

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DAVID D SUITER
Claimant

APPEAL NO: 07A-UI-04772-LT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARDINAL GLASS INDUSTRIES INC
Employer

**OC: 04/15/07 R: 03
Claimant: Respondent (2)**

Iowa Code § 96.5(1) – Voluntary Leaving
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Code § 96.5(2)a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the May 2, 2007, reference 01, decision that allowed benefits. After due notice was issued, a telephone conference hearing was held on May 29, 2007. Claimant participated. Employer participated through Bryan Henggeler, Sheila Meier, Richard Hoffman, Bill Ray, and Lori Ramsey and was represented by Russell Samson, Attorney at Law. Employer's Exhibits 1 through 10 were received. Claimant's Exhibit A was received.

ISSUE:

The issue is whether claimant quit the employment without good cause attributable to the employer.

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant was employed full time from March 3, 2003 until April 13, 2007 when he quit. His last day of work was April 9, 2007. Employer moved him from the maintenance automation technician job to a production job as of April 9, 2007 at the same hours, wages and benefits. The move was intended to be permanent and immediate and there were no supervisory duties in either job. A shift change was involved but claimant had worked that shift in the past.

Henggeler, claimant's immediate supervisor, told him of the transfer to production and instructed him to turn in the maintenance tools because of his history of being ineffective in repairing equipment, employee and supervisory complaints, sitting around during work hours and misrepresenting machine setting changes. (Employer's Exhibits 1, 2, 3, 4, 5, 6 and 7). Claimant performed his job adequately for a week at a time and inadequately for a month or two at a time over the past four years. During the meeting about the job change on April 9, Ramsey asked him if he knew where to report the next day (the training room) and he replied "yes" but did not indicate he would not accept the transfer position. Claimant did not report for work or call employer the next three workdays on April 10, 11, and 12, 2007, and was considered to have quit because of employer's policy. (Employer's Exhibit 8).

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant voluntarily left the employment without good cause attributable to the employer.

Iowa Code § 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.

Iowa Code § 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.

871 IAC 24.25(27) and (28) provide:

Voluntary quit without good cause. 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. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code § 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code § 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:

(27) The claimant left rather than perform the assigned work as instructed.

(28) The claimant left after being reprimanded.

Since no one told claimant he was fired or to leave the plant, claimant's action by leaving and not returning or otherwise communicating with employer is considered a voluntary leaving of employment rather than a discharge. The claimant has the burden of proving that the voluntary leaving was for good cause attributable to the employer. Iowa Code § 96.6(2). An individual who voluntarily leaves their employment must first give notice to the employer of the reasons for quitting in order to give the employer an opportunity to address or resolve the complaint. *Cobb v. Employment Appeal Bd.*, 506 N.W.2d 445 (Iowa 1993).

While the circumstances might be considered a change in the contract of hire, employer demoted him only for the purpose of placing him in a job which he was capable of performing because of his repeated errors. Failure in job performance due to inability or incapacity is not considered misconduct because the actions were not volitional. *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979). Where an individual is discharged due to a

failure in job performance, proof of that individual's ability to do the job is required to justify disqualification, rather than accepting the employer's subjective view. To do so is to impermissibly shift the burden of proof to the claimant. *Kelly v. IDJS*, 386 N.W.2d 552 (Iowa App. 1986).

While the claimant may have been generally and consistently incapable of performing the technician job, his other conduct such as misrepresenting machine settings and loafing during work hours does amount to misconduct. Thus, employer's option to demote or transfer (with no changes other than job duties and to a shift he had worked before) rather than discharge did not give claimant a good cause reason for leaving the employment. Moreover, because he was a no-call/no-show for three consecutive work days in violation of employer's policy, employer was reasonable to act upon the separation as a quit. Benefits are denied.

Iowa Code § 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.

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.

Because claimant's separation was disqualifying, benefits were paid to which claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The May 2, 2007, reference 01, decision is reversed. Claimant voluntarily left his employment without good cause attributable to the employer. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. Claimant is overpaid benefits in the amount of \$2,057.00.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/css