IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

KEN E DRAPER
Claimant

IOWA MOLD TOOLING CO INC
Employer

APPEAL NO: 06A-UI-08199-LT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 06-18-06 R: 02
Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge/Misconduct
Iowa Code § 96.5(1) – Voluntary Leaving
Iowa Code § 96.6(2) - Timeliness of Appeal

STATEMENT OF THE CASE:

The claimant filed an appeal from the July 25, 2006, reference 03, decision that denied benefits. After due notice was issued, a hearing was held on September 7, 2006. Claimant participated and was represented by Mark Young, Attorney at Law. Employer participated through Rhonda Krause. Department's Exhibit D-1 was received. Claimant's Exhibit A was received.

ISSUE:

The issue is whether claimant's appeal is timely and if he quit the employment without good cause attributable to the employer or was discharged for reasons related to job misconduct.

FINDINGS OF FACT:

Having reviewed the testimony and all of the evidence in the record, the administrative law judge finds: A disqualification decision was mailed to the claimant's address of record on July 25, 2006. The claimant did receive the decision within the appeal period and filed an appeal by postal service on August 1, 2006 prior to the August 4, 2006 appeal deadline. After claimant did not receive communication from Iowa Workforce Development, his spouse called and determined that the appeal had not been delivered. Claimant then immediately filed an appeal by facsimile on August 15, 2006.

Claimant was employed as a full-time paint supervisor from September 19, 2005 through June 23, 2006 when he was discharged. On or about June 19 claimant reported to human resources manager Rhonda Krause that earlier that day plant improvement manager Mike Rallier told claimant in front of other employees, "Ken, your people could fuck up a wet dream." Plant manager Jim Fisk was present, laughed and did nothing to address the matter.

On June 20 before his 7 a.m. shift Fisk called claimant into his office with Gary Osterkamp, claimant's peer production supervisor. Fisk told claimant he was giving part of the paint shop to Osterkamp and if he did not get the west end paint job under control he "would be looking for

another job." Claimant gave Fisk his work phone, which cannot be removed from the plant, left Fisk's office and left the building at approximately 6:30 a.m. Later that morning after the human resources office opened he called Krause and told her he was upset with Fisk for being hostile and breaching confidentiality by disciplining him in front of a coworker. Krause asked him if he could continue to work with Fisk and claimant responded in the affirmative. Krause apologized to claimant for the way Fisk treated him as she knew claimant had complained before about Fisk yelling, cussing, putting him down, badgering, harassing and threatening him. Krause told him she would meet with Tim Francis, vice president but called him back and told him "they" had decided he had left his job and would be happier working somewhere else. Claimant never told employer he quit and although employer alleged claimant told another employee Mitch Johnson he quit, employer did not produce the witness to rebut claimant's denial. Nor did Fisk, Osterkamp, Rallier or Francis participate in the hearing.

REASONING AND CONCLUSIONS OF LAW:

The first issue to be considered in this appeal is whether the claimant's appeal is timely. The administrative law judge determines it is.

Iowa Code § 96.6-2 provides:

> 2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of section 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to section 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 10, and has the burden of proving that a voluntary quit pursuant to section 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 1, paragraphs "a" through "h". Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The claimant filed an appeal in a timely manner but it was not received. Immediately upon receipt of information to that effect, a second appeal was filed. Therefore, the appeal shall be accepted as timely.

For the reasons that follow, the administrative law judge concludes claimant did not quit but was discharged from employment for no disqualifying reason.

Iowa Code § 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.

Iowa Code § 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).

A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980).

Claimant's leaving Fisk's office, even without his phone, and waiting until the human resources office opened to express his dissatisfaction with Fisk is not a resignation, especially after he told Krause specifically that he could continue to work with Fisk. Claimant reasonably attempted to

resolve his concerns with employer. See *Cobb v. Employment Appeal Board*, 506 N.W.2d 445 (Iowa 1993) where an individual who voluntarily leaves their employment must first give notice to the employer of the reasons for quitting in order to give the employer an opportunity to address or resolve the complaint. Employer's overreaction by ending claimant's employment, particularly after claimant had complained about Fisk and Rallier the day before, was a discharge not a voluntary leaving of employment.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, 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 misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Employment Appeal Board*, 423 N.W.2d 211 (Iowa App. 1988).

The U.S. Supreme Court has held that a cause of action for sexual harassment may be predicated on two types of harassment: (1) Harassment that involves the conditioning of concrete employment benefits on sexual favors, and (2) harassment that, while not affecting economic benefits, creates a hostile or offensive working environment. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 62 (1986).

An employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, employer incurs potential liability for unemployment insurance benefits related to that separation. Inasmuch as claimant had not actually given his resignation but merely walked out of a meeting and attempted to resolve issues that could avoid a possible resignation, employer has not met the burden of proof to establish that claimant engaged in misconduct. Although claimant did not allege or argue the point, the strong appearance, by the timeline of events and lack of attempted resolutions to claimant's concerns, is that employer discharged claimant in retaliation for his June 19 complaint about the arguable sexual (regardless of gender) harassment by Fisk and Rallier, the hostile working environment they created, and the retaliatory June 20 disciplinary meeting in front of Osterkamp. Benefits are allowed.

DECISION:

The July 25, 2006, reference 03, decision is reversed. Claimant's appeal is timely and he did not quit but was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

dml/pjs