but not for disqualifying misconduct, and, as a consequence, he is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits, and misconduct, to support a disqualification from unemployment insurance benefits, must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant his disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided he is otherwise eligible.

Even should the claimant's separation be considered a voluntary quit, the administrative law judge would conclude that the claimant left his employment with good cause attributable to the employer and he would still not be disqualified to receive unemployment insurance benefits. As noted above, the evidence establishes that the employer was insisting that the claimant go on an overnight trip with no notice so that the claimant could prepare. At the time, the claimant's infant son was seriously ill. Requiring the claimant to make an overnight trip under these circumstances establishes that the claimant's working conditions were unsafe, intolerable, and detrimental and perhaps subjected the claimant to a substantial change in his contact of hire. When the claimant was hired, he was informed that he would be making overnight trips, and even though the claimant was single at the time, he requested notice and the employer said that he would have notice of such overnight trips. Here, however, the claimant was not given any such notice. The administrative law judge notes that the claimant expressed concerns to Mr. Carpenter about the overnight trip, but Mr. Carpenter seemed to insist that the claimant make the overnight trip. The claimant also had vacation accumulated which he could have used. Although Mr. Carpenter testified that the claimant could have driven his own car to Arlington, Iowa, and then return home that night, the administrative law judge does not believe that this was a viable alternative since the claimant lived approximately three hours from Arlington, Iowa, and would still have to make the commute as well as work eight or more hours. Accordingly, even if the claimant's separation would be considered a voluntary quit, the administrative law judge would conclude that the claimant voluntarily left his employment with good cause attributable to the employer, and he would still not be disqualified to receive unemployment insurance benefits.

Iowa Code section 96.3-7 provides:

> 7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.
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> If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of $1,620.00 since separating from the employer herein on or about February 8, 2006, and filing for such benefits effective February 5, 2006. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision of February 27, 2006, reference 01, is affirmed. The claimant, Trenton R. Rohrdanz, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he was forced to resign or be discharged, but not for disqualifying misconduct. As a result of this decision, the claimant has not been overpaid any unemployment insurance benefits arising out of his separation from the employer herein.

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