

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

ROBERT M BROOKS
Claimant

J & D RESTAURANTS INC
Employer

APPEAL 16A-UI-04701-H2

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 03/27/16
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge/Misconduct
871 IAC 24.32(7) – Absenteeism

STATEMENT OF THE CASE:

The employer filed an appeal from the April 12, 2016, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. An in-person hearing was held on May 11, 2016 in Des Moines, Iowa. Claimant participated. Employer participated through Eric Westberg, Area Supervisor. Employer's Exhibit One was entered and received into the record.

ISSUE:

Was the claimant discharged due to job connected misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a crew member (the business is a McDonalds restaurant) from January 1, 2015 through March 19, 2016 when he was discharged. The employer bought the business from the previous owners on January 1, 2016. The claimant had worked for the prior owners since November of 2015.

In February, the claimant notified Mr. Westberg and the store manager Terry that he was having a problem with his left leg or knee. He provided a doctor's note that indicated he should be on light-duty work through 2016. (Employer's Exhibit One) The note did not specify what was meant by light duty. The claimant, Terry and Mr. Westberg met on March 4 to discuss issues including the claimant's non-work-related leg/knee problem. The claimant was asked to provide more detail as to what his doctor meant by light duty. The claimant's doctor refused to provide him with a note that indicated how many hours he could work per day. The claimant and the employer agreed that the claimant would work roughly 25 to 30 hours per week going forward. At that meeting there was no discussion or agreement that the claimant would only work five or six hours during a shift.

On March 19, the claimant was scheduled to work from 11:00 a.m. to 7:00 p.m. He called Terry during the lunch rush on March 18 to talk to her about the schedule. She told him he would

need to call back as she could not talk to him about it then as the restaurant was busy. The claimant called the corporate office after Terry could not speak to him and he was given Terry's cell phone number and told he needed to work the issue out with his manager. Mr. Westberg was not available to talk with him when he called. The claimant came into the restaurant later that afternoon to eat lunch, but did not ask to speak to Terry about the next day work schedule.

The claimant called Terry around 9:00 a.m. on March 19 and told her he could not work the entire eight-hour shift. She told him that if he did not show up for his scheduled shift, he would be discharged. The claimant did not appear for work and was discharged.

The employer's policy, a copy of which had been given to the claimant provides that two instances of no-call/no-show will lead to discharge. The employer could only identify that sometime in January the claimant had been a no-call/no-show for work. While the claimant had called in absent to work since January, due to his leg/knee problem, he had not been given any warnings that his attendance was placing his job in jeopardy.

The claimant was discharged when he did not show up for work on March 19.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

Iowa Admin. Code r. 871-24.25(4) 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 § 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 § 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:

(4) The claimant was absent for three days without giving notice to employer in violation of company rule.

Since claimant did not have three consecutive no-call/no-show absences as required by rule in order to consider the separation job abandonment, the separation was a discharge and not a quit.

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(7) provides:

(7) Excessive unexcused absenteeism. 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.

The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. The term “absenteeism” also encompasses conduct that is more accurately referred to as “tardiness.” An absence is an extended tardiness, and an incident of tardiness is a limited absence. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984).

A reported absence related to illness or injury is excused for the purpose of the Iowa Employment Security Act. An employer’s no-fault absenteeism policy is not dispositive of the issue of qualification for benefits. A failure to report to work without notification to the employer is generally considered an unexcused absence. However, one unexcused absence is not disqualifying since it does not meet the excessiveness standard. Benefits are allowed.

DECISION:

The April 12, 2016, (reference 01) decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/css