

**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**

**EDWARD P DUNCAN
468½ – 20TH ST
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**NASOS PIZZA INC
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**Appeal Number: 05A-UI-06975-D
OC: 06/05/05 R: 03
Claimant: Respondent (1)**

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.

(Administrative Law Judge)

(Decision Dated & Mailed)

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

STATEMENT OF THE CASE:

Naso's Pizza, Inc. (employer) appealed a representative's June 23, 2005 decision (reference 01) that concluded Edward P. Duncan (claimant) was qualified to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, an in-person hearing was held on November 15, 2005. The claimant participated in the hearing and was represented by James Kringlen, attorney at law. Brian Godwin appeared on the employer's behalf and presented testimony from two other witnesses, Marshall Godwin and Lori Baker. 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 February 20, 2002. He worked full time as a bartender at the employer's restaurant. His last day of work was October 8, 2004.

The claimant normally worked from 4:00 p.m. or 5:00 p.m. to close (11:30 p.m. or 12:30 a.m.) five or six nights per week. He had missed work on October 4, October 5, and October 6, 2004 because he had gotten stranded in Iowa City since October 2 without any transportation, having been abandoned by a coworker and a restaurant patron with whom he had traveled to a football game. He did report and worked his shifts on October 7 and October 8, 2004.

When he was in on October 7, he spoke to Ms. Baker, the scheduler, and told her he wanted to change to part-time on future schedules because he planned to quit and he needed time to look for a new job. Ms. Baker told him he would need to talk to Brian Godwin about changing from full-time to part-time. The claimant did not talk to Mr. Godwin about the proposal, as he assumed his request would not be granted. On October 8 the claimant again told Ms. Baker he wanted to go to part-time so he could look for a new job, and wanted to even further reduce his hours from what he had told her the prior day; she again told him to speak to Mr. Godwin. The claimant again did not speak to Mr. Godwin as he did not believe the change would be allowed. At that time, he did in fact intend to search for a new job; however, he had not decided how soon he would resign his employment with the employer.

Ms. Baker informed Mr. Godwin of the claimant's request to go to part-time and his stated intention to find a new job and quit his employment at the restaurant, and that he had already removed some of his personal belongings. At the end of the claimant's shift on October 8, Mr. Godwin confronted the claimant and demanded to know if it was true that the claimant was quitting. The claimant acknowledged that he was planning on looking for another job and then quitting. Mr. Godwin demanded that the claimant provide him with a written resignation at that time; the claimant declined, indicating he did not yet know when he would resign. Mr. Godwin continued to insist the claimant provide him with a written resignation, standing between claimant and the normal exit. The claimant finally put the keys to the premises on the bar and left.

REASONING AND CONCLUSIONS OF LAW:

The first issue in this case is whether the claimant voluntarily quit.

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 24.25 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 accompanied by an overt act of carrying out that intention. Bartelt v. Employment Appeal Board, 494 N.W.2d 684 (Iowa 1993). The employer asserted that the claimant was not discharged but that he quit. Simply stating that one is looking for another job planning on quitting in the future for a new job is not paramount to quitting. Requesting to go to part-time is not the same as quitting, particularly where the claimant did not even follow through with taking his request to higher management. When he was instructed to provide a written resignation, he declined, but ultimately turned over the keys in the face of the demands, which also does not exhibit an intent to voluntarily quit. The administrative law judge concludes that the employer has failed to satisfy its burden that the claimant voluntarily quit. Iowa Code section 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 section 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).

The focus of the definition of misconduct is on acts or omissions by a claimant that "rise to the level of being deliberate, intentional or culpable." Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer's interest, such as found in:
 - a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
 - b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:
 - a. Manifest equal culpability, wrongful intent or evil design; or
 - b. Show an intentional and substantial disregard of:
 1. The employer's interest, or
 2. The employee's duties and obligations 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.

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 reason the employer effectively discharged the claimant was his stated intention to look for another job and then quit. The claimant's looking for another job was not misconduct within the meaning of the statute. While the employer may have had good reason for not waiting until the claimant found new employment and did resign, it 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 June 23, 2005 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 he is otherwise eligible.

ld/kjw