

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ANDREW M BOWEN
Claimant

APPEAL NO. 09A-UI-07286-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**BURGER CONCRETE AND EXCAVATING
INC**
Employer

OC: 02/15/09
Claimant: Appellant (4)

Iowa Code Section 96.5(1) – Lay-off

STATEMENT OF THE CASE:

Andrew Bowen filed a timely appeal from the May 4, 2009, reference 05, decision that denied benefits. After due notice was issued, a hearing was held on June 5, 2009. Mr. Bowen participated. Debra Allen-Burger, Vice President, represented the employer and presented additional testimony through Anna Shakespeare, Office Administrator. Exhibits A and One through Eight were received into evidence. The hearing in this matter was consolidated with the hearing in Appeal Number 09A-UI-07285-JTT, in which the issues were the same.

ISSUE:

Whether Mr. Bowen separated from the employment for a reason that disqualifies him for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Andrew Bowen was employed by Burger Concrete and Excavating as a full-time concrete flatwork finisher beginning on April 28, 2008. Bob Burger, President, and Debra Allen-Burger, Vice President, were Mr. Bowen's immediate supervisors.

Mr. Bowen was laid off effective December 19, 2008. The employer attempted to contact Mr. Bowen, as it had intermittent work for him. On January 2, Ms. Allen-Burger sent Mr. Bowen an letter notifying Mr. Bowen that the employer had tried to contact him on December 29, 30 and 31, and on January 2. Ms. Allen-Burger notified Mr. Bowen that the employer had work for Mr. Bowen on January 5 and that he needed to appear at the shop by 7:00 a.m. On January 15, the employer sent Mr. Bowen a letter telling him that he needed to appear for work on January 20 and 21. On February 5, the employer sent Mr. Bowen a letter telling him that the employer planned to work the week of February 9-13.

On March 4, the employer sent Mr. Bowen a letter notifying him that the employer was preparing to start back to work for the spring and directing Mr. Bowen to provide an updated

phone number. The employer indicated it had been trying unsuccessfully for several days to contact Mr. Bowen by telephone.

In March, the employer had work for Mr. Bowen on March 4-6, 9-12, 16-19, 30, and 31. The employer did not have work for Mr. Bowen on March 20-29 due to inclement weather. In March, the Mr. Bowen appeared for work just four days: March 9, 12, 17 and 19. On March 18, the employer sent a letter to Mr. Bowen a letter after he failed to appear for work on March 18. Mr. Bowen had left work on March 17 with the knowledge that he was needed the next day.

During the last week of March, the employer notified employees that it would be auctioning off its equipment effective April 30, 2009 and that the employees would be laid off effective that date. Mr. Bowen last performed work for the employer on April 1 and 2, 2009. Mr. Bowen thereafter ceased appearing for work.

On April 13, 2009, the employer sent a letter to Workforce Development notifying the Agency that Mr. Bowen had ceased appearing for work when full-time work was available to him. The employer also notified the Agency that it had told employees it would be closing its doors effective April 30, 2009.

Mr. Bowen was subject to a court order that required him to carry health insurance for two minor children. Mr. Bowen had a family health insurance policy through the employment. On April 14, 2009, the employer sent Mr. Bowen a letter notifying him that the employer would be canceling the health insurance policy effective April 30, 2009, unless Mr. Bowen notified the employer he intended to continue the policy after terminating his employment. The employer included the paystub for Mr. Bowen's final paycheck. Mr. Bowen's final paycheck was wholly consumed by the health insurance premium for his family insurance policy. Mr. Bowen returned to the workplace in the middle of the workday on April 15, 2009. Mr. Bowen was upset that his net pay was zero. Mr. Bowen demanded that the employer review his pay with him. When the employer pointed out that the weather was nice, Mr. Bowen acknowledged that the weather was appropriate for pouring concrete, but did not comment further on why he had not been reporting to work.

The employer did in fact close its business effective April 30, 2009.

REASONING AND CONCLUSIONS OF LAW:

Workforce Development rule 871 IAC 24.1(113) provides as follows:

Separations. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.

a. Layoffs. A layoff is a suspension from pay status initiated by the employer without prejudice to the worker for such reasons as: lack of orders, model changeover, termination of seasonal or temporary employment, inventory-taking, introduction of laborsaving devices, plant breakdown, shortage of materials; including temporarily furloughed employees and employees placed on unpaid vacations.

b. Quits. A quit is a termination of employment initiated by the employee for any reason except mandatory retirement or transfer to another establishment of the same firm, or for service in the armed forces.

c. Discharge. A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.

d. Other separations. Terminations of employment for military duty lasting or expected to last more than 30 calendar days, retirement, permanent disability, and failure to meet the physical standards required.

Iowa Code section 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.

In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 698, 612 (Iowa 1980) and Peck v. EAB, 492 N.W.2d 438 (Iowa App. 1992). 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. See 871 IAC 24.25.

Iowa Administrative Code rule 871 IAC 24.26(13) provides as follows:

Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:

24.26(13) A claimant who, when told of a scheduled future layoff, leaves employment before the layoff date shall be deemed to be not available for work until the future separation date designated by the employer. After the employer-designated date, the separation shall be considered a layoff.

The weight of the evidence indicates that Mr. Bowen ceased appearing for work entirely shortly after the employer announced it would be laying off its employees effective April 30, 2009. Mr. Bowen left the employment before the lay-off date and was not eligible for benefits for the period of April 2, 2009 through April 30, 2009. But, under the administrative rule, Mr. Bowen is deemed laid off effective April 30, 2009 and would be eligible for benefits effective May 1, 2009, provided he was otherwise eligible. The employer's account shall not be charged for benefits disbursed for April 2009, but may be charged for benefits disbursed on or after May 1, 2009.

DECISION:

The Agency representative's May 4, 2009, reference 05, decision is amended as follows. The claimant was laid-off effective April 30, 2009 and is eligible for benefits effective May 1, 2009, provided he is otherwise eligible. The employer's account may be charged for benefits disbursed for the period beginning May 1, 2009. The claimant voluntarily separated from the

employment effective April 2, 2009, after learning of the lay-off, but before the effective date of the lay-off. The claimant is not eligible for benefits for the month of April 2009.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css