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

DENNY E DOUD
1611 BURLINGTON RD
OSKALOOSA IA 52577

COMMUNITY WHOLESALE OF DES MOINES INC
D/B/A R & R ALUMINUM
630 SE 15TH ST
DES MOINES IA 50317

Appeal Number: 05A-UI-02094-R
OC: 01-23-05 R: 03
Claimant: Appellant (2)

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 for Misconduct
Section 96.5-1 – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant, Denny E. Doud, filed a timely appeal from an unemployment insurance decision dated February 24, 2005, reference 01, denying unemployment insurance benefits to him. After due notice was issued, an in-person hearing was held in Des Moines, Iowa, at the claimant's request, on March 23, 2005 with the claimant participating. Vicki Douglas, General Manager, participated in the hearing for the employer, Community Wholesale of Des Moines, Inc., doing business as R & R Aluminum. Andrew Wilson, Vice President, was to have participated but he never appeared for the hearing. Employer's Exhibit 1 and Claimant's Exhibit B were admitted into evidence. Claimant's Exhibit A was not admitted into evidence.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a full-time sales representative from 2001 until he was separated from his employment on January 25, 2005. When the claimant was first hired and at all times thereafter until approximately the first week of January of 2005, the claimant was not asked, nor did he agree, to sign a covenant or agreement not to compete as a condition of his employment or continued employment. The owner of the employer decided to require all of its employees to sign a covenant or agreement not to compete because he believed that certain secrets were being leaked and employees were leaving to go to work for competitors. In early January of 2005 the claimant was presented with a covenant not to compete and asked to sign the same. The claimant asked for time to discuss the document with his attorney and the employer agreed. An example of most of the provisions of the agreement, if not all of the provisions, is shown at Employer's Exhibit 1 designated "1" of the exhibit. The claimant was dissatisfied with certain provisions of the agreement including the duration of one year and because it appeared that it could be implemented even if the claimant was discharged.

The claimant was on the road much of the time selling for the employer and was not in the office everyday. Periodically, the claimant was approached either by the employer's witness, Vicki Douglas, General Manager and/or Andrew Wilson, Vice President, about whether the claimant had signed the covenant not to compete or non-compete agreement. The employer agreed to modify the agreement. Most of the provisions, if not all of the provisions, of the modified or revised non-compete agreement are shown at Employer's Exhibit 2, the second page designated "2". The claimant was still dissatisfied with the agreement.

Matters came to a head on January 25, 2005. At that time, the claimant was called into the office of Ms. Douglas. Ms. Douglas informed the claimant that he needed to sign the agreement that day. The claimant requested additional time to again talk to his attorney and this was granted. The claimant then called his attorney. What occurred thereafter at the meeting is uncertain. However, the claimant did not deliver a signed copy of the agreement to Ms. Douglas. The claimant testified that he was discharged when he had signed the agreement but, before he had delivered it to Ms. Douglas, was informed by Ms. Douglas that the owner of the employer had said to let the claimant go because the claimant had talked to another company. Ms. Douglas testified that the claimant voluntarily quit because he failed to sign the document or call the owner. In any event, later that day the claimant returned and obtained his last check paying him for all outstanding matters which was earlier than he was usually paid. The claimant had talked to the employee of another company but only in regards to whether that employee had been required to sign a covenant not to compete or non-compete agreement with that company. The employer had no evidence as of January 25, 2005 that the claimant had done anything inappropriate in competition with the employer and his separation was not as a result of any such inappropriate competition.

REASONING AND CONCLUSIONS OF LAW:

The question presented by this appeal is whether the claimant's separation from employment was a disqualifying event. It was not.

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 24.26(1) 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:

(1) A change in the contract of hire. An employer's willful breach of contract of hire shall not be a disqualifiable issue. This would include any change that would jeopardize the worker's safety, health or morals. The change of contract of hire must be substantial in nature and could involve changes in working hours, shifts, remuneration, location of employment, drastic modification in type of work, etc. Minor changes in a worker's routine on the job would not constitute a change of contract of hire.

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 first issue to be resolved is the character of the separation. The claimant maintains that he was discharged after signing the requested covenant not to compete or non-compete agreement and then being told that he was let go because he had talked to another company. The employer maintains that the claimant voluntarily quit because he failed and refused to sign the covenant not to compete or non-compete agreement even after its revision and failed to call the owner to tell the owner he was not quitting. Neither the claimant nor Ms. Douglas were particularly credible. Their versions as to exactly what happened and who was present vary. The two even disagree as to the contents of the agreements. The employer maintains that Employer's Exhibit 1 is an exact copy of the agreements given to the claimant but the claimant denies this and claims that there is language left out and, in support, points out that Claimant's Exhibit B, a copy of the agreement sent to the fact finder, has what appears to be a sentence left out in the first paragraph. It is clear to the administrative law judge that the claimant was reluctant to sign the agreement and delayed in executing the agreement. The administrative law judge does not mean to suggest that the claimant's reluctance or his requested changes were unreasonable but merely points out that the claimant delayed in signing the agreement. Whether the claimant actually ultimately signed the agreement is uncertain. If the claimant signed the agreement, then he complied with the employer's wishes as to the execution of the agreement and, therefore, his separation would be a discharge. If the claimant never signed the agreement then he voluntarily quit by failing to do so. In either case, the administrative law judge concludes that the claimant was not disqualified to receive unemployment insurance benefits.

If the claimant never signed the agreement, the administrative law judge would conclude that the claimant quit. The issue would then become whether the claimant quit without good cause attributable to the employer. The claimant would have the burden to prove that he left his employment with the employer herein with good cause attributable to the employer. See Iowa Code section 96.6(2). The administrative law judge would conclude that the claimant has met his burden of proof to demonstrate by a preponderance of the evidence that he left his employment with the employer herein with good cause attributable to the employer. The administrative law judge would conclude that the required covenant not to compete or non-compete agreement was a change in the claimant's contract of hire which change would be substantial and which change would be a breach of the claimant's contract of hire. When the claimant was hired in 2001, he was not required to sign a covenant not to compete nor was any such agreement ever discussed with him. Then continuing throughout his employment for almost four years, nothing was said about such an agreement. In January 2005 the employer required the claimant to sign a covenant not to compete or non-compete agreement. The administrative law judge believes that this requirement was a substantial change in the claimant's contract of hire. A covenant not to compete or non-compete agreement is a serious matter which, if approved by the employee, places serious restrictions on the employee's employability upon separation from the employer. The claimant had legitimate concerns about the agreement in terms of its length of one year and its apparent enforcement despite the reason for the separation from employment. These were legitimate concerns and the claimant would be justified in failing and refusing to sign such a document. The claimant could be immediately discharged by the employer and unable to gain employment in an area in which he had been employed for some time. Accordingly, the administrative law judge would conclude if the claimant had not signed the agreement and his failure was interpreted as a quit, that he quit with good cause attributable to the employer and would not be disqualified to receive unemployment insurance benefits. Unemployment insurance benefits would be allowed to the claimant, provided he is otherwise eligible.

If the claimant had signed the agreement and then separated from his employment, this would have been a discharge. The claimant may well have also been discharged for a failure to sign the agreement. In either case, in the event of a discharge, it is well established that the employer must prove disqualifying misconduct for the discharge. See Iowa Code section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. The administrative law judge would conclude that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. As noted above, the claimant would be justified in failing to sign a covenant not to compete or non-compete agreement and a discharge for such failure would not be disqualifying misconduct. If the claimant was discharged because he spoke to another company, this would also not be disqualifying misconduct. The claimant testified that he merely spoke to a friend who was employed with a competing company to see if his friend had signed a covenant not to compete. Neither act, failing to sign the covenant or discussing with a friend and employee of a competitor whether the friend had been required to sign such an agreement, is a deliberate act or omission constituting a material breach of the claimant's duties or evinces a willful or wanton disregard of the employer's interests or is carelessness or negligence in such a degree of recurrence so as to establish disqualifying misconduct. Therefore, should the claimant's separation be considered a discharge, the administrative law judge would conclude that he was discharged but not for disqualifying misconduct and, as a consequence, he would not be disqualified to receive unemployment insurance benefits. The claimant would be entitled to receive unemployment insurance benefits, provided he is otherwise eligible.

In summary, whether the claimant was discharged or quit, he would not be disqualified to receive unemployment insurance benefits. For the purposes of this decision, the administrative law judge concludes that the claimant was essentially discharged. The evidence does indicate that the claimant was reluctant to sign the agreement and delayed his execution but he had good reasons and was continuing to consult with his attorney. The claimant was given less than a month to work out the details of the agreement before he was separated. Even Ms. Douglas concedes that the claimant never actually said that he was quitting nor did he ever actually refuse outright to sign the agreement. Accordingly, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct, and, as a consequence, he is not disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided he is otherwise eligible.

DECISION:

The representative's decision of February 24, 2005, reference 01, is reversed. The claimant, Denny E. Doud, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he was discharged but not for disqualifying misconduct.

tjc/tjc