

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

PERRY R GAMBLIN
Claimant

ALPHA SERVICES INC
Employer

APPEAL 16A-UI-13012-LJ-T
ADMINISTRATIVE LAW JUDGE
DECISION

OC: 11/13/16
Claimant: Appellant (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant filed an appeal from the December 1, 2016, (reference 01) unemployment insurance decision that denied benefits based upon a determination that claimant did not meet his burden of proving he had good cause to leave his employment that was attributable to his employer. The parties were properly notified of the hearing. A telephone hearing was held on December 27, 2016. The claimant, Perry R. Gamblin, participated, and Michelle Gamblin also participated. The employer, Alpha Services, Inc., participated through Michelle Pearson, human resources; and Ricco Cooper, site manager. Claimant's Exhibits A and B were received and admitted into the record.

ISSUE:

Did claimant voluntarily leave the employment with good cause attributable to the employer or did employer discharge the claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time, most recently as a working supervisor, from approximately May 28, 2007 until November 16, 2016, when he was discharged for failure to return to work after an approved leave of absence.

Claimant last reported to work in September 2016, after which point he went on a medical leave of absence. Claimant testified that he was exposed to carbon monoxide in his workplace, and this exposure led to his leave of absence. The employer denies that any exposure was dangerous or unhealthy for claimant. Cooper testified that OSHA came onsite and conducted an inspection and found no issues with the carbon monoxide levels. Claimant had some contact with Pearson during his medical leave, though the parties provided conflicting testimony as to the substance of their conversations. Pearson and Cooper testified that claimant's approved leave of absence ended on November 14, 2016, and he was scheduled to return to work on that day.

On October 27, 2016, claimant sent a text message to Cooper and asked whether, if he was released to return to work, there was anything other than his current job that he could do. (Exhibit B) Cooper replied that mostly all of the available work was inside the Deere plant. On November 13, claimant sent a text message to Cooper and stated that his doctor told him it was not in his best interest to return to work. (Exhibit B) Claimant told Cooper to call or text him if he had any work outside the plant. Claimant did not return to work on November 14, nor did he call in and report that he would be absent. Claimant did not provide the employer with any documentation showing his doctor instructed him not to return to work.

Claimant testified that in August 2016, his doctor instructed him not to return back to work due to carbon monoxide exposure. Claimant subsequently returned to work for two weeks, got sick, and took additional medical leave. Claimant provided one page of documentation from a medical provider. (Exhibit A) While it states that the author reviewed his medical file and found there may be cause to keep claimant out of his work environment, it does not identify the medical provider and there is no indication claimant provided any medical documentation to the employer.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant did not quit but was discharged from employment for disqualifying misconduct. Benefits are withheld.

Iowa Code §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.

A voluntary quitting means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer and requires an intention to terminate the employment. *Wills v. Emp't Appeal Bd.*, 447 N.W. 2d 137, 138 (Iowa 1989); see also Iowa Admin. Code r. 871-24.25(35). A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980). Where a claimant walked off the job without permission before the end of his shift saying he wanted a meeting with management the next day, the Iowa Court of Appeals ruled this was not a voluntary quit because the claimant's expressed desire to meet with management was evidence that he wished to maintain the employment relationship. Such cases must be analyzed as a discharge from employment. *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438 (Iowa Ct. App. 1992).

Here, claimant provided a text message he sent to Cooper demonstrating an intent to remain employed. The employer has not met its burden of showing claimant voluntarily quit his employment. Therefore, this case will be analyzed as a discharge from employment and the employer has the burden of showing claimant was separated for disqualifying misconduct.

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.

Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness cannot constitute work-connected misconduct since they are not volitional, even if the employer was fully within its rights to assess points or impose discipline up to or including discharge for the absence under its attendance policy. Iowa Admin. Code r. 871-24.32(7); *Cosper*, supra; *Gaborit v. Emp't Appeal Bd.*, 734 N.W.2d 554 (Iowa Ct. App. 2007). Medical documentation is not essential to a determination that an absence due to illness should be treated as excused. *Gaborit*, supra. 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. Iowa Admin. Code r. 871-24.32(7) (emphasis added); see *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 190, n. 1 (Iowa 1984) holding "rule [2]4.32(7)...accurately states the law."

The requirements for a finding of misconduct based on absences are therefore twofold. First, the absences must be excessive. *Sallis v. Emp't Appeal Bd.*, 437 N.W.2d 895 (Iowa 1989). The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins* at 192. Second, the absences must be unexcused. *Cosper* at 10. The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused either because it was not for "reasonable grounds," *Higgins* at 191, or because it was not "properly reported," holding excused absences are those "with appropriate notice." *Cosper* at 10.

An employer's point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits. However, an employer is entitled to expect its employees to report to work as scheduled or to be notified as to when and why the employee is unable to report to work. Here, claimant did not report to work on November 14 and he was scheduled to do. His medical leave had expired, and he did not provide the employer with any documentation excusing his failure to return to work when scheduled. Claimant was absent for three consecutive days without calling in or providing the employer with any documentation extending his leave of absence. Claimant's failure to return to work is disqualifying misconduct. Benefits are withheld.

DECISION:

The December 1, 2016, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Elizabeth A. Johnson
Administrative Law Judge

Decision Dated and Mailed

lj/