IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

AMY M AUSBORN
Claimant

MCDONALD'S /KASTIM CORPORATION
Employer

APPEAL NO: 10A-UI-15938-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/10/10
Claimant: Respondent (1)

Section 96.5-2-a – Discharge
Section 96.5-1 – Voluntary Leaving
§ 17A.12-3 – Non-appearance of Party
871 IAC 26.14(7) – Late Call

STATEMENT OF THE CASE:

McDonald's / Kastim Corporation (employer) appealed a representative's November 10, 2010 decision (reference 01) that concluded Amy M. Ausborn (claimant) was qualified to receive unemployment insurance benefits. Hearing notices were mailed to the parties' last-known addresses of record for a telephone hearing to be held on January 5, 2011. This appeal was consolidated for hearing with one related appeal, 10A-UI-15939-DT. The employer failed to respond to the hearing notice and provide a telephone number at which a witness or representative could be reached for the hearing and did not participate in the hearing. The claimant responded to the hearing notice and indicated that she would participate in the hearing. When the administrative law judge contacted the claimant for the hearing, she agreed that the administrative law judge should make a determination based upon a review of the available information including her informal statement. The record was closed at 2:11 p.m. At 3:17 p.m., the employer called the Appeals Section and requested that the record be reopened. Based on a review of the available information and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Should the hearing record be reopened? 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 employer received the hearing notice prior to the January 5, 2011 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 was on January 5, 2011, over an hour after the scheduled start time for the hearing. The employer asserted that it had in fact previously called in to provide its telephone number information for the hearing.

However, the employer did not have a control number, which the Appeals Section issues to each party who calls in for a hearing to verify that they have called. An entry of a call from the employer does not appear in the call-in logbooks maintained by the Appeals Section. Neither did the employer provide a name of an Agency representative to whom its representative had supposedly spoken, nor had the employer followed the instructions routinely given to parties who do call in as to what they should do if they do not get a call within a few minutes after the designated hearing time. While the employer had intended on calling in and participating in the hearing, the administrative law judge concludes that the employer did not call in as instructed on the hearing notice.

The claimant started working for the employer on February 8, 2007, working at the employer's Fort Dodge, Iowa location. She worked full time as a manager. As of August 27, 2010, the employer granted the claimant's request for a transfer to the employer's Webster City location, at which she began working on September 7. On September 26 the claimant spoke to the supervisor about needing to be transferred back to Fort Dodge due to some personal/family issues, and was told the employer would get back with her. On September 29 she called in an absence; she was then told that she was not going to allowed to transfer back to Fort Dodge. The claimant did not specifically say that she would not continue her employment at the Webster City location, but when the supervisor learned that the claimant had already physically moved back to Fort Dodge and she knew that the claimant's own vehicle was currently not operable, the supervisor assumed that the claimant had quit. When the claimant asked if she was fired, the supervisor responded that she considered the claimant to have quit. While the claimant's personal vehicle was not then operable, she had an arrangement for daily transportation from Webster City to Fort Dodge that she had intended to utilize until the supervisor told her that her employment was deemed ended.

REASONING AND CONCLUSIONS OF LAW:

The Iowa Administrative Procedures Act at Iowa Code § 17A.12-3 provides in pertinent part:

> If a party fails to appear or participate in a contested case proceeding after proper service of notice, the presiding officer may, if no adjournment is granted, enter a default decision or proceed with the hearing and make a decision in the absence of the party. … If a decision is rendered against a party who failed to appear for the hearing and the presiding officer is timely requested by that party to vacate the decision for good cause, the time for initiating a further appeal is stayed pending a determination by the presiding officer to grant or deny the request. If adequate reasons are provided showing good cause for the party's failure to appear, the presiding officer shall vacate the decision and, after proper service of notice, conduct another evidentiary hearing. If adequate reasons are not provided showing good cause for the party's failure to appear, the presiding officer shall deny the motion to vacate.

The first issue in this case is whether the employer's request to reopen the hearing should be granted or denied, or whether a decision should be issued on the basis of the available information. After a record has been closed the administrative law judge may not take evidence from a non-participating party but can only reopen the record and issue a new notice of hearing if the non-participating party has demonstrated good cause for the party's failure to participate. 871 IAC 26.14(7)b. The record shall not be reopened if the administrative law judge does not find good cause for the party's late contact. Id. Failing to read or follow the instructions on the notice of hearing are not good cause for reopening the record. 871 IAC 26.14(7)c.

The first time the employer called the Appeals Section for the January 5, 2011 hearing was after the record had been closed. Although the employer intended to participate in the hearing, the employer failed to read or follow the hearing notice instructions and did not contact the Appeals Section 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.

A claimant is not eligible for unemployment insurance benefits if she 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 she quit by requesting a transfer back to Fort Dodge from Webster City and physically moving back to Fort Dodge. 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 essentially her physical relocation from Webster City to Fort Dodge without personal transportation, even though she had other transportation arrangements. 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 November 10, 2010 decision (reference 01) is affirmed. 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 she is otherwise eligible.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

ld/pjs