

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JUSTICE W SHOEMAKER
Claimant

APPEAL NO. 11A-UI-12404-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TEAM STAFFING SOLUTIONS NIC
Employer

**OC: 08/21/11
Claimant: Appellant (5)**

Section 96.5(2)(a) – Discharge for Misconduct
Section 96.4(3) – Able & Available

STATEMENT OF THE CASE:

Justice Shoemaker filed a timely appeal from the September 13, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on October 13, 2011. Mr. Shoemaker participated. Sara Fiedler, claims administrator, represented the employer. The parties waived formal notice on the issues of whether the claimant was discharged for misconduct and whether the claimant voluntarily quit for good cause attributable to the employer.

ISSUES:

Whether the claimant separated from Team Staffing Solutions for a reason that would disqualify him for unemployment insurance benefits.

Whether the claimant has been able to work and available for work since he established the claim for unemployment insurance benefits that was effective August 21, 2011.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Justice Shoemaker was employed by Team Staffing Solutions and placed in a full-time temporary work assignment at Winegard in Burlington on July 7, 2011. Team Staffing Solutions On-site Coordinator Nicole Rice monitored the assignment on behalf of Team Staffing Solutions, while a Winegard warehouse manager supervised Mr. Shoemaker's work in the assignment.

Mr. Shoemaker was off work due to issues with his back after July 22 and returned to work on July 28. Mr. Shoemaker's need to be off work was supported by a doctor's note and was deemed an excused absence by the employer.

Mr. Shoemaker last performed work in the assignment on August 17, 2011. Mr. Shoemaker was absent due to back problems on August 18, 19, and 22. The attendance policy required that Mr. Shoemaker notify both companies prior to the start of the shift if he needed to be absent, and Mr. Shoemaker did that. When Mr. Shoemaker spoke with Team Staffing Solutions On-site Coordinator Nicole Rice on August 22 about ongoing evaluation of his back issues and his continued need to be away from work, Ms. Rice told Mr. Shoemaker that Winegard had ended the assignment. Mr. Shoemaker contacted Team Staffing Solutions later on August 22 and asked whether the

employer had other assignments. A Team Staffing representative told Mr. Shoemaker that the employer would not be able to place him in any additional assignment until his back issues were resolved.

Mr. Shoemaker then established a claim for unemployment insurance benefits that was deemed effective August 21, 2011. Mr. Shoemaker continued under a doctor's care regarding his back issues after he last performed work for Winegard and after he established his claim for unemployment insurance benefits. Mr. Shoemaker underwent an ultrasound at the end of August. Mr. Shoemaker underwent an MRI on September 7. Mr. Shoemaker participated in physical therapy. The MRI showed a bulging disk in Mr. Shoemaker's lower spine and disk degeneration. Mr. Shoemaker's doctor provided him with a 30-day prescription for vicodin. Mr. Shoemaker completed his physical therapy program at the end of September. Mr. Shoemaker last met with a back surgeon on September 28, 2011. The surgeon recommended that Mr. Shoemaker continue with machine-based strengthening and mobility exercise at the medical facility.

Mr. Shoemaker began new full-time, temporary employment with Select Staffing on September 29, 2011 and continued in that employment at the time of the appeal hearing.

REASONING AND CONCLUSIONS OF LAW:

Workforce Development rule 871 IAC 24.1(113) provides as follows:

Separations. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.

a. Layoffs. A layoff is a suspension from pay status initiated by the employer without prejudice to the worker for such reasons as: lack of orders, model changeover, termination of seasonal or temporary employment, inventory-taking, introduction of laborsaving devices, plant breakdown, shortage of materials; including temporarily furloughed employees and employees placed on unpaid vacations.

b. Quits. A quit is a termination of employment initiated by the employee for any reason except mandatory retirement or transfer to another establishment of the same firm, or for service in the armed forces.

c. Discharge. A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.

d. Other separations. Terminations of employment for military duty lasting or expected to last more than 30 calendar days, retirement, permanent disability, and failure to meet the physical standards required.

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.

When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

The weight of the evidence establishes that Mr. Shoemaker was discharged from the assignment with Winegard and from the employment with Team Staffing Solutions on August 22 for absences related to an ongoing back condition. The weight of the evidence indicates that Mr. Shoemaker properly reported the final three absences that triggered the discharge from the assignment and the

end of the employment relationship with Team Staffing Solutions. The evidence establishes a discharge from Team Staffing based on the discharge from the Winegard assignment and based on Team Staffing's decision not to attempt to place Mr. Shoemaker in any further assignments until the back issue was resolved. The evidence fails to establish that Mr. Shoemaker, at any point, expressed an intention to separate from the assignment at Winegard or the employment with Team Staffing.

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.

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

In order for a claimant's absences to constitute misconduct that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant's *unexcused* absences were excessive. See 871 IAC 24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the evidence must first establish that the most recent absence that prompted the decision to discharge the employee was unexcused. See 871 IAC 24.32(8). Absences related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness is a form of absence. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

Employers may not graft on additional requirements to what is an excused absence under the law. See Gaborit v. Employment Appeal Board, 743 N.W.2d 554 (Iowa Ct. App. 2007). For example, an employee's failure to provide a doctor's note in connection with an absence that was due to illness properly reported to the employer will not alter the fact that such an illness would be an excused absence under the law. Gaborit, 743 N.W.2d at 557.

For the reasons set forth above, the administrative law judge concludes that the claimant was discharged based on absences that were excused absences under the applicable law. The discharge was not for misconduct and would not disqualify Mr. Shoemaker for unemployment insurance benefits. Mr. Shoemaker would be eligible for benefits, provided he was otherwise eligible. The employer's account may be charged for benefits.

Iowa Code section 96.4-3 provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

871 IAC 24.22(1)a 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.

(1) Able to work. An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.

a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

871 IAC 24.22(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.

The weight of the evidence indicates that Mr. Shoemaker has been under the care of one or more doctors for a significant back condition since he established his claim for benefits. He has been subjected to xrays, an ultrasound, and an MRI. He has been referred to physical therapy. He has been prescribed pain medication. Most recently, he has been counseled by a back surgeon to continue with rehabilitative therapy at the surgeon's office. All of this points to a serious medical condition. Mr. Shoemaker has provided no medical documentation to indicate that he has been released to perform full-time work since he filed his claim for benefits. In light of the testimony and in the absence of an appropriate medical release, the administrative law judge must conclude that Mr. Shoemaker has not met the work ability and availability requirements since he established his claim for benefits. See 871 IAC 24.23(34) and (35). The fact that Mr. Shoemaker recently obtained new employment does not make up for the absence of medical documentation indicating he has been released to return to work. The new full-time employment does, however, create a second basis for concluding that Mr. Shoemaker does not meet the work availability requirements of the law. This is because the full-time employment effectively precludes Mr. Shoemaker from being available for other employment. See 871 IAC 24.23(23). Benefits are denied effective August 21, 2011 based on the able and available disqualification. The disqualification continued as of the October 13, 2011 appeal hearing.

DECISION:

The Agency representative's September 13, 2011, reference 01, decision is modified as follows. The claimant was discharged for no disqualifying reason on August 22, 2011. The discharge would not disqualify the claimant for benefits. The claimant would be eligible for benefits, provided he met all other eligibility requirements. The employer's account may be charged. The claimant is however disqualified for benefits effective August 21, 2011, because he has not met the work ability and availability requirements since he established his claim for benefits. The disqualification continued as of the October 13, 2011 appeal hearing.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw