

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**JONATHAN D LANDTISER**  
Claimant

**APPEAL NO: 09A-UI-14623-DT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**MILLARD REFRIGERATED SERVICES INC**  
Employer

**OC: 08/30/09**

**Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

Jonathan D. Landtiser (claimant) appealed a representative's September 23, 2009 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment from Millard Refrigerated Services, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on October 27, 2009. The claimant participated in the hearing. Sara Cross appeared on the employer's behalf. 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:**

After a prior period of employment with the employer through a temporary employment firm, the claimant started working directly for the employer on August 18, 2008. He worked full time as a checker in the employer's Ottumwa, Iowa cold storage warehouse. His regular schedule was Monday, Tuesday, and Friday from 6:00 p.m. until done, and Saturday 8:00 p.m. until done. His last day at work was August 11, 2009.

The claimant's shift that had begun at 6:00 p.m. on August 10 ended at about 5:00 a.m. on August 11. During that shift he had injured his knee at work. He went home after the shift, but as the knee continued to give him pain, he called the employer and an arrangement was made for him to return to work and be taken to the company's doctor, which occurred at about 11:00 a.m. He returned from the doctor's office at about 3:00 p.m. As he had gotten no sleep but was still scheduled for work at 6:00 p.m., he told the employer he was going home. He was told and understood this meant he would be receiving an attendance point.

The point assessed for missing the August 11 shift brought the claimant to 9.5 points under the employer's 10 point attendance policy. All but a half point of the 9.5 points was due to properly reported illness; that remaining half point was for a tardy on January 17 for unknown reasons. The claimant had been given a warning on July 14 which advised him he was at 8.0 points. He had thereafter incurred an additional half point on August 3 for going home sick.

The claimant was next scheduled for work on August 14. The employer believed the claimant was a no-call, no-show for work and believed that he had abandoned his job. However, prior to his shift on August 14 the claimant had called in and reported that his knee was still hurting and so he would not be at work; he had requested that a particular production supervisor give him a call back. He did not hear back from the production supervisor, possibly because the absence on August 14 would have been assessed as at least a point, which would have taken the claimant to the discharge stage. When the claimant did not hear back, he assumed he had been discharged for exceeding the ten point level.

### **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 by not contacting the employer after August 11; however, the evidence shows that the claimant did call the employer on August 14. 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 his attendance. Absenteeism can constitute misconduct; however, to be misconduct, absences must be both excessive and unexcused. 871 IAC 24.32(7). A determination as to whether an absence is excused or unexcused does not rest solely on the interpretation or application of the employer's attendance policy. Absences due to properly reported illness cannot constitute work-connected misconduct since they are not volitional, even if the employer was fully within its rights to assess points or impose discipline up to or including discharge for the absence under its attendance policy. 871 IAC 24.32(7); Cosper, supra; Gaborit v. Employment Appeal Board, 734 N.W.2d 554 (Iowa App. 2007). Because the vast majority of the claimant's absences as well as his final absence were related to properly reported illness or other reasonable grounds, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct and no disqualification is imposed. 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 September 23, 2009 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.

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Lynette A. F. Donner  
Administrative Law Judge

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Decision Dated and Mailed

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