

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

LARRY P DREESSEN  
1794 – 345<sup>TH</sup> ST  
VAIL IA 51465

TIM VOGL TRUCKING INC  
PO BOX 44  
ARCADIA IA 51430-0044

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COUNCIL BLUFFS IA 51503-0803

Appeal Number: 04A-UI-10562-DT  
OC: 08/22/04 R: 01  
Claimant: Respondent (1)

**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.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

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

STATEMENT OF THE CASE:

Tim Vogl Trucking, Inc. (employer) appealed a representative's September 20, 2004 decision (reference 01) that concluded Larry P. Dreessen (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on October 27, 2004. The claimant participated in the hearing and was represented by Joseph Basque, attorney at law. Donna Vogl appeared on the employer's behalf. During the hearing, Claimant's Exhibits A and B were entered into evidence. 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 September 17, 2003. He worked full time as a local and long-haul truck driver in the employer's livestock hauling business. His last day of work was August 6, 2004.

The claimant arrived back at the employer's base operation at approximately 6:30 a.m. the morning of August 6 after a trip to and from Kentucky. There was no one at the employer's business operation at that time, so the claimant left the truck and went home. It was not unusual for the claimant to have a layover of four or so days between trips, so when he arrived home, he went camping at a local camping area. He took both his personal cell phone and his work cell phone in case the employer needed to reach him.

The employer did try to call the claimant at home on August 6 and August 7 for a load that might have been available for the claimant to take on August 7 or August 8. The employer tried the claimant again at home on August 9. The employer did not try to call the claimant on either of the cell phones.<sup>1</sup> The claimant returned home mid-day on August 9. He received the messages the employer had left on his home phone answering machine, and attempted to reach the employer at its business office, but did not reach anyone and was not able to leave a message. On August 10, he attempted again to return the call to the employer, this time leaving a message on the voice mail of Mr. Vogl's cell phone.

On August 11, Ms. Vogl returned the call to the claimant and was successful in reaching him. The prior day the employer had received a contact from another employer indicating that the claimant had made an application for employment. When Ms. Vogl reached the claimant, she asked him if it was true that he had applied for a job with another employer. He acknowledged that he had been looking for a better job. She asked when the claimant was going to let them know, and he replied he would have let her know in a couple weeks. She assumed that he had already decided to quit and had just not let her know. She told him that the loads for the rest of the week were covered, and concluded the conversation.

Still believing that the claimant had intended to leave for other employment, the employer sold the truck the claimant had been driving. On August 15 the claimant spoke to Mr. Vogl, who informed him that the truck had been sold and that he needed to clean his gear out of the truck. The claimant complied with this instruction.

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<sup>1</sup> Although Ms. Vogl testified that her husband had attempted to call from his cell phone to the claimant's cell phone, the claimant had no indication on his cell phones that the employer had attempted to call him. Further, through discovery the claimant had required the employer to provide a list of "all telephone calls allegedly made by the employer to Mr. Dreessen . . . with any supporting proof . . . including but not limited to company phone logs and cell phone records." The employer identified the calls made from the business phone and provided phone records for those calls, but did not identify any calls from the employer's cell phone and did not provide any cell phone records.

## 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 abandoned his job by not returning to work or contacting the employer for several days after August 6 and by applying for another job. The claimant asserted that he did not abandon his job, and been available by phone as he routinely had been in the past. Simply admitting that one is looking for another job is not paramount to quitting. 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 he had abandoned his job and was quitting for other employment. The claimant was reasonably available should the employer have truly needed to reach him. Looking for other employment 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.

DECISION:

The representative's September 20, 2004 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 he is otherwise eligible.

ld/kjf