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

EVERETT A SIDDELL
1103 NASH ST
APLINGTON IA 50604-1067

SPEE-DEE DELIVERY SERVICE INC
710 SE CREEKVIEW DR
ANKENY IA 50021

Appeal Number: 06A-UI-03715-DT
OC: 03/05/06 R: 03
Claimant: Respondent (5)

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
Section 96.5-1 – Voluntary Leaving
Section 96.7-2-a(2) – Charges Against Employer's Account

STATEMENT OF THE CASE:

Spee-Dee Delivery Service, Inc. (employer) appealed a representative's March 29, 2006 decision (reference 01) that concluded Everett A. Siddell (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 April 26, 2006. The claimant participated in the hearing. Ron Watson appeared on the employer's behalf and presented testimony from

one other witness, Jeffery Cutler. 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:

The claimant started working for the employer on November 28, 2005. He worked part time (25–30 hours per week) as a package handler in the employer's Mason City, Iowa parcel delivery service. He normally worked from approximately 2:00 a.m. until about 7:00 a.m. or 8:00 a.m., Monday through Friday. The claimant previously had been given only general instructions as to his specific work start time; on February 23, 2006 he was verbally informed that his official start time was 2:00 a.m., and that he therefore had been tardy when he reported for work at about 2:25 a.m. on February 21, 2006.

The claimant's last day of work was February 24, 2006. He was a no-call, no-show for work on February 27 and February 28, 2006. The employer considered the claimant a voluntary quit under its two-day no-call, no-show policy. Sometime after the end of the claimant's shift on March 1, 2006, the claimant called the branch manager, Mr. Cutler. He reported that he would be able to return to work. Mr. Cutler understood the claimant to say he could return to work the next day, March 2, and told him to come in at 6:30 a.m. to meet with him; the claimant believed he had communicated that he could return to work the following day, March 3, and understood that he was to come in to meet with Mr. Cutler at 6:30 a.m. that day.

The claimant did come in at 6:30 a.m. on March 3, 2006, but Mr. Cutler was not available. Mr. Cutler's assistant served as intermediary, and the claimant presented him with a doctor's excuse indicating that was to be off work from February 26 until March 3, 2006. He indicated that he had suffered a minor stroke on February 26, 2006 and had been taken to the Mayo Clinic hospitals in Rochester, MN, and that he had not been released from the hospital until March 1, 2006. Despite this information, through the assistant manager Mr. Cutler informed the claimant that he was deemed to have abandoned his job and was no longer employed.

The claimant established an unemployment insurance benefit year effective March 5, 2006.

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 he voluntarily quit by violating the employer's two-day no-call, no-show policy.

The intent to quit can be inferred in certain circumstances. For example, a three-day no-call, no-show in violation of company rule created an inference of a voluntary quit. 871 IAC 24.25(4). The employer's policy does not comply with this rule, however, as it infers an intent to quit after only two days. Since the employer's policy does not satisfy the rule as far as what can be deemed a voluntary quit under Iowa Code chapter 96, the claimant's actions did not demonstrate the intent to sever the employment relationship necessary to treat the separation as a "voluntary quit" for unemployment insurance purposes. Further, the claimant's contact with the employer on March 1 and March 3, 2006 further refutes any inference that he had meant to quit. Finally, even if a quit could be inferred, the claimant did have a compelling personal reason for leaving, and his period of absence before seeking to return to work did not exceed ten working days. 871 IAC 24.25(20).

The administrative law judge concludes that the employer has failed to satisfy its burden that the claimant voluntarily quit. 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 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, (7) provide:

> 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).

> (7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

The reason the employer effectively discharged the claimant was his absence from work. Excessive unexcused absences can constitute misconduct, however, in order to establish the necessary element of intent, the final incident must have occurred despite the claimant's knowledge that the occurrence could result in the loss of his job. Cosper, supra; Higgins v. IDJS, 350 N.W.2d 187 (Iowa 1984). Absences due to properly reported illness cannot be considered intentional. Cosper, supra. While the claimant's absences the week of February 27, 2006 were not properly reported, it is clear that the claimant's failure to report his absences were also not volitional, as he was hospitalized with a serious medical condition. 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.

The final issue is whether the employer's account is subject to charge. An employer's account is only chargeable if the employer is a base period employer. Iowa Code § 96.7. The base period is "the period beginning with the first day of the five completed calendar quarters

immediately preceding the first day of an individual's benefit year and ending with the last day of the next to the last completed calendar quarter immediately preceding the date on which the individual filed a valid claim." Iowa Code § 96.19-3. The claimant's base period began October 1, 2004 and ended September 30, 2005. The employer did not employ the claimant during this time, and therefore the employer is not currently a base period employer and its account is not currently chargeable for benefits paid to the claimant.

DECISION:

The representative's March 29, 2006 decision (reference 01) is modified with no effect on the parties. 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. The employer's account is not subject to charge in the current benefit year.

ld/tjc