IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JAMES D SEARS Claimant	**APPEAL NO: 06A-UI-09237-H2T**
	ADMINISTRATIVE LAW JUDGE DECISION
ELECTROLUX HOME PRODUCTS INC FRIGIDAIRE Employer	
	OC: 04-30-06 R: 02 **Claimant: Respondent (1)**

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the September 6, 2006, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on October 2, 2006. The claimant did participate. The employer did participate through Mallory Russell, Human Resources Generalist and Lavonne Russell, Benefits Administrator. Claimant's Exhibit A was received.

ISSUE:

Was the claimant discharged for work-related misconduct or did he voluntarily quit his employment without good cause attributable to the employer?

FINDINGS OF FACT:

Having reviewed the testimony and all of the evidence in the record, the administrative law judge finds: Claimant was employed as a specialist II in the press department full time beginning May 7, 2001 through July 10, 2006 when he was discharged.

The claimant was discharged because the employer believed he was a three day no call-no show from work. The claimant had been off work to help care for his terminally ill brother in Arizona beginning June 1, 2006. The claimant was given permission to be off work through June 7, 2006 then was placed in a layoff status from June 8 through June 19. On or about June 20 or June 21 the claimant's supervisor spoke to him and told him that he needed to return to work either on June 20 or June 21 because the employer was no longer willing to extend his leave. The claimant told the employer he was still in Arizona and could not possibly be back. The claimant asked for additional leave. The claimant did not appear for work on June 21, 22, 23, 26, 27, 28, 29, 30, July 5, 6, 7 and 10. He was mailed a letter telling him his employment was ended because the employer considered him a three day no call-no show in early July. The claimant did not receive the 'no report' letter until July 20. Under the employer's union contract the claimant would have been entitled to at minimum three days or more bereavement leave beginning on the date his brother died. The claimant's brother died on June 26. the administrative law judge is persuaded that the employer knew or could have known that the

claimant's brother died had they only read the documents provided to them by the claimant's union representative. At the time the claimant's brother died he was entitled to bereavement leave. Ms. Mallory Russell indicated that the employer did not begin considering the claimant a no call-no show until June 26, 2006, the day his brother died. When the employer found out the claimant's brother had died, his bereavement leave should have immediately kicked in and he should have been allowed at least anther week of leave under the union contract.

The claimant did not intend to quit his job, he just wanted some time off to spend with his brother during his final days and time off to attend the funeral and burial. The employer sent the letter terminating the claimant on July 5. Ms. Mallory indicated that had she known about the death, the claimant would have been given *at least until July 5* bereavement leave. The employer's employees did not communicate amongst themselves since it is clear that the death notice information was provided to the employer by Harlan Swanson.

Thinking he was already discharged, the claimant did not return to Iowa until July 20.

Harlan Swanson told Lavone Russell on June 27 that the claimant's brother had died and provided her with the documents to give to the plant manager Byron Nelson. Ms. Russell had the death information on June 27 but she failed to read the information. The claimant did adequately communicate with the employer through his union representative.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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.
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> 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).

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). The employer discharged the claimant and has the burden of proof to show misconduct. Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. Miller v. Employment Appeal Board, 423 N.W.2d 211 (Iowa App. 1988).

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 took no action to indicate to the employer that he wanted to quit his employment. The claimant followed the employer's instructions about calling in and through his union notified the employer about the death of his brother. The uncontroverted testimony from the employer is that the claimant's bereavement leave should have covered him until July 5. The claimant was told he was discharged on July 5 for missing work during time that should have been covered by his bereavement leave. The employer had actual notice from Harlan Swanson about the claimant's brother's death and reasonably should have known the claimant would use his bereavement leave. The employer discharged the claimant so there was no reason for the claimant to quickly return to Iowa. The employer violated their own bereavement policy and the administrative law judge concludes that claimant's absences were excused or covered under the bereavement policy. The claimant did not voluntarily quit. The employer has not established misconduct as they did not follow their own bereavement leave policy and give the claimant time to return to work after the death. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The September 6, 2006, reference 01, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

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Teresa K. Hillary
Administrative Law Judge

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Decision Dated and Mailed

tkh/pjs