IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

RICHARD H ZOHNER
Claimant

SCHUSTER GRAIN CO INC

APPEAL NO: 19A-UI-01731-JC-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/20/19
Claimant: Appellant (1)

Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.5(1)d – Voluntary Quitting/Illness or Injury
Iowa Admin. Code r. 871-24.25(35) – Separation Due to Illness or Injury

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the February 19, 2019, (reference 01) unemployment insurance decision that denied benefits due to the claimant's separation from employment with Schuster Grain Company Inc. After due notice was issued, a telephone conference hearing was conducted on March 13, 2019. The hearing was held jointly with 19A-UI-01732-JC-T. The claimant participated and was represented by Corey Walker, attorney at law. Erica Witt, director of human resources, testified for the employer. The administrative law judge took official notice of the administrative records including the fact-finding documents. Claimant Exhibits A-G were admitted into evidence. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant worked for this employer beginning in 2011 as an over-the-road truck driver, and last performed work on March 23, 2018. When the claimant was hired, he was made aware that passing a DOT physical would be a continued requirement of the job.

Originally, the claimant was expected to return to work on April 5, 2018, but he did not and during the period of April 5 through August 1, 2018, remained in contact with the employer as a worker's compensation claim was pursued. On August 1, 2018, an independent medical examiner determined the claimant's injury was not work-related. Through the claimant's attorney, contact resumed between the parties for the claimant to return to work (Claimant Exhibit B).

On November 16, 2018, the employer emailed the claimant's attorney, stating the claimant had a position to return to with the employer upon completing his DOT physical, since the medical

certification expired (Claimant Exhibit C). The claimant was expected to go to LeMars, Iowa to complete a drug test, physical capacity test and the DOT physical before resuming driving (Witt testimony).

Due to timing of the letter and logistics, the claimant could not have been in LeMars, Iowa on November 19, 2018, as directed in the letter. However, the claimant's attorney did communicate with the employer on November 19, 2018 in response of the claimant being offered his position (Claimant Exhibit E.) Mr. Walker, on behalf of the claimant, wrote in an email to the employer, "Also, given that I just now received your email, it will be at least a few days after we receive the job description before we can respond to your letter" (Claimant Exhibit E). Neither the claimant nor his attorney made contact with the employer between November 20 and December 19, 2018. The claimant did not attempt to go to LeMars for the DOT physical or inquire to his options should he be unable to pass the physical.

On December 14, 2018, on his own accord, the claimant attempted, but did not pass the DOT physical (Claimant Exhibit G). Thereafter, his counsel notified the employer that he had failed the physical and could not perform his job duties as a truck driver. The claimant, through counsel, also inquired about job opportunities. By this time, the employer assumed since the claimant did not show up to LeMars, Iowa after Mr. Walker received the letter dated November 16, 2018 and did not make contact with the employer for one month, that separation had ensued.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant voluntarily quit his employment without good cause attributable to the employer. Benefits are denied.

The claimant has the burden of proof to establish he quit with good cause attributable to the employer, according to Iowa law. 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. 871 IAC 24.25. "

Ordinarily, "good cause" is derived from the facts of each case keeping in mind the public policy stated in Iowa Code section 96.2. *O'Brien v. EAB*, 494 N.W.2d 660, 662 (Iowa 1993)(citing *Wiese v. Iowa Dep't of Job Serv*., 389 N.W.2d 676, 680 (Iowa 1986)). "The term encompasses real circumstances, adequate excuses that will bear the test of reason, just grounds for the action, and always the element of good faith." *Wiese v. Iowa Dep't of Job Serv*., 389 N.W.2d 676, 680 (Iowa 1986) "[C]ommon sense and prudence must be exercised in evaluating all of the circumstances that lead to an employee's quit in order to attribute the cause for the termination." *Id.*

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.*. In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id*. After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the weight of the

evidence in the record establishes claimant has not met his burden of proof to establish he quit for good cause reasons within Iowa law.

Iowa Code § 96.5(1)d 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. But the individual shall not be disqualified if the department finds that:
>
> d. The individual left employment because of illness, injury or pregnancy upon the advice of a licensed and practicing physician, and upon knowledge of the necessity for absence immediately notified the employer, or the employer consented to the absence, and after recovering from the illness, injury or pregnancy, when recovery was certified by a licensed and practicing physician, the individual returned to the employer and offered to perform services and the individual's regular work or comparable suitable work was not available, if so found by the department, provided the individual is otherwise eligible.

Iowa Admin. Code r. 871-24.25(35) provides:

> Voluntary quit without good cause. 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. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:
>
> (35) The claimant left because of illness or injury which was not caused or aggravated by the employment or pregnancy and failed to:
>
> (a) Obtain the advice of a licensed and practicing physician;
> (b) Obtain certification of release for work from a licensed and practicing physician;
> (c) Return to the employer and offer services upon recovery and certification for work by a licensed and practicing physician; or
> (d) Fully recover so that the claimant could perform all of the duties of the job.

The court in *Gilmore v. Empl. Appeal Bd.*, 695 N.W.2d 44 (Iowa Ct. App. 2004) noted that:

> "Insofar as the Employment Security Law is not designed to provide health and disability insurance, only those employees who experience illness-induced separations that can fairly be attributed to the employer are properly eligible for unemployment benefits." *White v. Emp't Appeal Bd.*, 487 N.W.2d 342, 345 (Iowa 1992) (citing *Butts v. Iowa Dep't of Job Serv.*, 328 N.W.2d 515, 517 (Iowa 1983)).

An employee's failure to return to the employer and offer services upon recovery from an injury "statutorily constitutes a voluntary quit and disqualifies an individual from unemployment insurance benefits." *Brockway v. Emp't Appeal Bd.*, 469 N.W.2d 256 (Iowa Ct. App. 1991).

Subsection d of Iowa Code § 96.5(1) provides an exception; however, the statute specifically requires that the employee has recovered from the illness or injury, and this recovery has been certified by a physician. The exception in section 96.5(1)(d) only applies when an employee is

fully recovered and the employer has not held open the employee's position. *White*, 487 N.W.2d at 346 (Iowa 1992); *Hedges v. Iowa Dep't of Job Serv.*, 368 N.W.2d 862, 867 (Iowa App. 1985); see also *Geiken v. Lutheran Home for the Aged Ass'n.*, 468 N.W.2d 223, 226 (Iowa 1991)(noting the full recovery standard of section 96.5(1)(d)). In the *Gilmore* case he was not fully recovered from his injury and was unable to show that he fell within the exception of section 96.5(1)(d). Therefore, because his injury was not connected to his employment and he had not fully recovered, he was considered to have voluntarily quit without good cause attributable to the employer and was not entitled to unemployment benefits. See *White*, 487 N.W.2d at 345.

In this case, the claimant was on a leave of absence beginning March 2018 due to illness or injury. In August, it was determined by an independent medical examiner that the condition was personal and not work related. The claimant was formally offered his job to return to work on November 16, 2018 by the employer, provided he met the physical requirements, which included passing a DOT physical. The claimant's attorney responded on November 19, 2018 that upon receiving the job description, a few days would be needed. The claimant did not make contact with the employer until one month later on December 19, 2018, to state he had failed the DOT physical.

Here, the claimant was out of communication for nearly one month after a job offer was made. The administrative law judge is persuaded that the claimant's lack of communication and failure to return to work after the November 16, 2018 offer could be construed as a quit due to job abandonment inasmuch as an employer is not reasonably obligated to hold a job open indefinitely for a claimant and the claimant failed to maintain in communication.

Alternatively, the record reflects that claimant's medical condition is not work-related and he is unable to perform full work duties because of the illness or injury (as evidenced by the failure to pass the DOT physical) and, for unemployment insurance benefits purposes, the employer is not obligated to accommodate a non-work related medical condition. Accordingly, although the separation was for good personal reasons, it was without good cause attributable to the employer and benefits must be denied.

The parties are reminded that under Iowa Code § 96.6-4, a finding of fact or law, judgment, conclusion, or final order made in an unemployment insurance proceeding is binding only on the parties in this proceeding and is not binding in any other agency or judicial proceeding. This provision makes clear that unemployment findings and conclusions are only binding on unemployment issues, and have no effect otherwise.

DECISION:

The February 19, 2019, (reference 01) decision is affirmed. The claimant voluntarily left the employment without good cause attributable to the employer. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

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Jennifer L. Beckman
Administrative Law Judge

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Decision Dated and Mailed

jlb/scn