

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DUSTIN J TURKINGTON
Claimant

APPEAL NO: 11A-UI-06824-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CAN SHED LLC
Employer

**OC: 04/24/11
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

Dustin J. Turkington (claimant) appealed a representative's May 18, 2011 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment from Can Shed, L.L.C. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on June 16, 2011. The claimant participated in the hearing. Julie Willard appeared on the employer's behalf and presented testimony from one other witness, Darrin Peyton. 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 June 21, 2010. He worked full time as a route manager for the employer's redemption center, working on a salary basis, Monday through Friday. His last day of work was April 22, 2011.

On April 25 the claimant called in to report that he would be absent because he had a sore back. On April 26 the claimant called to report he would be absent because his infant child was sick; she had been taken to the hospital later on the day on April 25 and diagnosed with strep. On April 27 the claimant either did not call in at all or called in late to indicate he was still absent due to his sick child. On April 28 the claimant again called in to report he would be absent, as his child was still sick, and further that the child care provider who usually cared for the child had gone to the hospital in labor.

The employer found it suspicious that the claimant was giving these various reasons for being absent. Mr. Peyton, the supervisor, spoke with some of the other employees who indicated they had heard the claimant was looking for another job and was going to quit. The employer

concluded that the claimant was absent because he was searching for another job and was going to quit without notice without returning to work. At about 11:30 a.m. on April 28 Mr. Peyton called the claimant. He accused the claimant of lying about the reasons he had been absent approximately four times during the conversation. He asked the claimant if he was looking for other employment, and the claimant acknowledged that he was, but he insisted that his reasons for his absences that week were not because he was looking for another job. Mr. Peyton again accused the claimant of lying. The claimant became enraged, told Mr. Peyton that he had "no right to call me a liar," indicated that he had been intending on giving a two-week notice prior to resigning, but that the employer could just "f - - - off," and then hung up.

Mr. Peyton immediately called the claimant back. When he got the claimant back on the line, he told the claimant that he was calling back to clarify that the employer did not need the claimant any longer, that he was fired.

Prior to concluding that the claimant was lying about the reasons for the absences, the employer did not make any request of the claimant to provide medical documentation for the child's illness or other verification about the claimed reasons for the absences.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not eligible for unemployment insurance benefits if he quit the employment without good cause attributable to the employer or was discharged for work-connected misconduct. Iowa Code §§ 96.5-1; 96.5-2-a.

Rule 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 and an action to carry out that intent. Bartelt v. Employment Appeal Board, 494 N.W.2d 684 (Iowa 1993); Wills v. Employment Appeal Board, 447 N.W.2d 137, 138 (Iowa 1989). The employer asserted that the claimant was not discharged but that he quit. Simply admitting that one is looking for another job is not paramount to quitting. Also, making a statement that he had intended to give notice before a future quit but was now deciding he would not give advance notice of quitting when he quit is not the same as quitting. Further, even if there was some ambiguity in how the first conversation between the claimant and Mr. Peyton on April 28 ended, Mr. Peyton clarified that potential ambiguity by calling the claimant back; he did not say to the claimant that he had understood the claimant have quit, rather he said that the employer was discharging the claimant. 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 § 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).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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. 871 IAC 24.32(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

The reason the employer effectively discharged the claimant was that the claimant was admittedly looking for other employment and that the employer believed the claimant had lied about his reasons for being absent from April 25 through April 28. Looking for new employment is not misconduct. Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant in fact lied about the reasons he was absent that week. 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 May 18, 2011 decision (reference 01) 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.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs