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

GREG E THIES
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SIOUX CITY IA 51106

K & L CUSTOM FARMS INC
PO BOX 1040
SERGEANT BLUFF IA 51054-1040

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SIOUX CITY IA 51102-3372

Appeal Number: 04A-UI-08121-RT
OC: 06-27-04 R: 01
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.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5-1 – Voluntary Quitting
Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant, Greg E. Thies, filed a timely appeal from an unemployment insurance decision dated July 23, 2004 reference 01, denying unemployment insurance benefits to him. After due notice was issued, a telephone hearing was held on October 12, 2004, with the claimant participating. The claimant was represented by Richard Sturgeon. The claimant's wife sat in on the hearing but did not testify. The employer, K & L Custom Farms, Inc., did not participate in the hearing because the employer did not call in a telephone number, either before the hearing or during the hearing, where any witnesses could be reached for the hearing, as instructed in the notice of appeal. By letter dated July 28, 2004, the claimant, by his representative, requested interrogatories, which were satisfactorily completed.

The hearing began when the record was opened at 2:01 p.m. and ended when the record was closed at 2:13 p.m. and the employer had not called by that time. At 2:38 p.m. the employer called and the administrative law judge first spoke to Kristy Oltken for the employer. She informed the administrative law judge that the employer had received the notice of hearing but had not called in a telephone number. The administrative law judge explained to Ms. Oltken that he had already held the hearing and he could not now take evidence but that he would treat the employer's telephone call as a request to reopen the record and reschedule the hearing made after the hearing had been held and the record was closed. Ms. Oltken then attempted to transfer the administrative law judge to Kevin Alexander. She was unable to do so, so the administrative law judge called Mr. Alexander. The administrative law judge explained the same thing to Mr. Alexander. Mr. Alexander at first stated that he thought his wife had called in the proper telephone numbers. However, Mr. Alexander equivocated about this. Mr. Alexander indicated that he had not called earlier because he was waiting for the administrative law judge to call. Mr. Alexander had no control number. Mr. Alexander then stated that he understood that the administrative law judge was going to call a telephone number because that is what the fact finder had done. The administrative law judge also informed Mr. Alexander that he would treat the employer's telephone call as a request to reopen the record and reschedule the hearing made after the hearing had been held and the record was closed. 871 IAC 26.14(7)(b) provides that if a party responds to a notice of appeal and telephone hearing after the record has been closed and any party which has participated is no longer on the telephone line, the administrative law judge shall not take evidence of the late party. Instead, the administrative law judge shall inquire as to why the party was late in responding to the notice of appeal and telephone hearing. For good cause shown, the administrative law judge 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 administrative law judge does not find good cause for the tardy party's late response to the notice of appeal and hearing. Failure to read or follow the instructions on the notice of appeal and telephone hearing shall not constitute good cause for reopening the record. The administrative law judge concludes here that the employer has not demonstrated good cause for reopening the record and rescheduling the hearing. Ms. Oltken stated that the employer had received the notice but had not called in a telephone number. Mr. Alexander equivocated about calling in a telephone number but seemed, in his arguments, to imply that he had not specifically called in a number to the Appeals Section for the hearing. He did not have a control number. The administrative law judge also notes that when someone calls in with a telephone number they are told to call the administrative law judge at five minutes after the time for the hearing if they have not been called by the administrative law judge. Here, the employer waited for almost 40 minutes to call the administrative law judge. Accordingly, the administrative law judge concludes that the employer did receive the notice of appeal and telephone hearing but did not properly call in a telephone number as instructed and, as a consequence, the employer has not demonstrated good cause to reopen the record and reschedule the hearing. Therefore, the administrative law judge concludes that the employer's request to reopen the record and reschedule the hearing should be denied and such request is hereby denied.

FINDINGS OF FACT:

Having heard the testimony of the witness and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a full-time laborer from the spring of 2004 until he separated from his employment on June 29, 2004. However, since June 1, 2004, the claimant performed no work for the employer. The claimant came to work on June 1, 2004 and was told by Kevin Alexander, Owner, that there was no work and the claimant was to go home. He told the claimant to come back the next

day. Mr. Alexander did not say why there was no work. The claimant returned to work the next day and was again told that there was no work and to go home and to come back the next day. The claimant did so. This situation was repeated for a month, when each day the claimant would come to work and would be told that there was no work and to go home and to return the next day. The claimant would return the next day but find no work. The claimant was not paid during this time. Getting to the employer's location required a 45-minute drive. Finally, on June 29, 2004, the claimant informed the head mechanic that he was going to have to quit. The claimant talked to the head mechanic because Mr. Alexander was out of state. The claimant had no absences and no one ever complained to him about his attendance, and he never received any warnings or disciplines for his attendance. The claimant never received any warnings or disciplines for any kind of behavior. The claimant never had any complaints about his work performance and he did not sit around and watch others work.

REASONING AND CONCLUSIONS OF LAW:

The question presented by this appeal is whether the claimant's separation from employment was a disqualifying event. It was not.

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.

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 first issue to be resolved is the character of the separation. The claimant testified that he was laid off for a lack of work on June 29, 2004, and the administrative law judge so concludes. Beginning on June 1, 2004 and continuing through June 29, 2004, the claimant would repeatedly drive 45 minutes to work to be told only that there was no work and to go home and come back the next day. After a month of this, the administrative law judge concludes that the claimant was effectively laid off for a lack of work. Being laid off for a lack of work is not disqualifying. Accordingly, the administrative law judge concludes that the claimant was laid off for a lack of work and, as a consequence, he is not disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided he is otherwise eligible.

Even assuming that the claimant was discharged, the administrative law judge would conclude that the claimant was not discharged for disqualifying misconduct. It is well established that the employer has the burden to prove disqualifying misconduct. See Iowa Code section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. The administrative law judge would conclude in the event that the separation was a discharge, that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The employer did not participate in the hearing and provide sufficient evidence of deliberate acts or omissions on the part of the claimant constituting a material breach of his duties and/or evincing a willful or wanton disregard of an employer's interest and/or in carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. Accordingly, even if the claimant's separation should be considered a discharge, the administrative law judge would conclude that the claimant was discharged but not for disqualifying misconduct and he would still not be disqualified to receive unemployment insurance benefits.

Even assuming that the claimant voluntarily quit when he finally, on June 29, 2004, left word with the head mechanic that he was quitting, the administrative law judge would conclude that the claimant quit with good cause attributable to the employer. The administrative law judge would conclude that if the claimant quit, he quit because of the employer's willful breach of its contract of hire with the claimant. There is at least an implied provision in the claimant's contract of hire that there would be work for him and, for a month, the claimant came to work every day but there was no work and he was sent home. During this period of time the claimant was not paid but, nevertheless, commuted 45 minutes one way to inquire about work, only to learn that there was no work. Accordingly, even should the claimant's separation be considered a voluntary quit, the administrative law judge would conclude that the claimant left voluntarily with good cause attributable to the employer and would still not be disqualified to receive unemployment insurance benefits.

DECISION:

The representative's decision dated July 23, 2004, reference 01, is reversed. The claimant, Greg E. Thies, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he was laid off for a lack of work.

b/kjf