IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DOUGLAS J PEARSON
Claimant

JACK ROSENBERG ELECTRIC INC
Employer

APPEAL NO: 07A-UI-07390-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 07/01/07 R: 01
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

Jack Rosenberg Electric, Inc. (employer) appealed a representative's July 26, 2007 decision (reference 01) that concluded Douglas J. Pearson (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 August 16, 2007. The claimant participated in the hearing and was represented by Marry Hamilton, attorney at law. Jack Rosenberg appeared on the employer's behalf. During the hearing, Claimant's Exhibits A through I were entered into evidence. The record was left open through August 27, 2007 to allow for the claimant to provide and distribute a more legible copy of Claimant's Exhibit D. 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 July 30, 2006. He worked full time as a carpenter and lumberyard worker. His last day of work was May 16, 2007.

On May 14 the claimant reported a work-related injury to his left arm; he was placed on a 25 pound lifting restriction for his left arm. As a result, the employer took the claimant off work and he began to receive workers' compensation benefits. He routinely provided doctor's statements to the employer and/or the workers' compensation carrier regarding his doctor's continued restrictions on his left arm.

In about mid-June the employer became aware that the claimant was doing some siding on a house of someone for whom the employer had with the claimant done an estimate for siding on April 20; the home owner was a friend of the claimant's wife. The employer concluded that the claimant was working independently and was violating his work restriction and so reported the

matter to the workers' compensation carrier. As a result, on June 21 the workers' compensation carrier sent the claimant a letter terminating his payments, stating this was due to the claimant "working elsewhere." The claimant was not being paid for his work on the friend's house and only did it sporadically. He claimed and the employer provided no specific evidence to the contrary that he was able to do the work he had done on the house without violating the restriction on the use of his left arm.

The most recent doctor's excuse the employer had prior to June 28 indicated that the claimant's restriction was through June 28. The claimant had another doctor's appointment on the afternoon of June 28; as a result of that visit, the doctor extended the claimant's restriction for two weeks and recommended he consult with an orthopedic surgeon. The claimant did not physically take the doctor's note to the employer's office as he had in the past. However, he testified and demonstrated with a fax transmission report that he had faxed a copy of the note to both the employer and the workers' compensation carrier on the morning of June 29. It is unknown whether the workers' compensation carrier received the note; the employer did not receive or did not realize it had received the fax of the doctor's note.

When the employer believed the claimant had not provided another doctor's note to extend his restriction past June 28, on June 29 the employer concluded that the claimant had determined to quit. A letter to the claimant to that effect was drafted and sent to the claimant. On July 3 the claimant obtained another doctor's note also maintaining the restriction for two weeks; he faxed both that and the note from June 28 to the employer. The employer did receive the notes faxed on that date. However, the employer determined that it would not reverse its conclusion that the claimant's employment was ended, but rather sent another letter dated July 5 confirming that it considered the claimant to be terminated by a three-day no-call, no-show. The employer does not have a specific three-day no-call, no-show policy.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not eligible for unemployment insurance benefits if he quit the employment without good cause attributable to the employer or was discharged for work-connected misconduct.

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.

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 quit by being a three-day no-call, no-show after June 28, 2007. First, while a three-day no-call, no-show in violation of company rule can be considered to be a voluntary quit, the employer does not have such a rule, and therefore the rule cannot be applied. 871 IAC 24.25(4). Further, while unfortunately the employer did not receive the note faxed to it on June 29, the claimant had made a bona fide effort to communicate his extended restrictions to the employer; his actions did not demonstrate the intent to sever the employment relationship necessary to treat the separation as a "voluntary

quit" for unemployment insurance purposes. 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 § 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 § 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.

The reason the employer effectively discharged the claimant was the employer's not receiving the doctor's notes until July 3; secondarily the employer was affected by the conclusion that the claimant was working a job in competition with the employer by working a job the employer had bid. The claimant timely communicated the continued restrictions to the employer. The claimant credibility testified that he was receiving no compensation for the work he was occasionally doing on the friend's house; the employer provided no specific evidence to the contrary. 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 July 26, 2007 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.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

ld/pjs