

**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**

**LYDIA A KEMPER  
2320 GOLDEN RD  
WEST POINT IA 52656**

**FRANK MILLARD & CO INC  
c/o EMPLOYERS UNITY INC  
k/n/a TALX EMPLOYER SERVICES  
PO BOX 749000  
ARVADA CO 80006-9000**

**Appeal Number: 06A-UI-01247-DT  
OC: 01/01/06 R: 04  
Claimant: Respondent (1/R)**

**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, 4<sup>th</sup> 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  
Section 96.5-1 – Voluntary Leaving

STATEMENT OF THE CASE:

Frank Millard & Company, Inc. (employer) appealed a representative's January 23, 2006 decision (reference 01) that concluded Lydia A. Kemper (claimant) was qualified to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on February 20, 2006. The claimant participated in the hearing. Lisa Jennings of Employer's Unity appeared on the employer's behalf and presented testimony from two witnesses, MacArthur Coffin and Dennis Mc Gregor.

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:

Was there a disqualifying separation from employment either through a voluntary quit without good cause attributable to the employer or through a discharge for misconduct?

FINDINGS OF FACT:

After previously working with the employer through a temporary employment firm, the claimant started working directly for the employer on or about September 14, 2003. She worked full time as payroll administrator in the employer's Burlington, Iowa office of its mechanical, industrial, and residential construction company. Her last day of work was December 23, 2005.

In early December 2005, the claimant learned that she was one of very few employees who did not receive any raise. She was upset both because she had not been given a raise and because the employer had not informed her directly she would not be getting a raise or why. Prior to November 7, 2005 she had requested and the employer had approved an unpaid vacation from December 27 through December 31, 2005; she was scheduled to return to work on January 3, 2006. A part-time coworker who had previously held the claimant's job full time had been arranged to fill in for the claimant during the week she was gone.

December 23, 2005 was also the day of the employer's Christmas party. During that time, the claimant had what she felt was a private confidential conversation with Mr. Mc Gregor, the controller, who she considered a friend. She confided her discontent to him, and told him that if she happened to find a new job while she was off work, she would not be back. She had also made statements to other coworkers indicating that she might not be returning to work. Before she left work that day, she cleaned up her work area for the coworker who would be filling in for her; she removed her personal belongings from the area, which included a name-plate, some family pictures, and a 2005 calendar. When Mr. Mc Gregor discovered that the claimant had removed her personal belongings, he informed Mr. Coffin, the president, of the claimant's prior statement.

The claimant had made prior statements since at least August 2005 that if she ever got a private business off the ground, she would quit her job with the employer; Mr. Coffin had never taken those statements seriously. However, when apprised of the claimant's discontent and removal of her personal items on December 23, he decided that she in fact was quitting. Rather than waiting until January 3, 2006 to see if the claimant did in fact return to work or not, the employer determined not to take any chances, and on December 29, 2005 the employer send her a letter "accepting her resignation" and directing her to return her keys.

The claimant returned from her vacation trip on December 29, 2005, and read her mail, including the letter from the employer on January 1, 2006. She did not seek to return to the employer on January 3, 2006 as she understood that the employer had terminated her employment.

On January 7, 2006, the claimant accepted some part time work at Tri-State Furniture, where her son also works, to earn some income while seeking new employment. She has worked approximately 10 – 16 hours per week. She had discussed that income with an Agency advisor, whom she understood as advising that she did not need to report that part time income.

## REASONING AND CONCLUSIONS OF LAW:

The first issue in this case is whether the claimant voluntarily quit.

Iowa Code Section 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 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. A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. Bartelt v. Employment Appeal Board, 494 N.W.2d 684 (Iowa 1993). The employer asserted that the claimant was not discharged but that she quit. The administrative law judge concludes that the employer has failed to satisfy its burden that the claimant voluntarily quit. Iowa Code Section 96.6-2. As the separation was not a voluntary quit, it must be treated as a discharge for purposes of unemployment insurance. 871 IAC 24.26(21).

The issue in this case is then whether the employer discharged the claimant for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue is not whether the employer was right or even had any other choice but to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate decisions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988). A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code Section 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982).

The focus of the definition of misconduct is on acts or omissions by a claimant that "rise to the level of being deliberate, intentional or culpable." Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer's interest, such as found in:
  - a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
  - b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:
  - a. Manifest equal culpability, wrongful intent or evil design; or
  - b. Show an intentional and substantial disregard of:
    1. The employer's interest, or
    2. The employee's duties and obligations to the employer.

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.

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 reason the employer effectively discharged the claimant was the belief that she was going to quit her employment. Simply admitting that one is considering quitting job is not the same as quitting, and is not misconduct. The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

An issue as to whether the claimant had offsetting income after establishing her claim for unemployment insurance benefits arose during the hearing. This issue was not included in the notice of hearing for this case, and the case will be remanded for an investigation and preliminary determination on that issue. 871 IAC 26.14(5).

DECISION:

The representative's January 23, 2006 decision (reference 01) is affirmed. The claimant did not voluntarily quit and the employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible. The matter is remanded to the Claims Section for investigation and determination of the offsetting income issue.

ld/s