IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

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Appeal Number: 06A-UI-02846-H2T
OC: 01-22-06 R: 03
Claimant: Respondent (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the February 27, 2006, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on April 19, 2006. The claimant did participate and was represented by Dan Holub, Attorney at Law. The employer did participate through Monica Kelly, Customer Service Representative and was represented by Cheryl Rodermund of Talx UC express. Employer's Exhibit One was received.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed by Labor Ready and assigned to work at Bluefield Trust beginning on October 5, 2005 through October 5, 2005. The claimant was discharged on January 24, 2006.

The claimant was to work on October 6 but was late coming to the office. The claimant was told on October 6, 2005 that he was suspended for ninety days for being an alleged no-call/no-show for work. At that time the claimant did not file a claim for unemployment insurance benefits, instead he took another job. The claimant was hired by a union to picket a local employer, McComas-Lacina. The claimant worked for approximately ten or eleven weeks in the fall of 2005 walking the picket line at McComas-Lacina. After his job with the union ended, the claimant returned to Labor Ready on January 24, 2006 and was told that he was no longer eligible to be placed for assignments since he had worked on a picket line against one of Labor Ready's biggest clients, McComas-Lacina. The claimant was not discharged in October as he was clearly told only that he was suspended for ninety days. The claimant had no previous warnings due to attendance issues and had never been told that if he missed another day of work or was tardy for another day, he would be discharged. The employer did not make the decision to discharge the claimant until after they found out that he had worked for another employer and the his work for that employer offended one of their clients. The picketing work the claimant was doing for the union was legal. The claimant did not picket Labor Ready offices, just the workplace of one of their clients.

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.
>
> 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). 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).

The real question here is whether it is misconduct for the claimant to work for a union picketing an employer who is a client of Labor Ready's. The administrative law judge concludes that the claimant's employment for a union, engaging in legal behavior, cannot be construed as misconduct. While the employer may not like the employment history of the claimant, they cannot claim that his mere legal employment for another employer who is disliked by one of their clients is misconduct. While their clients may not chose to hire any employees that have worked for the union, that opinion by the client does not make the claimant's action of taking a legal job, misconduct. Substantial misconduct has not been established by the evidence. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The February 27, 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.

tkh/tjc