IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

JEREMY J RICHARDSON
603 RAY ST
OTTUMWA IA 52501

THE DEXTER COMPANY
2211 W GRIMES
PO BOX 310
FAIRFIELD IA 52556

Appeal Number: 06A-UI-08023-DT
OC: 07/09/06 R: 03
Claimant: Appellant (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

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

STATEMENT OF THE CASE:

Jeremy J. Richardson (claimant) appealed a representative's August 7, 2006 decision (reference 03) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment from The Dexter Company (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on August 24, 2006. The claimant participated in the hearing. Kathy Baker appeared on the employer's behalf. During the hearing, Employer's Exhibit One and Claimant's Exhibit A were entered into evidence. 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 11, 2005. There was a hiatus in the employment from September 17 through October 9, but the claimant resumed working for the employer on October 10, 2005. He worked full time as a laborer in the employer's iron casting foundry. His specific job assignment was as a grinder. The work schedule was from 7:00 p.m. to 7:00 a.m., usually seven days per week. His last day of work was the shift that began at 7:00 p.m. on October 20 and was scheduled to end at 7:00 a.m. on October 21, 2005.

The claimant reported for work as scheduled on his last shift. At approximately 8:30 p.m., he injured his hand on the grinder. He received first-aid treatment, and then went to talk with his foreman at approximately 8:40 p.m. The foreman advised that the claimant should go to the emergency room to have the hand looked at by a doctor. The claimant responded that he had no insurance. The foreman repeated that the claimant really should go to the emergency room to have the hand looked at by a doctor, but did not indicate that the expense might be covered under the employer's workers' compensation policy. The foreman then told the claimant that with the injury to his hand, the claimant could not continue to work his assigned job on the grinder, that the claimant did not have sufficient time employed with the employer to qualify to do any of the other jobs, and that, therefore, he had no job he could let the claimant do. The claimant responded that he would then have to go out and find another job. He clocked out and left the premises at 8:59 p.m.

The employer asserted that a lead worker had detected the smell of alcohol on the claimant after the accident and had reported this to the foreman and that when the claimant talked with the foreman after receiving first-aid, the foreman had informed the claimant he needed to report to the hospital for an alcohol test. The employer further asserted that the claimant then refused to go to the hospital to have an alcohol test. Under the employer's drug and alcohol policy, refusal to submit to a reasonable suspicion drug or alcohol test would result in immediate discharge. The employer maintained that rather than submit to the alcohol test, the claimant quit by responding that he would just go out and find another job and leaving. The claimant denied each of these assertions.

REASONING AND CONCLUSIONS OF LAW:

The first issue in this case is whether the claimant voluntarily quit.

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.

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 stating he would go and find another job and by leaving the premises rather than submit to an alcohol test. However, the claimant denied that he was ever told he needed to go to the hospital in order to submit to an alcohol test, denied refusing to submit to an alcohol test, and denied saying he would find another job and left in order to avoid submitting to an alcohol test. Rather, his testimony was that the only reason he left was because the foreman told him there was no work for him due to the injury to his hand. No firsthand witness was available at the hearing to provide testimony to the contrary under oath and subject to cross-examination. The employer relies exclusively on the second or thirdhand accounts from the lead worker and the foreman; however, without that information being provided first hand, the administrative law judge is unable to ascertain whether the lead worker and the foreman are credible, or whether the employer's witness might have misinterpreted or misunderstood aspects of their reports. Under the circumstances, the administrative law judge finds the claimant's firsthand information more credible. 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 section 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 section 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 either because the claimant did not submit to an alcohol test or because of the injury to his hand, which prevented him from working on the only machine for which he was qualified. As noted above, the employer has not established that the claimant was in fact ordered to submit to an alcohol test or that he refused. As to dismissal due to an inability to perform a job due to injury, this would not be misconduct. Huntoon, 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.

DECISION:

The representative's August 7, 2006 decision (reference 03) is reversed. 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.

ld/kjw