

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ALLEN L VAN BEEK
Claimant

APPEAL NO. 11A-UI-13069-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

KPTOO INC
Employer

**OC: 09/11/11
Claimant: Appellant (2)**

Section 96.4-3 – Leave of Absence
Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

The claimant filed a timely appeal from a representative's decision dated September 30, 2011, reference 01, which denied unemployment insurance benefits, finding the claimant voluntarily quit work on August 3, 2011, by being incarcerated. After due notice was issued, a telephone hearing was held on October 27, 2011. The claimant participated personally. The employer participated by Ms. Nicole Rensink, store manager.

ISSUE:

At issue is whether the claimant was discharged for misconduct in connection with his employment.

FINDINGS OF FACT:

Having considered the evidence in the record, the administrative law judge finds: Allen Van Beek was employed by Kptoo, Inc., doing business as McDonald's, from August 23, 2008, until September 8, 2011, when he was discharged from employment. Mr. Van Beek held the position of part-time crew member and was paid by the hour. His immediate supervisor was Nicole Rensink, store manager.

Mr. Van Beek was discharged by the employer at the conclusion of a term of negotiated leave of absence when the employer chose not to re-employ Mr. Van Beek at the conclusion of the negotiated leave of absence.

Prior to beginning a 30-day jail sentence for operating a motor vehicle while under suspension, Mr. Van Beek had specifically requested to be retained as an employee but taken off the company's schedule for a 30-day period. The scheduling manager agreed and did not schedule Mr. Van Beek during the 30-day period that he was incarcerated. It was agreed that upon being released, the claimant would contact the employer for re-scheduling. Prior to the claimant's release, the claimant's mother confirmed that the claimant's employment was ongoing and that he would be re-employed at the conclusion of his incarceration and the time away from work agreed to by the parties.

After being released from incarceration, Mr. Van Beek returned to the McDonald's facility to reclaim his employment. The store manager did not indicate that the claimant had been previously discharged for being absent but instead interviewed Mr. Van Beek about placing him back on the schedule. At that time, the claimant's previous limitations on his availability for night and weekend work were considered and the employer made a management decision not to re-employ Mr. Van Beek on the shift from 11:00 a.m. until 2:00 p.m. that he regularly worked and chose to end the employment relationship because of employment issues that had taken place prior to the claimant entering the approved or negotiated leave of absence.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes misconduct sufficient to warrant the denial of unemployment insurance benefits. It does not.

871 IAC 24.23(10) provides:

(10) The claimant requested and was granted a leave of absence, such period is deemed to be a period of voluntary unemployment and shall be considered ineligible for benefits for such period.

871 IAC 24.22(2)j(1)(2) provides:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(2) Available for work. The availability requirement is satisfied when an individual is willing, able, and ready to accept suitable work which the individual does not have good cause to refuse, that is, the individual is genuinely attached to the labor market. Since, under unemployment insurance laws, it is the availability of an individual that is required to be tested, the labor market must be described in terms of the individual. A labor market for an individual means a market for the type of service which the individual offers in the geographical area in which the individual offers the service. Market in that sense does not mean that job vacancies must exist; the purpose of unemployment insurance is to compensate for lack of job vacancies. It means only that the type of services which an individual is offering is generally performed in the geographical area in which the individual is offering the services.

j. Leave of absence. A leave of absence negotiated with the consent of both parties, employer and employee, is deemed a period of voluntary unemployment for the employee-individual, and the individual is considered ineligible for benefits for the period.

(1) If at the end of a period or term of negotiated leave of absence the employer fails to reemploy the employee-individual, the individual is considered laid off and eligible for benefits.

(2) If the employee-individual fails to return at the end of the leave of absence and subsequently becomes unemployed the individual is considered as having voluntarily quit and therefore is ineligible for benefits.

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.

In this case, the evidence establishes that a leave of absence was negotiated between Mr. Van Beek and a management individual who was the manager of scheduling at the McDonald's facility where Mr. Van Beek was employed. The claimant requested in advance of a 30-day jail sentence to be allowed to enter into a form of leave of absence and not be scheduled during the 30-day period that he would be incarcerated. The employer agreed and Mr. Van Beek was maintained on the company employment rolls but not scheduled for the 30-day period. Upon his release, the claimant attempted to resume his employment, but the employer failed to re-employ the claimant. The claimant's availability for work had not changed. The claimant still was employed part-time by another employer working evenings and had other part-time employment on weekends. The claimant was willing and able to assume his normal scheduled working time of 11:00 a.m. until 2:00 p.m. for McDonald's, but the employer was unwilling to re-employ him. The employer cited past employment problems as a reason for choosing not re-employ the claimant at the time that the negotiated leave of absence came to an end.

871 IAC 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.

Based upon the evidence in the record, the administrative law judge concludes that the claimant was not discharged for a current act of misconduct but was discharged when the employer made a management decision not to re-employ the claimant after the end of a negotiated leave of absence. While the decision not to re-employ Mr. Van Beek may have been a sound decision from a management viewpoint, the employer has not sustained its burden of proof in establishing intentional disqualifying misconduct at the time of separation and Mr. Van Beek was able and available to work his normal shift but the employer chose not to re-employ him. Unemployment insurance benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The representative's decision dated September 30, 2011, reference 01, is reversed. The claimant was discharged for no disqualifying reason. Unemployment insurance benefits are allowed, provided the claimant meets all other eligibility requirements of Iowa law.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

kjw/kjw