

**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**

**SHAY P CURTIN
610 – 4TH ST NW
WAUKON IA 52172**

**WINNESHEIK COUNTY MEMORIAL
HOSPITAL
ATTN PAYROLL
901 MONTGOMERY ST
DECORAH IA 52101-2325**

**Appeal Number: 04A-UI-06134-L
OC: 05-09-04 R: 04
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, 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/Misconduct
Section 96.5-1 – Voluntary Leaving

STATEMENT OF THE CASE:

Employer filed a timely appeal from the May 24, 2004, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on July 16, 2004 in Decorah, Iowa. Claimant did participate with Kevin Kulish. Employer did participate through Lori Bulman, Allen Atkinson, and Tim Wren.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed as a full-time maintenance worker through May 5, 2004 when he was discharged. Tim Wren denied claimant's request to rent equipment for an afternoon project but claimant arranged to borrow the equipment from a friend. Wren, thinking that the equipment

was rented went to talk to claimant and Kevin Kulish about his “disappointment.” Wren asked Larry Gable to leave the room to speak to claimant and Kulish. Kulish recalls the conversation between Wren and claimant as “pretty heated” and Wren telling claimant it was not right for him to get the trailer. Further conversation ensued about claimant’s opinion of how employer wasted money. As claimant took his keys out of his pocket, Kulish heard Wren say, “okay, let’s go” and also interpreted that as a discharge. Claimant offered to work two more weeks and Wren declined. Claimant then turned over his keys and badge to employer.

REASONING AND CONCLUSIONS OF LAW:

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

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).

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). Employer discharged claimant and has the burden of proof to show misconduct. 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).

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).

While Wren portrayed the meeting as only for the purpose of expressing his disappointment, claimant and Kulish characterized the meeting as heated. Kulish's testimony is credible, as he had nothing to gain and much to risk by his testimony that the separation was a discharge rather than a voluntary leaving of employment. Even though claimant initially brought out his keys, his intent was to ask Wren if he thought he could do the job better. Before he could say that or explain that the equipment was borrowed, Wren told him to "go" or that he was "done" and to "get out." Claimant did inquire further about working an additional two weeks but that offer was declined. Wren's heated discussion with claimant and telling him to "go" belies the purported expression of disappointment and lack of intention to discharge claimant. Although Wren did not have official authority to discharge, the effect of his actions and heated words was to dismiss claimant from his employment effective immediately. Benefits are allowed.

DECISION:

The May 24, 2004, reference 01, decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

dml/smc