

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TIMOTHY M DESPENAS
Claimant

APPEAL NO. 08A-UI-06564-SWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MENARD INC
Employer

**OC: 11/04/07 R: 02
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

The employer appealed an unemployment insurance decision dated July 16, 2008, reference 02, that concluded the claimant's discharge was not for work-connected misconduct. A telephone hearing was held on July 30, 2008. The parties were properly notified about the hearing. The claimant participated in the hearing. Troy Meyers participated in the hearing on behalf of the employer. Exhibit One was admitted into evidence at the hearing.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant worked part time for the employer as a sales employee in the plumbing department from May 25 to June 19, 2008. Carl Borchardt was the claimant's supervisor.

The house that the claimant rents as his residence was flooded starting June 8, 2008. As a result, the claimant had missed several scheduled days of work. The days were considered excused because they were due to emergency situations beyond the claimant's control.

The claimant was scheduled to work on June 24, 2008, from noon to 9:00 p.m. He found out that a Federal Emergency Management Agency official was coming out in the afternoon to inspect the house to determine whether the claimant could return to his home or would be forced to leave. The claimant called Borchardt at about 9:30 a.m. and informed him about the FEMA visit. He told Borchardt that he could not report to work at noon because of the visit. He asked Borchardt what his work hours were for June 25. Borchardt replied that if he could not work his full shift on June 24, he would not have any hours on June 25. When the claimant asked if that meant he was terminated, Borchardt reiterated that if he did not work his full shift, he would not have any more hours.

After his conversation with Borchardt, the claimant unsuccessfully attempted to contact FEMA to arrange his appointment. He called at 11:52 a.m. and informed Borchardt that he was not able to get his appointment rescheduled and would not be in at noon. Borchardt replied that it was

nice working with you, which the claimant reasonably believed meant he was discharged. The claimant never informed Borchardt that he intended to quit his job and did not intend to quit.

The employer's account is not presently chargeable for benefits paid to the claimant since it is not a base period employer on the claim.

REASONING AND CONCLUSIONS OF LAW:

The unemployment insurance law provides for a disqualification for claimants who voluntarily quit employment without good cause attributable to the employer or who are discharged for work-connected misconduct. Iowa Code sections 96.5-1 and 96.5-2-a. To voluntarily quit means a claimant exercises a voluntary choice between remaining employed or discontinuing the employment relationship and chooses to leave employment. To establish a voluntary quit requires that a claimant must intend to terminate employment. Wills v. Employment Appeal Board, 447 N.W.2d 137, 138 (Iowa 1989); Peck v. Employment Appeal Board, 492 N.W.2d 438, 440 (Iowa App. 1992). The evidence establishes the claimant never intended to quit and Borchardt discharged him.

The unemployment insurance rules define misconduct as (1) deliberate acts or omissions by a worker that materially breach the duties and obligations arising out of the contract of employment, (2) deliberate violations or disregard of standards of behavior that the employer has the right to expect of employees, or (3) carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design. 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 misconduct within the meaning of the statute. 871 IAC 24.32(1).

The findings of fact show how I resolved the disputed factual issues in this case by carefully assessing of the credibility of the witnesses and reliability of the evidence and by applying the proper standard and burden of proof. 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). While the employer may have been justified in discharging the claimant due to his attendance, work-connected misconduct as defined by the unemployment insurance law has not been established. No willful and substantial misconduct has been proven in this case.

The employer's account is not presently chargeable for benefits paid to the claimant since it is not a base period employer on the claim. If the employer becomes a base period employer in a future benefit year, its account may be chargeable for benefits paid to the claimant based on this separation from employment.

DECISION:

The unemployment insurance decision dated July 16, 2008, reference 02, is affirmed. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

Steven A. Wise
Administrative Law Judge

Decision Dated and Mailed

saw/css