

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JEROME B SIMON
Claimant

APPEAL NO. 06A-UI-10923-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

J M SIMON CONSTRUCTION
Employer

**OC: 10/08/06 R: 04
Claimant: Appellant (4)**

Section 96.5-2-a – Discharge
Section 96.5-1 – Voluntary Leaving

STATEMENT OF THE CASE:

Jerome B. (Ben) Simon (claimant) appealed a representative's November 6, 2006 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits as of December 3, 2006 after a separation from employment from J. M. Simon Construction (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on November 29, 2006. The claimant participated in the hearing, was represented by Susan Hess, Attorney at Law, and presented testimony from one other witness, Angela Simon. The employer failed to respond to the hearing notice and provide a telephone number at which a witness or representative could be reached for the hearing and did not participate in the hearing. 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.

ISSUES:

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? Is the employer's account subject to charge?

FINDINGS OF FACT:

After prior periods of employment with the employer, the claimant returned to working for the employer on July 11, 2006. He worked full-time as a heavy equipment operator in the employer's construction business. Employment was seasonal, with layoffs typically occurring during the winter at the point where the weather became too wet or cold for work. The claimant's last day of work was October 12, 2006. As of that date, there had been no determination made as to how much longer the employer's work season would continue; as of the date of the hearing, to the claimant's knowledge the employer continued to work.

The employer's business is owned by the claimant's father, Jerome M. Simon (Mr. Simon). Mr. Simon had been having some disputes with another employee who was a mechanic. On October 9 the claimant had to physically break up an argument between Mr. Simon and the

mechanic. The claimant later discussed the confrontation with Mr. Simon, indicating that he would continue working through the rest of the season, but if Mr. Simon's manner of handling disputes did not change, the claimant would not plan on returning to the employer when the employer would be recalling employees after the winter layoff.

On October 11, unknown to the claimant, Mr. Simon discharged the mechanic. On October 12, while the claimant was waiting at a job site for Mr. Simon to arrive with instructions, he learned that the mechanic had been fired for allegedly stealing tools or equipment from the employer. When Mr. Simon arrived on the job site, the claimant confronted him and stated that the firing of the mechanic was not right, that there was no proof of any theft, and that the claimant had been with the mechanic during much of the time the employer believed the mechanic might have been stealing. Mr. Simon became upset with the claimant's attempted intervention on behalf of the mechanic and began to argue with the claimant, bringing up personal, not business-related issues. He ultimately told the claimant to "get the f - - - out of here." The claimant understood from this that he was discharged and left. Mr. Simon subsequently confirmed to the claimant's mother, Ms. Simon, that he had discharged the claimant.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not eligible for unemployment insurance benefits if he quit the employment without good cause attributable to the employer or was discharged for work-connected misconduct. If he was discharged other than for work-connected misconduct prior to the effective date of a previously announced quit, he would be disqualified only as of the effective date of the resignation.

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(38) provides:

Voluntary quit without good cause. 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. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:

(38) Where the claimant gave the employer an advance notice of resignation which caused the employer to discharge the claimant prior to the proposed date of resignation, no disqualification shall be imposed from the last day of work until the proposed date of resignation; however, benefits will be denied effective the proposed date of resignation.

871 IAC 24.26(12) provides:

When an employee gives notice of intent to resign at a future date, it is a quit issue on that future date. Should the employer terminate the employee immediately, such employee shall be eligible for benefits for the period between the actual separation and the future quit date given by the claimant.

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 representative's decision concluded that the claimant voluntarily quit effective December 2, 2006, and that the employer then discharged the claimant in advance of that announced resignation. While a claimant has the burden to establish that a quit is for good cause, in a case of dispute as to whether there has been a quit, it is the employer's burden to initially establish that there was a quit. Iowa Code § 96.6-2.

When the claimant discussed the possibility of not returning to employment with the employer after the current season, he did not specify a "future date" on which he intended to end his employment; rather, he stated a condition (improving the manner of resolving conflicts) upon the likelihood of his refusing or accepting recall to work in the next season. This is too tentative to even be considered a definite refusal of work, much less to be considered an announced resignation. 871 IAC 24.24(1). The administrative law judge concludes that the employer has failed to satisfy its burden that the claimant had offered a resignation to be effective December 2, 2006. Iowa Code § 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 § 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.

The reason the employer effectively discharged the claimant was the claimant's attempted intervention with the discharge of the mechanic. Under the circumstances of this case, the claimant's actions were at worst the result of inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence or were due to a good faith error in judgment or discretion. 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.

DECISION:

The representative's November 6, 2006 decision (reference 01) is modified in favor of the claimant. 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 he is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

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