IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DANIEL H TROWBRIDGE
Claimant

LINDA ATKINSON
BAR X
Employer

APPEAL NO. 10A-UI-16800-LT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 09/19/10
Claimant: Appellant (2)

Iowa Code § 96.4(3) – Ability to and Availability for Work
Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the December 7, 2010 (reference 01) decision that denied benefits. After due notice was issued, a telephone conference hearing was held on January 25, 2011. Claimant participated. Employer participated through co-owner Linda Atkinson. The parties waived notice and fact-finding of Iowa Code §§ 96.5(1) and 96.5(2)a.

ISSUE:

The issue is whether claimant is able to and available for work from September 19, 2010 and if he was discharged on November 5, 2010 for reasons related to job misconduct sufficient to warrant a denial of benefits.

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant was separated from employment on November 5, 2010. Co-owner John Atkinson hired him as head cook working full-time plus overtime hours. The week prior to September 19 his hours were cut to about 20 hours per week because of reduced business. Part of the reduction of hours was related to him giving up Wednesday evening hours because business was slow and John said his payroll was killing him. They agreed that he would work Wednesday days and Pam, another cook, would work Wednesday nights. Linda did not like the arrangement and hired someone else to work Wednesday days so his hours were further reduced. He received a voice mail from Linda Atkinson that they had hired someone to replace him after he told John that he had taken a job to supplement his reduced hours. He ended up not accepting the job. The employer never advised claimant verbally or in writing that his job was in jeopardy for any reason but Linda Atkinson made only verbal veiled references to following the schedule. Claimant always communicated his attendance issues directly with John Atkinson. Employer never advised claimant he was supposed to report to a particular owner as supervisor.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was available for work and was discharged from employment for no disqualifying reason.

Iowa Code § 96.4-3 provides:

> An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:
>
> 3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

Since claimant's hours were cut due to business reasons to the extent he sought a supplemental part-time job, which he later declined, claimant was considered available for work.

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.

871 IAC 24.32(7) provides:

> (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 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." *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

In an at-will employment environment 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. The conduct for which claimant was discharged was related to absences and schedule changes excused or approved by John Atkinson. Seeking a part-time job to supplement the cut in hours with this employer was not misconduct. Inasmuch as employer had not previously warned claimant about any of the issues leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Benefits are allowed.

DECISION:

The December 7, 2010 (reference 01) decision is reversed. Claimant was available for work and was discharged from employment for no disqualifying reason. Benefits are allowed. The benefits claimed and withheld shall be paid, provided the claimant is otherwise eligible.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

dml/pjs