IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MATHEW J SCANLON
Claimant

AMERICAN CONCRETE PUMPING INC
Employer

APPEAL NO. 07A-UI-00520-H2T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 02-19-06 R: 03
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the January 10, 2007, reference 05, decision that allowed benefits. After due notice was issued, a hearing was held on January 31, 2007. The claimant did participate. The employer did participate through Ray Philippson, Owner/President and Tonya Hawker, Secretary.

ISSUE:

Was the claimant discharged for work-related misconduct?

FINDINGS OF FACT:

Having reviewed the testimony and all of the evidence in the record, the administrative law judge finds: Claimant was employed as a laborer full-time beginning first on February 26, 2004 through May 23, 2005 and then again on July 25, 2005 through December 21, 2006 when he was discharged.

The claimant had made arrangements to be off work on December 21 so he could attend an afternoon court date. The employer had granted permission for the claimant to be gone. On the morning of December 21 the employer needed the claimant to come in and work on a job in Iowa City. When the claimant was called he agreed to go to the Iowa City jobsite to help out so long as he would be done by noon so he could have time to get to his 1:00 p.m. court date. When the claimant arrived at the job, he found the workers were not ready for him to work and he would not be able to stay until they would be ready since the jobsite was behind. The claimant told the lead man on the job that he would be leaving at noon because he had a previous appointment. The lead man called Mr. Philippson and told him that the claimant was going to leave the jobsite early. Mr. Philippson called the claimant and told him to come back to the shop, clean out his truck, turn in his timesheet and that he, Mr. Philippson, would let the claimant know in the springtime if he was going to be called back to work. The claimant returned to the shop and did as Mr. Philippson had instructed. The claimant told Mr. Philippson his side of the story but still left the shop believing that Mr. Philippson had discharged him. The claimant had permission to be off work on December 21 and had gone in for the morning shift as a favor to the employer.

Ms. Hawker called the claimant's house on December 22 and spoke to the claimant's wife. Ms. Hawker asked the claimant's wife if he was going to return to work. Mrs. Scanlon told Ms. Hawker that her husband had been fired on December 21. When the claimant called back to talk to Ms. Hawker on December 26 after Christmas, he indicated that he believed he had been fired by Mr. Philippson on December 21. The claimant said that Mr. Philippson could call him if he wanted to. The employer never returned the claimant's call. In the meantime the claimant searched for and obtained employment that paid better per hour and had better health insurance benefits.

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 § 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 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 claimant could reasonably believe that he was discharged when told to return to the shop, turn in his time ticket, and clean his belongings out of the truck. The administrative law judge is persuaded that the claimant was told by Mr. Philippson that he would be called in the spring if Mr. Philippson decided to bring him back to work. The claimant was not out of line by telling the lead man at the jobsite that he would leave by noon, when he had been granted permission previously to be gone for the whole day. The claimant had come into work to help out the employer, and the employer knew he would not be able to stay a whole day. Under these circumstances, the employer has not met its burden of proving misconduct. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The January 10, 2007, reference 05, decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

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Teresa K. Hillary
Administrative Law Judge

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Decision Dated and Mailed

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