

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RICHARD R REIMERS
Claimant

APPEAL NO. 15A-UI-00320-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DURHAM D & M LLC
c/o TALX UCM SERVICES

OC: 12/07/14
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

The claimant filed a timely appeal from a representative's decision dated January 7, 2015, reference 01, which denied unemployment insurance benefits finding the claimant voluntarily quit work on November 20, 2014 by failing to report for work for three days in a row and not notifying the employer of the reason. After due notice, a telephone hearing was scheduled for and held on February 3, 2015. The claimant participated. The employer participated by Mr. Scott Miller, General Manager. Employer's Exhibit A was not admitted into evidence because the claimant had not been provided a copy. The proposed Exhibit A will remain with the administrative file.

ISSUE:

At issue in this matter is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

Having considered all of the evidence in the record, the administrative law judge finds: Richard Reimers began employment with Durham D & M LLC on May 27, 2008. Mr. Reimers was hired as a route driver for the bus company at that time. Subsequently, on December 7, 2010, Mr. Reimers left the position of route driver for the company but continued to be employed with the company as a "casual or on-call" driver for the company. In the position of casual or on-call driver, claimant's services were utilized only on an as-needed basis by the employer. The claimant has been assigned to only one "on-call" driving assignment since December 7, 2010.

The employer has a requirement in its collective bargaining agreement that on-call drivers must make themselves available for a charter or special events trip by verifying their general availability to take such a trip at least once every 90 days. The failure of an on-call driver to do so may result in the driver's name being removed from the driving availability list, although the rule was not previously enforced by the employer.

Mr. Reimers was unaware of the sign up requirement, because it had not been enforced in the past and he had not been required to do so by the company. Mr. Reimers has attended a yearly "kick off" meeting held in August of each year for all drivers who drive for the company or potentially might be given driving assignments. The requirement that all casual drivers must verify their availability once each 90 days has not been brought to the attention of the drivers in the annual meetings.

A recent mandate to reduce expenses by eliminating the costs to the company associated with drivers who are not often assigned to driving trips was received from management. The employer reviewed past sign up lists and removed drivers' names from the list if they had not stated their availability for at least one trip each 90 days in the past.

The claimant's removal from the list of drivers who were available to take casual assignments may have caused the representative firm to report that the claimant quit employment by failing to report to work without notification resulting in Mr. Reimers' disqualification from unemployment insurance benefits.

Durham D & M LLC was aware that Mr. Reimers was working part time for Wolfe Construction Company and had not signed the availability sheet. The company continued to list Mr. Reimers as one of its casual employees for five years and required the claimant's attendance at a yearly "kick off" meeting held by the company.

REASONING AND CONCLUSIONS OF LAW:

The first question before the administrative law judge is whether the evidence in the record establishes that the claimant quit his casual employment with Durham D & M LLC or was discharged by the employer. The administrative law judge concludes that the claimant did not indicate a desire to quit his casual on-call employment and there was no overt act by the claimant indicating his desire to leave the casual employment relationship with this company. The question before the administrative law judge is whether the evidence in the record establishes any misconduct on the part of the claimant sufficient to warrant the denial of unemployment insurance benefits. It does not.

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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

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 the claimant from its employment but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Department of Job Service*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants the denial unemployment insurance benefits are two separate decisions. To warrant a denial of job insurance benefits such misconduct on the part of the claimant must be "substantial." When the employee's failure is based upon 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).

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, the employer incurs potential liability for unemployment insurance benefits related to that separation.

Inasmuch as the evidence in the record establishes that the requirement of signing up each 90 days was not actively enforced and the claimant was given no indication that his failure to do so would result in his separation from employment, the administrative law judge concludes that the claimant's removal from the casual list by the employer was not a disqualifying event. The employer made a management decision to remove non active casual drivers from its employment rolls. While this decision may have been a sound decision from a management viewpoint, the evidence does not establish disqualifying misconduct on the part of this claimant. It appears based upon the very limited amount of income for the base period from this employer, the amount of unemployment insurance benefits chargeable to the employer's account is minimal. The claimant is not disqualified from the receipt of unemployment insurance benefits based upon this separation from employment.

DECISION:

The representative's decision dated January 7, 2015, reference 01, is reversed. Claimant was discharged under non disqualifying conditions. Unemployment insurance benefits are allowed, providing the claimant is otherwise eligible.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs