

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CRYSTAL M PETERSON
Claimant

APPEAL NO: 11A-UI-16265-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MILLER BROTHERS FURNITURE CO
Employer

OC: 11/06/11

Claimant: Respondent (2/R)

Section 96.5-2-a – Discharge
Section 96.5-1 – Voluntary Leaving
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

Miller Brothers Furniture Company (employer) appealed a representative's December 19, 2011 decision (reference 03) that concluded Crystal M. Peterson (claimant) was qualified to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on January 23, 2012. The claimant participated in the hearing. Justin Miller 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?

OUTCOME:

Reversed. Benefits denied.

FINDINGS OF FACT:

The claimant started working for the employer on January 24, 2011. She worked full time as office manager. She was supposed to work a schedule of 9:00 a.m. to 5:30 p.m. Monday through Friday. Her last day of work was October 31, 2011.

In the fall of 2011 the claimant began having chronic attendance issues. The claimant was encountering a series of family and personal issues for which she was spending time away from work. She was frequently gone all or most of a day, and did not obtain the employer's approval for the absences. On October 20 or October 21 the business' president, Miller, spoke to the claimant and advised her that the employer needed her there full time, and that her frequent absences were not acceptable.

The claimant was a no-call/no-show for work on October 24. When the employer sent her a text message to find out her status, she responded that she was conferring with an attorney on a family issue; however, she had not advised the employer she would need the time and had not gotten the employer's approval. She did not report for work the rest of the day, nor did she report for work on October 26. On October 26 the claimant was a no-call/no-show, and when the employer contacted her in the afternoon, she indicated she would be in shortly, but she did not come in. She later indicated she would be in for sure the next day. However, on October 27 the claimant was a no-call/no-show, and did not respond to the employer's effort to contact her. On October 28 the claimant was again a no-call/no-show; the employer attempted to contact her in the morning, but the claimant did not respond until mid-afternoon, to the effect that she would drop off her children with childcare and would be in.

The employer decided on October 28 that it would need to replace the claimant, and made arrangements to run an advertisement for the position, which ran on October 30. The claimant did come in for part of the day on October 31; she was then informed that the employer had decided it needed to replace her.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not eligible for unemployment insurance benefits if she 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. A voluntary quit is a termination of employment initiated by the employee – where the employee has taken the action which directly results in the separation; a discharge is a termination of employment initiated by the employer – where the employer has taken the action which directly results in the separation from employment. 871 IAC 24.1(113)(b), (c).

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 she voluntarily quit. The administrative law judge concludes that the employer has failed to satisfy its burden that the claimant voluntarily quit; it was the employer who decided to replace the claimant because of her erratic attendance, effectively discharging her. 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. 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); Iowa Code § 96.5-2-a.

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).

Excessive and unexcused absenteeism can constitute misconduct. 871 IAC 24.32(7). The claimant's chronic and excessive absences from work without any contact with the employer to even seek to be excused from work shows a willful or wanton disregard of the standard of behavior the employer has the right to expect from an employee, as well as an intentional and substantial disregard of the employer's interests and of the employee's duties and obligations to the employer. Absences due to issues that are of purely personal responsibility are not excusable. *Higgins v. IDJS*, 350 N.W.2d 187 (Iowa 1984); *Harlan v. Iowa Department of Job Service*, 350 N.W.2d 192 (Iowa 1984). The claimant's final absences were not excused. The claimant had previously been warned that future absences were not acceptable. *Higgins*, supra. The employer discharged the claimant for reasons amounting to work-connected misconduct.

The unemployment insurance law 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. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code § 96.3-7. In this case, the claimant has received benefits but was ineligible for those benefits. The matter of determining the amount of the overpayment and whether the claimant is eligible for a waiver of overpayment under Iowa Code § 96.3-7-b is remanded the Claims Section.

DECISION:

The representative's December 19, 2011 decision (reference 03) is reversed. The claimant did not voluntarily quit, but the employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of October 31, 2011.

This disqualification continues until the claimant has been paid ten times her weekly benefit amount for insured work, provided she is otherwise eligible. The employer's account will not be charged. The matter is remanded to the Claims Section for investigation and determination of the overpayment issue.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/css