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

Appeal Number: 04A-UI-06485-LT
OC 05-09-04 R 02
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.

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_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5-1 – Voluntary Leaving

STATEMENT OF THE CASE:

Claimant filed a timely appeal from the June 3, 2004, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on July 8, 2004. Claimant did participate. Claimant called Jason Murray as a witness who had initially agreed to participate but after employer witnesses were identified, he declined to participate. Employer did participate through Tracy Kading, Diana Alexander, Steve Schraeder, Cherish Ingbers and Katie Staudt and was represented by David Williams of Talx UC Express.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed as a part-time night stocker through May 11, 2004 when he was constructively

discharged. Claimant requested a meeting to express his concerns about physical and verbal abuse of Diana Alexander, Assistant Manager and verbal abuse toward him. Those named in his concerns were Alexander, Charlie Fisher, John Erdman and Jason Fox. After some scheduling conflicts, Tracy Kading, manager, called claimant while he was at his son's baseball game and told him to report to the meeting scheduled an hour later or he would not have a job. Claimant attended and Diana Alexander and Steve Schrader were present as well. Claimant explained that he was concerned about the verbal and physical abuse of Alexander who denied the abuse. Claimant also expressed his complaint that he was alternatively ignored, belittled and berated in front of customers, yelled and sworn at and left alone to do work while the others, including Alexander, took breaks.

In spite of Alexander's denial of abuse, Kading said it was cowardly for claimant not to have come forward sooner and that "Hitler killed a lot of Jews before anyone objected." Claimant asked Kading to look into the issue with former night stock employees since there was such a high degree of turnover and Kading said he did not have time to "dig up" things and asked, "Why don't you just get another job?" Claimant clearly told Kading that he did not want to quit and wanted to continue working but wanted the misbehavior on the night stock shift to end. Kading repeatedly asked claimant if he was willing to continue working with Alexander. Claimant's answer was consistently that he wished to continue working but without the behavior he had outlined. He did not state that he would not work with Alexander.

Finally, Kading said that since claimant was part-time and Alexander was full time that letting claimant go was the easiest solution and said to claimant "you are done" and "thank you for your service."

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 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 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).

Claimant's version of the events is credible. Kading was hostile to claimant's desire to have a meeting about his complaints from the start and wanted information before Alexander was present per claimant's request. He called claimant to the meeting upon short notice and threatened his job if he did not attend causing claimant to miss his son's sporting event. He also badgered claimant during the meeting by not addressing the concerns but repeatedly asking if claimant was willing to continue working with Alexander. Certainly the references to cowardice and Hitler were combative. Furthermore, Alexander's denial of the misbehavior on the shift was not unexpected, as she would face possible discipline for failure to manage subordinates if she acknowledged any of claimant's concerns. Finally, Steve Schraeder did not report for work until 6:00 a.m. so he would not have had any knowledge of the night shift antics. Thus, were employer's recounting of the events differs from claimant's recollection, claimant is considered to be credible.

Kading's statements to claimant about the duration of his employment when compared to Alexander and indicating claimant was done and issuing thanks for his service were dismissive and did constitute a discharge. Claimant's expressions of concern about the goings on during the night stock shift were not misconduct and were, in fact, clearly intended to assist the employer.

Even had claimant actually said that he quit by that time during the meeting, he had met the standards of Cobb v. Employment Appeal Board, 506 N.W.2d 445 (Iowa 1993) and certainly had good reasons attributable to the employer for quitting. Benefits are allowed.

DECISION:

The June 3, 2004, reference 01, decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

dml/kjf