IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JAMES A WILLSON
Claimant

FRITSCH FAMILY PARTNERS LLC
Employer

APPEAL NO. 10A-UI-10410-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 06/20/10
Claimant: Respondent (2-R)

Section 96.5(1) – Voluntary Quit

STATEMENT OF THE CASE:

The employer filed a timely appeal from the July 16, 2010, reference 01, decision that allowed benefits. After due notice was issued, a hearing was started on September 8, 2010 and completed on September 20, 2010. Claimant James Willson participated for part of the proceeding on September 8, 2010, but terminated his participation before the evidentiary record had closed. The administrative law judge rescheduled the conclusion of the hearing and both parties were duly notified of the rescheduled hearing by notice mailed on September 13, 2010. Mr. Willson did not make himself available for the proceedings set for September 20, 2010. Dee Kerr, Controller, represented the employer on September 8 and 20, and presented additional testimony through Jeri Smith, Head Housekeeper. Exhibits One through Seven were received into evidence. The administrative law judge took official notice of the Agency's record (DBRO) of base period wages and employers.

ISSUE:

Whether Mr. Willson separated from the employment for a reason that disqualifies him for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: James Willson was employed by Fritsch Family Partners, doing business as Clarion Hotel & Convention Center, as a part-time custodian from May 2009 and last performed work on June 1, 2010. Mr. Willson's immediate supervisor was Jeri Smith, Head Housekeeper. On June 2, 2010, Mr. Willson appeared for work and told Ms. Smith that he had hurt his back to previous day at work. Mr. Willson was in obvious pain. Ms. Smith drove Mr. Willson to the emergency room. Mr. Willson received evaluation and treatment and was discharged from the emergency room to home later that day. The emergency room doctor provided Mr. Willson with a written medical excuse that excused Mr. Willson from work from June 2 through June 4, 2010. Mr. Willson provided the excuse to the employer on June 2, 2010. The employer deemed this sufficient notice to satisfy the employer's absence notification requirement concerning shifts on June 2-4, 2010.

Mr. Willson was next to schedule to work on Monday, June 7, 2010 at 7:00 a.m. Mr. Willson was also scheduled to work on June 8, June 9, and June 10 at the same time. The work schedule had been on June 5 and Mr. Willson knew that he was scheduled to work on all four of these days. Mr. Willson's girlfriend also worked for the employer and had relayed Mr. Willson's work schedule to him. Mr. Willson did not take any steps to notify the employer of his need to be absent on any of these four days. The employer's written policy required that Mr. Willson notify his immediate supervisor at least four hours prior to the scheduled start of his shift if he needed to be absent. This policy was in the employee handbook and Mr. Willson had received a copy of the handbook.

Mr. Willson did not make further contact with the employer until June 17, 2010, when he went to the workplace to collect his paycheck. At that time, Mr. Willson provided the employer with a medical excuse, dated June 14, 2010, that indicated he had been unable to work from June 8, 2010 through June 14, 2010 for medical reasons. The note was written on a prescription pad from St. Luke's Hospital. The note did not say anything about June 7, 2010, the first day Mr. Willson had been absent without notifying the employer. The note did not say anything about Mr. Willson having been hospitalized. Mr. Willson's girlfriend had continued to work for the employer and did not mention anything to the employer about Mr. Willson being hospitalized.

The employer's written attendance policy indicated that an employee who was absent two consecutive days without notifying the employer would be deemed to have voluntarily quit. The attendance policy also indicated that three instances of no-call/no-show absence during a rolling 12 month period could result in termination of the employment. These policies were contained in the handbook Mr. Willson received.

This employer was Mr. Willson's only base period employer for purposes of the claim for unemployment insurance benefits that was effective June 20, 2010.

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 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.

When a worker is absent for three days without notifying the employer in violation of the employer's policy, the worker is presumed to have voluntarily quit without good cause attributable to the employer. See 871 IAC 24.25(4).

The weight of the evidence does *not* support Mr. Willson's assertion that on June 2, 2010 he provided the employer with notice that he would be absent for two weeks. Rather, the doctor's note Mr. Willson provided specifically referenced and excused shifts scheduled for June 2 through June 4, 2010.

The weight of the evidence does not support Mr. Willson's assertion that he was hospitalized on June 5, 2010. Mr. Willson provided a doctor's note that indicated he was unable to work from June 8 through 14 for medical reasons. A reasonable person would expect the note to reference a hospitalization if one had occurred. A reasonable person would expect June 5, 6 and 7 to have been referenced in the note if Mr. Willson had been hospitalized and/or unable to work due to medical reasons on those days. One would at least expect June 7 to be referenced in the note.

Mr. Willson has presented insufficient evidence to establish that he was hospitalized and/or incapacitated on June 7-10, such that he was unable to notify the employer that he would be absent those days. Mr. Willson's assertion that he was hospitalized until June 14 would not explain why he waited until June 17 to contact the employer. Mr. Willson's testimony that he was self-medicating *with beer* is noteworthy.

The weight of the evidence establishes no-call/no-show absences on June 7, 8, 9 and 10. Each absence was an unexcused absence. The consecutive no-call/no-show absences constituted a voluntary quit under the employer's policy and the applicable unemployment insurance law.

Mr. Willson voluntarily quit the employment without good cause attributable to the employer. Accordingly, Mr. Willson 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. Willson. There were no other base period employer's and, therefore, no other base period wage credits upon which reduced benefits might be based.

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 representatives July 16, 2010, 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. The Claims Division should also determine whether Mr. Willson has met the work availability requirement since he established his claim for benefits.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/css