

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

WILLIAM J RUMBAUGH
Claimant

APPEAL NO. 09A-UI-08711-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SDH SERVICES WEST LLC
Employer

OC: 05/03/09
Claimant: Respondent (2-R)

Iowa Code Section 96.5(1) – Voluntary Quit

STATEMENT OF THE CASE:

The employer filed a timely appeal from the June 8, 2009, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on July 2, 2009. Claimant William Rumbaugh participated. Joseph Schnieders, General Manager, represented the employer.

ISSUE:

Whether Mr. Rumbaugh voluntarily quit or was discharged from the employment. The administrative law judge concludes that Mr. Rumbaugh voluntarily quit.

Whether Mr. Rumbaugh's voluntary quit was for good cause attributable to the employer.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: William Rumbaugh commenced his full-time employment with Sedexho in November 2005 and last performed work for the employer on April 14, 2009. Mr. Rumbaugh's title was utility worker. Mr. Rumbaugh's duties included cleaning the front of the cafeteria, checking and cleaning the pop dispenser, working in the dish room during lunch, and putting away the dry goods. Mr. Rumbaugh's work hours were 8:00 a.m. to 2:30 p.m. on Mondays, Wednesdays and Thursdays, and 7:30 a.m. to 2:30 p.m. on Tuesdays and Fridays. Joseph Schnieders, General Manager, was Mr. Rumbaugh's immediate supervisor.

If Mr. Rumbaugh needed to be absent from work the attendance notification policy required that Mr. Rumbaugh contact Mr. Schnieders at least an hour before the scheduled start of his shift. If Mr. Schnieders was not available, Mr. Rumbaugh could leave a voice mail message. The policy was contained in an employee handbook. Mr. Rumbaugh received a copy of the handbook at the start of his employment. The employee handbook also contained a "no-call, no-show" policy. Under that policy, the employer deemed three days of "no-call, no-show" absences to be job abandonment.

Mr. Rumbaugh had been absent from work on April 13 and had notified the employer he would not be in. Mr. Rumbaugh did not provide additional information. Mr. Rumbaugh had then appeared for work on April 14, 2009 and left when his work was completed.

Mr. Rumbaugh was absent from his shift on April 15 and failed to properly notify the employer he would be absent. At 8:52 p.m. on April 15, well after the cafeteria had closed for the day, Mr. Rumbaugh left a voice mail message for Mr. Schnieders. In the message, Mr. Rumbaugh said he had "family problems." Mr. Rumbaugh said that if he was not already fired, he would need to take some time off. Mr. Rumbaugh was absent from his shift on April 16 and failed to properly notify the employer. At 4:36 p.m., after the cafeteria has closed, Mr. Rumbaugh left a message saying that his grandmother's "tube" was being taken out. Mr. Rumbaugh also said in his message that his cell phone was dead and that the employer would probably not be able to get a hold of him. The employer lacked a backup telephone number for Mr. Rumbaugh. Mr. Rumbaugh did not make further contact with the employer.

Mr. Rumbaugh's grandmother passed away on April 18, 2009 and the funeral took place on April 22, 2009.

On April 23, 2009, after Mr. Rumbaugh had been absence from seven consecutive shifts, and absent from five consecutive shifts without making any contact with the employer, the employer sent Mr. Rumbaugh a letter by certified mail. Mr. Rumbaugh received the letter on April 24, 2009. The letter indicated that the employer had concluded that Mr. Rumbaugh had resigned from the employment by being a "no-call, no-show" for three days.

During his absence from the employment, Mr. Rumbaugh was not providing care to his grandmother. Rather, Mr. Rumbaugh wanted to be with his grandmother and his family.

REASONING AND CONCLUSIONS OF LAW:

A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, or failure to pass a probationary period. 871 IAC 24.1(113)(c). A quit is a separation initiated by the employee. 871 IAC 24.1(113)(b). In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 698, 612 (Iowa 1980) and Peck v. EAB, 492 N.W.2d 438 (Iowa App. 1992). 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. See 871 IAC 24.25.

Iowa Code section 96.5-1-c 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:

c. The individual left employment for the necessary and sole purpose of taking care of a member of the individual's immediate family who was then injured or ill, and if after said member of the family sufficiently recovered, the individual immediately returned to and offered the individual's services to the individual's employer, provided, however, that during such period the individual did not accept any other employment.

A person who is absent three days without notifying the employer in violation of the employer's policy is deemed to have voluntarily quit the employment without good cause attributable to the employer. See 871 IAC 24.25(4).

This case does not present a situation where Mr. Rumbaugh was absent due to the need to provide care to an ailing family member. Rather, Mr. Rumbaugh simply wanted to be with his grandmother and his family as they underwent the difficulties associated with the grandmother's final days. The weight of the evidence indicates that the employer had an absence notification policy that required that Mr. Rumbaugh contact the employer at least an hour before the scheduled start of his shift if he needed to be absent. The weight of the evidence indicates that Mr. Rumbaugh was aware of the absence notification policy. The evidence indicates that Mr. Rumbaugh failed to do that on seven consecutive work days before the employer concluded the employment was ended. The weight of the evidence indicates that the employer had a "no-call, no-show" policy that deemed three consecutive "no-call, no-show" absences a voluntary quit. The weight of the evidence indicates that Mr. Rumbaugh was given proper notice of the policy. The evidence indicates that Mr. Rumbaugh was a "no-call, no-show" for five consecutive shifts. The weight of the evidence indicates that Mr. Rumbaugh intentionally avoided contact with the employer by calling after hours on April 15 and 16. Mr. Rumbaugh's testimony that he was too upset to talk does not excuse his failure to properly notify the employer of the need to be absent.

The administrative law judge concludes that Mr. Rumbaugh voluntarily quit the employment through the "no-call, no-show" absences and that the quit was without good cause attributable to the employer. Accordingly, Mr. Rumbaugh is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits paid to Mr. Rumbaugh.

The outcome of this case would be the same if the administrative law judge had concluded that Mr. Rumbaugh was discharged from the employment. The evidence indicates seven consecutive absences where Mr. Rumbaugh failed to properly notify the employer of the need to be absent. This would constitute excessive unexcused absences and would constitute misconduct in connection with the employment. See Iowa Code section 96.5(2)(a); see also 871 IAC 24.32(1)(a) and (7).

Iowa Code section 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code section 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received would constitute an overpayment. Accordingly, the administrative law judge will

remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The Agency representative's June 8, 2009, reference 01, decision is reversed. The claimant voluntarily quit the employment without good cause attributable to the employer. The claimant is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged.

This matter is remanded to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs