

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

NICK AUGUSTINE

Claimant

APPEAL NO. 08A-UI-10946-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DES MOINES METRO ELECTRIC INC

Employer

**OC: 10/05/08 R: 02
Claimant: Respondent (1)**

Iowa Code § 96.5(2)(a) - Discharge for Misconduct

STATEMENT OF THE CASE:

Des Moines Metro Electric, Inc. (employer) appealed an unemployment insurance decision dated November 13, 2008, reference 03, which held that Nick Augustine (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on December 8, 2008. The claimant participated in the hearing. The employer participated through Steve Ivanovich, President, and Jane Ivanovich, Vice-President. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

The issue is whether the employer discharged the claimant for work-related misconduct.

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 employed as a full-time electrician's helper from November 22, 2007 through January 14, 2008, when he was discharged. The employer said the claimant reported at the time he was hired that he would only be there for a couple months because he was going to open a restaurant. The claimant had a poor attendance record and did not once work a 40-hour work week during his employment. He left work on Friday January 4, 2008 after picking up his paycheck. The claimant called the employer on the following Monday and claimed he sustained a work-related injury on Friday. The employer did not believe him, since nothing had been said on Friday. The claimant went to a doctor and was reportedly taken off work for a week. He called the employer and wanted to work light duty, but the employer told him there was no light-duty work available. The claimant reportedly told the office manager that if he did not get what he was looking for in workers' compensation, then "things were going to start up missing." The claimant denies this allegation. The employer did not feel he could trust the claimant, and when the claimant returned to work on January 14, 2008, he was discharged. There was a workers' compensation telephone call in which the claimant used a lot of profanity towards the employer and called the company stupid. However, it is assumed this conversation took place after the termination.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the reasons for the claimant's separation from employment qualify him to receive unemployment insurance benefits. The claimant is not qualified to receive unemployment insurance benefits if he voluntarily quit without good cause attributable to the employer or if the employer discharged him for work-connected misconduct. Iowa Code §§ 96.5-1 and 96.5-2-a.

The employer began testifying that the claimant was discharged for misconduct but subsequently testified the short term of employment was agreed upon by both parties. Rule 871 IAC 24.25 provides that, 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. Whatever the claimant may have said at the time of hire, he wanted to return to work for the employer. In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 608, 612 (Iowa 1980) and Peck v. Employment Appeal Bd., 492 N.W.2d 438 (Iowa Ct. App. 1992). The claimant did not exhibit the intent to quit and did not act to carry it out. Since the claimant did not have the requisite intent necessary to sever the employment relationship so as to treat the separation as a "voluntary quit", it must be treated as a discharge.

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.

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 to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000).

The employer discharged the claimant because the employer did not feel he could be trusted. The claimant was not a credible witness, as he claimed that he had no problems with attendance, but the employer offered substantial evidence that he never worked a 40-hour work week. Additionally, the claimant denied saying he planned to open a restaurant, but that information is far too specific for the employer to have fabricated it. However, the employer has failed to establish the claimant was discharged for work-related misconduct. While the employer had every right to discharge the claimant, the discharge was not disqualifying. Benefits are allowed.

DECISION:

The unemployment insurance decision dated November 13, 2008, reference 03, is affirmed. The claimant was discharged. Misconduct has not been established. Benefits are allowed, provided the claimant is otherwise eligible.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/kjw