IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JOSEPH M BERES
Claimant

ADM TRUCKING INC
Employer

APPEAL NO. 09A-UI-09095-S2T

ADMINISTRATIVE LAW JUDGE DECISION

Original Claim: 05/10/09
Claimant: Respondent (1-R)

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

STATEMENT OF THE CASE:

ADM Trucking (employer) appealed a representative's June 12, 2009 decision (reference 01) that concluded Joseph Beres (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for July 13, 2009. The claimant participated personally. The employer participated by Raymond Neff, Regional Transportation Manager.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds that: The claimant was hired on May 29, 2007, as a full-time day cab driver. Later, he became a sleeper truck driver. The claimant took vacation in early April 2009, and was to return to work on April 6, 2009. While on vacation, he heard that he was going to be required to haul gasoline loads. He felt uncomfortable with that and tried to contact the employer. He left messages. The employer did not get the messages.

On April 6, 2009, he returned to work and put his belongings in the truck. He walked into the employer's office and explained his concerns. He told the employer that he wanted to switch to day driving because he was uncomfortable with the week-long gasoline loads. The claimant told the employer that he would drive those loads if he had to do so. The employer thought the claimant was refusing to drive unless given a day driver position. The employer sent the claimant home to await further instructions. The employer had no further work for the claimant.

The claimant filed for unemployment insurance benefits with an effective date of May 10, 2009. He started a new job in June 2009.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant did not voluntarily quit work without good cause attributable to the employer.

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.

A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 608, 612 (Iowa 1980). The claimant had no intention to voluntarily leave work. Therefore, the separation has to be viewed as involuntary.

For the reasons that follow, the administrative law judge concludes the claimant was not discharged for misconduct.

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 employer has the burden of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984). The employer did not provide sufficient evidence of job-related misconduct at the hearing. The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

The issue of whether the claimant is able and available for work based on his new employment is remanded for determination.

DECISION:

The representative's June 12, 2009 decision (reference 01) is affirmed. The employer has not met its burden of proof to establish job-related misconduct. Benefits are allowed. The issue of whether the claimant is able and available for work based on his new employment is remanded for determination.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/kjw