

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

WILLIAM J MCGEE
Claimant

APPEAL NO. 16A-UI-13005-S1-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

CITY OF DAVENPORT
Employer

OC: 11/06/16
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

William McGee (claimant) appealed a representative's December 1, 2016, decision (reference 01) that concluded he was not eligible to receive unemployment insurance benefits because he voluntarily quit work with City of Davenport (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for December 27, 2016. The employer did not provide a telephone number where it could be reached and therefore, did not participate in the hearing. The claimant offered and Exhibit A was received into evidence.

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 considered all of the evidence in the record, finds that: The claimant was hired on September 15, 2014 as a full-time clerk/residential appraiser. The claimant received the employer's handbook. He worked at the counter as a clerk and inspected new and existing homes.

In early 2016, the employer issued the claimant a verbal warning for making too many mistakes and overlooking obvious items on his inspection of existing homes. The claimant failed to notice air conditioning and improperly measured a deck. The employer warned the claimant that he should improve. On or about May 6, 2016, the employer issued a second warning for mistakes in inspections. The claimant did not note the existence of a second fireplace, brick veneer, and whether an attic was finished. The employer told the claimant that it would have to do something if the claimant did not improve. The claimant understood he could be terminated and developed a checklist for existing homes. After the warning was issued the supervisor told him his errors had decreased. Later the employer told him he was missing items again. The employer wanted him to be 90-percent accurate.

In early September 2016, the claimant inspected approximately fifteen new homes. He had not inspected new homes for a period of time and knew it was a skill he would have to relearn. The claimant did not ask the employer for training. The claimant was on vacation from October 3 to 9, 2016. On October 14, 2016, the employer met with the claimant to discuss the errors he made on the new homes. At some point the employer discovered that the claimant made approximately nine mistakes on the fifteen homes. He was working at an accuracy rate of 66-percent. The claimant did not notice that there were deck footings at one house. The claimant reported he had inspected one home but did not walk through the house. He felt the area was unsafe due to workers with power tools. His report did not indicate he did not go through the house. The employer told the claimant he must resign or he would be terminated. On October 24, 2016, the claimant submitted his letter of resignation effective November 4, 2016. The claimant's last day of work was November 4, 2016.

REASONING AND CONCLUSIONS OF LAW:

The first issue is whether the claimant voluntarily quit without good cause attributable to the employer. For the following reasons the administrative law judge concludes he did not.

Iowa Admin. Code r. 871-24.26(21) provides:

Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:

(21) The claimant was compelled to resign when given the choice of resigning or being discharged. This shall not be considered a voluntary leaving.

If an employee is given the choice between resigning or being discharged, the separation is not voluntary. The claimant had to choose between resigning or being fired. The claimant's separation was involuntary and must be analyzed as a termination.

The issue becomes whether the claimant was discharged for misconduct. For the following reasons the administrative law judge concludes the claimant was not.

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 Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r. 871-24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

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 must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The employer did not participate in the hearing and, therefore, did not provide any evidence of a final incident of misconduct. It did not provide the final incident, the date of the final incident, or the date the employer discovered the final incident. The employer has failed to provide any evidence of willful and deliberate misconduct which would be a final incident leading to the discharge. The claimant was discharged but there was no misconduct.

DECISION:

The representative's December 1, 2016, decision (reference 01) is reversed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/rvs