

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

BRENDAN M DEASON
Claimant

P&K MIDWEST INC
Employer

APPEAL 17A-UI-04920-DB-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 04/23/17
Claimant: Appellant (5)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant/appellant filed an appeal from the May 8, 2017 (reference 01) unemployment insurance decision that denied benefits based upon its determination that he voluntarily quit work by failing to notify his employer or go to work for three days in a row. The parties were properly notified of the hearing. A telephone hearing was held on May 26, 2017. The claimant, Brendan M. Deason, participated personally. The employer, P&K Midwest Inc., participated through witness Karen Swinton.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Did claimant voluntarily quit the employment with good cause attributable to employer?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a service assistant. He was employed from March 9, 2015 until April 21, 2017. His immediate supervisor was Zach McFarland. The store manager was Ben Schemmel.

The employer has a written policy regarding absenteeism. Claimant received a copy of the written policy upon hire. The policy states that if an employee cannot come to work they are required to contact management each day that they are absent; otherwise, they can be subject to discharge.

On April 9, 2017 claimant was arrested. He was confined in jail until April 20, 2017. He was arrested for first-degree burglary and domestic abuse assault. He has pled not guilty and the case is still pending. He did not work or call in to work prior to his scheduled shift start times from April 10, 2017 through April 20, 2017. Claimant returned to work on April 21, 2017 and was told that he was no longer employed. Claimant had asked both his sister and girlfriend to notify his employer of his absences each day but they did not. No one in management was notified about claimant's absences.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for job-related misconduct. Benefits are denied.

First, it must be determined whether the separation was a voluntary quitting or a discharge from employment.

Iowa Code §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.

Claimant has the burden of proving that the voluntary leaving was for good cause attributable to the employer. Iowa Code § 96.6(2). The employer has the burden of proving that a claimant's departure from employment was voluntary. *Irving v. Emp't Appeal Bd.*, No. 15-0104, 2016 WL 3125854 (Iowa June 3, 2016). "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". *Id.* (citing *Cook v. Iowa Dept. of Job Service*, 299 N.W.2d 698, 701 (Iowa 1986)).

The term "voluntary" requires volition and generally means a desire to quit the job. *Id.* (citing *Bartelt v. Emp't Appeal Bd.*, 494 N.W.2d 684, 686 (Iowa 1993); *Wills v. Emp't Appeal Bd.*, 447 N.W.2d 137, 138 (Iowa 1989); *Cook*, 299 N.W.2d at 701 (Iowa 1986); *Moulton v. Iowa Emp't Sec. Comm'n*, 34 N.W.2d 211, 213 (1948)). There must be substantial evidence to show that claimant's absence from work was voluntary.

Incarceration, in and of itself, can never be considered volitional or voluntary. If the leaving was not voluntary, then there is no analysis into whether or not the employee left with good cause attributable to the employer because the case must be analyzed as a discharge. *Irving v. Emp't Appeal Bd.*, No. 15-0104, 2016 WL 3125854 (Iowa June 3, 2016)(citing *Ames v. Emp't Appeal Bd.*, 439 N.W.2d 669, 673-74)(Iowa 1989)(employees refusing to go to work and cross union picket line due to the risk of violence associated with crossing the picket line was not a voluntary quitting of employment)).

However, predicate acts that lead to incarceration can rise to a level of conduct that would disqualify a claimant from receiving benefits. *Id.* Those predicate acts must be volitional and must lead to an absence from the workplace which results in a loss of employment. *Id.* Further, the circumstances that led to the incarceration must establish volitional acts of a nature sufficient to allow a fact finder to draw the conclusion that the employee, by his or her intentional acts, has purposively set in motion a chain of events leading to incarceration, absence from work, and ultimate separation from employment. *Id.*

Lastly, if an employee fails to notify the employer of the status of his or her incarceration, or engages in deception regarding the incarceration, that may result in a voluntary quit or disqualifying misconduct. *Id.* The analysis must also consider whether the employee was capable of notifying the employer of the status of the incarceration and the steps the employee took to notify the employer.

If the claimant's leaving of employment was voluntary, the next step is to analyze whether or not the claimant left for good cause attributable to the employer. Iowa Code § 96.6(2). "Good cause" for leaving employment must be that which is reasonable to the average person, not the overly sensitive individual or the claimant in particular. *Uniweld Products v. Indus. Relations Comm'n*, 277 So.2d 827 (Fla. Dist. Ct. App. 1973). If the claimant's leaving of employment was not voluntary, the case must be analyzed as a discharge case and the burden of proof falls to the employer. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

This claimant did not voluntarily leave his employment. This claimant did not desire to quit his job. It is clear that claimant did not intend to quit as he immediately contacted his employer after he was released from jail on April 21, 2017. Therefore, this case must be analyzed as a discharge.

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and the employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in

disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

Iowa Admin. Code r.871-24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

In the context of disqualification for unemployment benefits based on misconduct, the question is whether the employee engaged in a “deliberate act or omission,” conduct “evinced 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 conduct with “carelessness or negligence of such degree of recurrence as to manifest equal culpability.” See Iowa Admin. Code r. 871 – 24.32(1)(a). Further, excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer. See Iowa Admin. Code r. 871 – 24.32(7).

However, excessive absences are not considered misconduct unless unexcused. *Cosper v. Iowa Dep’t of Job Serv.*, 321 N.W.2d 6, 10 (Iowa 1982). For example, 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. Iowa Admin. Code r. 871-24.32(7); *Gaborit v. Emp’t Appeal Bd.*, 743 N.W.2d 554 (Iowa Ct. App. 2007).

Claimant was arrested and unable to work due to his incarceration. Claimant had family available to call the employer on his behalf but they did not do so. Claimant knew and understood the employer’s reporting policy for absenteeism.

While claimant’s incarceration was involuntary, he did not properly notify the employer of his absences, in violation of the employer’s written policy. Excessive absenteeism has been found when there has been seven unexcused absences in five months; five unexcused absences and three instances of tardiness in eight months; three unexcused absences over an eight-month period; three unexcused absences over seven months; and missing three times after being warned. See *Higgins v. Iowa Dep’t of Job Serv.*, 350 N.W.2d 187, 192 (Iowa 1984); *Infante v. Iowa Dep’t of Job Serv.*, 321 N.W.2d 262 (Iowa App. 1984); *Armell v. EAB*, 2007 WL 3376929*3 (Iowa App. Nov. 15, 2007); *Hiland v. EAB*, No. 12-2300 (Iowa App. July 10, 2013); and *Clark v. Iowa Dep’t of Job Serv.*, 317 N.W.2d 517 (Iowa App. 1982).

Claimant’s failure to report his absences were in violation of the employer’s written policy. Further, his absences from April 10, 2017 to April 20, 2017 were excessive. Claimant’s failure to notify his employer of his absences due to his incarceration rises to the level of job-related misconduct. As such, benefits are withheld.

DECISION:

The May 8, 2017 (reference 01) unemployment insurance decision denying benefits is modified with no change in effect. Claimant was discharged for job-related misconduct. Unemployment insurance benefits shall be withheld in regards to this employer until such time as claimant is deemed eligible.

Dawn R. Boucher
Administrative Law Judge

Decision Dated and Mailed

db/rvs