IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

BRANDON E SEPTER
Claimant

LOMONT MOLDING INC
Employer

APPEAL NO: 07A-UI-09053-LT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 08/26/07 R: 04
Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge/Misconduct
Iowa Code § 96.5(1) – Voluntary Leaving

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the September 19, 2007, reference 01, decision that denied benefits. After due notice was issued, a telephone conference hearing was held on October 22, 2007. Claimant participated and was represented by Danny Cornell, Attorney at Law. Employer participated through Kathy Schimmelpfenning, Kevin Janecek and Gary Roberts. Employer's Exhibit 1 was received.

ISSUE:

The issue is whether claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant was employed as a full time maintenance tool setter from May 31, 2003 until August 24, 2007 when he was discharged. On August 16 he approached Janecek and said he was going to college full time and wanted to get out of maintenance worker job to change positions to be an operator since it would not be so physical. Janecek seemed to agree so claimant said he would talk to Becker and Roberts about the arrangements. Janecek asked claimant to work the following week (August 20 – 24) in maintenance and claimant agreed. At no point did claimant ever say he quit Lomont.

Claimant inquired about an open weekend shipping job with shipping supervisor Phil on August 20 and asked if he was okay with claimant working there. Phil replied that it would be no problem and he would appreciate the help so claimant e-mailed Becker about the proposal on August 21. (Employer's Exhibit 1) There was no response from Becker by August 22 so claimant called him. Becker seemed like he had no problem with the proposal for the work schedule and said he would talk to Phil and weekend shipping supervisor Gary Ross to see if that was okay with them. On August 23 claimant was feeling ill but called Becker again who said he had talked to Phil and Ross who said they were unhappy with his performance. Claimant was confused since he had never worked for them and Phil seemed enthusiastic

about the idea. Claimant called Roberts to report his absence saying he was tired and did "not feel well." Later the same day, claimant's cousin called him to say he had been fired from Lomont and employer told him it was not happy with claimant's performance either. Later that night claimant called Janecek and asked about his cousin's separation since Becker mentioned the performance issue with regard to the shipping job denial. He specifically told Janecek he did not quit. Janecek said it was up to Becker. Claimant's impression at that point was that as long as he stayed in maintenance he still had a job. There had been no notice his job was in jeopardy for any reason. When he reported for work on August 24 Roberts called him in to tell him employer considered him to have quit. Claimant declined to leave only because he wanted Roberts to understand that it was not his intention to quit when he asked for a transfer out of the maintenance department. Other employees attend school part time and are allowed to work full time but that was not presented as an option to claimant, nor was he told that if he did not continue to work in maintenance he would no longer have a job.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant did not quit but was discharged from employment for no disqualifying reason.

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.

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.

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).

Claimant's expression of his desire to work in a different department other than maintenance is not an actual notice of resignation. Claimant reasonably attempted to resolve his concerns with employer. See *Cobb v. Employment Appeal Board*, 506 N.W.2d 445 (Iowa 1993) where an individual who voluntarily leaves their employment must first give notice to the employer of the reasons for quitting in order to give the employer an opportunity to address or resolve the complaint. Employer's failure to communicate the inability to transfer and its overreaction by ending claimant's employment was a discharge not a voluntary leaving of employment.

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).

An employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, employer incurs potential liability for unemployment insurance benefits related to that separation. Balky or argumentative conduct is not necessarily disqualifying. Inasmuch as claimant had not actually given his resignation but merely attempted to transfer to a different department within the company and insisted he did not quit, employer has not met the burden of proof to establish disqualifying misconduct. Benefits are allowed.

DECISION:

The September 19, 2007, reference 01, decision is reversed. Claimant did not quit but was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

dml/pjs