IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

SCOTT R SHUMANSKY
Claimant

TEC-CORP
Employer

APPEAL NO. 07A-UI-04369-LT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 04/01/07 R: 01
Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge/Misconduct
Iowa Code § 96.5(1) – Voluntary Leaving
871 IAC 24.26(4) – Intolerable Working Conditions

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the April 18, 2007, reference 01, decision that denied benefits. After due notice was issued, a telephone conference hearing was held on May 15, 2007. Claimant participated. Employer did not participate but called after the hearing record was closed.

ISSUE:

The issues are whether employer's request to reopen the record is granted, if claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of unemployment benefits, and if claimant quit the employment without good cause attributable to the employer.

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: The employer received the hearing notice prior to the May 15, 2007 hearing. The instructions inform the parties that if the party does not contact the Appeals Section and provide the phone number at which the party can be contacted for the hearing, the party will not be called for the hearing. The first time the employer directly contacted the Appeals Section for that purpose was on May 15, 2007, after the scheduled start time for the hearing and after the record had been closed. The employer had assumed that the Appeals Section would initiate the telephone contact from a faxed document and without compliance with the hearing notice. The telephone clerks verified from their manual call logs that employer did not provide witness name and contact information as instructed by the hearing notice.

Claimant was employed as a full-time warehouse and fleet manager from April 20, 1998 until March 30, 2007, when he was discharged without reason by Craig Thompson, majority owner. Claimant had never been advised his job was in jeopardy for any reason and the only issue of possible concern happened about a year ago. Two weeks earlier claimant gave notice of his intention to quit but agreed to work through the middle of June.

He quit because of drug usage by the owner and claimant's direct supervisor, who also urged claimant to partake with him and he was fearful of legal repercussion if he were around Thompson if he were "caught." Claimant was also concerned because Thompson did not return his calls and was

not around to answer questions. He also experienced stress because of employer's sexual affair with one of claimant's best friends. He had been instructed never to go to the other owner, Skip Early, with any questions or concerns.

REASONING AND CONCLUSIONS OF LAW:

The first issue in this case is whether the employer's request to reopen the hearing should be granted or denied.

871 IAC 26.14(7) provides:

> (7) If a party has not responded to a notice of telephone hearing by providing the appeals section with the names and telephone numbers of its witnesses by the scheduled time of the hearing, the presiding officer may proceed with the hearing.
>
> a. If an absent party responds to the hearing notice while the hearing is in progress, the presiding officer shall pause to admit the party, summarize the hearing to that point, administer the oath, and resume the hearing.
>
> b. If a party responds to the notice of hearing after the record has been closed and any party which has participated is no longer on the telephone line, the presiding officer shall not take the evidence of the late party. Instead, the presiding officer shall inquire as to why the party was late in responding to the notice of hearing. For good cause shown, the presiding officer shall reopen the record and cause further notice of hearing to be issued to all parties of record. The record shall not be reopened if the presiding officer does not find good cause for the party's late response to the notice of hearing.
>
> c. Failure to read or follow the instructions on the notice of hearing shall not constitute good cause for reopening the record.

The first time the employer called the Appeals Section for the May 15, 2007 hearing was after the hearing had been closed. Although the employer may have intended to participate in the hearing, the employer failed to read or follow the hearing notice instructions and did not contact the Appeals Section as directed prior to the hearing. The rule specifically states that failure to read or follow the instructions on the hearing notice does not constitute good cause to reopen the hearing. The employer did not establish good cause to reopen the hearing. Therefore, the employer's request to reopen the hearing is denied.

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason and had decided to quit in mid-June 2007 for good cause attributable 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.

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 24.26(3), (4) provides:

> 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:
>
> (3) The claimant left due to unlawful working conditions.
>
> (4) The claimant left due to intolerable or detrimental working conditions.

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. Inasmuch as employer had not previously warned claimant about any of the issues leading to the separation, it has not met the burden of proof to establish that

claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. The claimant was entitled to fair warning that the employer was no longer going to tolerate his performance and conduct. Without fair warning, the claimant had no way of knowing that there were changes he needed to make in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Since employer has not established any misconduct, claimant's separation is not disqualifying.

As to the decision to quit by mid-June 2007, it was with good cause attributable to employer.

Generally notice of an intent to quit is required by *Cobb v. Employment Appeal Board*, 506 N.W.2d 445, 447-78 (Iowa 1993), *Suluki v. Employment Appeal Board*, 503 N.W.2d 402, 405 (Iowa 1993), and *Swanson v. Employment Appeal Board*, 554 N.W.2d 294, 296 (Iowa Ct. App. 1996). These cases require an employee to give an employer notice of intent to quit, thus giving the employer an opportunity to cure working conditions. Accordingly, in 1995, the Iowa Administrative Code was amended to include an intent-to-quit requirement. The requirement was only added, however, to rule 871-24.26(6)(b), the provision addressing work-related health problems. No intent-to-quit requirement was added to rule 871-24.26(4), the intolerable working conditions provision. Our supreme court recently concluded that, because the intent-to-quit requirement was added to 871-24.26(6)(b) but not 871-24.26(4), notice of intent to quit is not required for intolerable working conditions. *Hy-Vee, Inc. v. Employment Appeal Bd.,* 710 N.W.2d 1 (Iowa 2005).

Claimant had reasonable concern if employer was involved in illegal drug activity and urged claimant to join him. He also was entitled to reasonable communication from his supervisor but had ongoing difficulty with that as well. Furthermore, he was not obligated to tolerate his supervisor's public affair with one of his best friends, as it overlapped with the work atmosphere. Benefits are allowed.

DECISION:

The April 18, 2007, reference 01, decision is reversed. Claimant was discharged from employment for no disqualifying reason and his decision to quit by mid-June 2007 was with good cause attributable to the employer. Benefits are allowed, provided claimant is otherwise eligible.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

dml/kjw