

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**MICHAEL D MCGIBONEY SR**  
Claimant

**APPEAL NO. 08A-UI-03071-DT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**MANPOWER INC OF CEDAR RAPIDS**  
Employer

**OC: 11/18/07 R: 04**  
**Claimant: Appellant (2/R)**

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

**STATEMENT OF THE CASE:**

Michael D. McGiboney, Sr. (claimant) appealed a representative's March 25, 2008 decision (reference 03) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment from Manpower Inc. of Cedar Rapids (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on April 14, 2008. The claimant participated in the hearing. Debra Chamberlain appeared on the employer's behalf and presented testimony from one other witness, Matt Dorsett. 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 employer is a temporary employment firm. The claimant began taking assignments with the employer on March 24, 2005. His most recent assignment prior to reopening his claim effective February 10, 2008 began on January 24, 2008. He worked full time on the machine sanitation crew at the employer's New Hampton, Iowa business client, working on the third shift, 10:30 p.m. to approximately 6:00 a.m. The assignment was to be through approximately June 2008. However, his last day on the assignment was January 31, 2008.

The claimant had a significant drive to the business client's workplace, but he had believed he would have a carpool arrangement with another employee. However, that other employee was unable to be placed at the assignment. On January 28, the claimant expressed a desire to an employee in one of the employer's offices for the employer to find another assignment for him as he was unhappy with the shift and driving arrangements for the assignment he was then working.

On January 25, the claimant called in an absence due to illness. On January 29, the claimant called in an absence due to weather. On Friday, February 1, he called the business client to report he would be absent due to moving. The business client then advised the claimant that he was no longer needed due to the days he was already missing.

On Monday, February 4, the claimant contacted another of the employer's offices and told the staff person that he was in need of a new assignment due to the business client's ending of the New Hampton assignment, but that he wanted a closer assignment. He again called the employer on February 5 to indicate that he was available for work closer to home.

Subsequent to the claimant reopening his claim on February 10, 2008, he had another assignment through the employer with another business client on March 17 through March 19. However, there has not been a preliminary review or determination made on the ending of that assignment.

### **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 the assignment. Simply verbalizing a desire for a different, closer assignment 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 § 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.

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 reason the employer effectively discharged the claimant was his attendance. Excessive unexcused absences can constitute misconduct, however, in order to establish the necessary element of intent, the final incident must have occurred despite the claimant's knowledge that the occurrence could result in the loss of his job. Cosper, supra; Higgins v. IDJS, 350 N.W.2d 187 (Iowa 1984). The claimant had not previously been warned that future absences could result in termination. Higgins, supra. 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.

An issue as to whether the claimant had another separation from another assignment on or about March 19 arose during the hearing. This issue has not been subject to a preliminary inquiry and determination, and the case will be remanded for an investigation and preliminary determination on that issue. 871 IAC 26.14(5).

**DECISION:**

The representative's March 25, 2008 decision (reference 03) is reversed. The claimant did not voluntarily quit and the employer did discharge the claimant but not for disqualifying reasons. As of February 1, 2008 the claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible. The matter is remanded to the Claims Section for investigation and determination of the March 19 separation issue.

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Lynette A. F. Donner  
Administrative Law Judge

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Decision Dated and Mailed

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