

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

REBECCA L SANOW

Claimant

APPEAL 15A-UI-05591-KC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

ADVANCE SERVICES INC

Employer

OC: 04/12/15

Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1)d – Voluntary Quitting/Illness or Injury

STATEMENT OF THE CASE:

The claimant filed an appeal from the May 8, 2015, (reference 01) unemployment insurance decision that denied benefits based upon voluntary quitting. The parties were properly notified about the hearing. A telephone hearing was held on June 17, 2015. The claimant participated, as did witness Sarah Swick, her former supervisor. The employer participated through Michael Payne, Risk Manager.

ISSUES:

Did the claimant voluntarily leave the employment with good cause attributable to employer or did the employer discharge her from employment 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: The claimant was employed full time as a general laborer beginning April 2, 2014, and was separated from employment on August 20, 2014. She last worked on August 19, 2014.

The claimant's most recent assignment started on August 11, 2014 with Pella Windows. It was an indefinite assignment. On August 19, 2014, the claimant injured her knee at work. Her knee began to swell and she had difficulty with weight-bearing. She told Trudy Witrowsky, a supervisor with Advanced Services at the Pella worksite, about the injury, as she had been advised. Witrowsky told her to go home, ice the leg and call back when she could work. On August 20, 2014, the claimant called Witrowsky and told her that she could not bear weight on her left leg. The claimant spoke with Witrowsky three times on August 20, 2014 regarding her physical status. Witrowsky advised the claimant that if she missed more than three days she would have to reapply for the position. Witrowsky did not request medical documentation.

On August 29, 2014, the claimant called the employer Advanced Services and learned that the position had been filled. She had not been able to work in a standing position before that date. She assumed that she would return to work upon recovery from her work-related injury. The

claimant did not file a workers' compensation claim because she was told that was not possible. She requested an assignment in an office position.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant did not quit but was discharged for no disqualifying reason.

Iowa Code § 96.5(1)d 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. But the individual shall not be disqualified if the department finds that:

d. The individual left employment because of illness, injury or pregnancy upon the advice of a licensed and practicing physician, and upon knowledge of the necessity for absence immediately notified the employer, or the employer consented to the absence, and after recovering from the illness, injury or pregnancy, when recovery was certified by a licensed and practicing physician, the individual returned to the employer and offered to perform services and the individual's regular work or comparable suitable work was not available, if so found by the department, provided the individual is otherwise eligible.

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(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Disqualification from benefits pursuant to Iowa Code § 96.5(1) requires a finding that the quit was voluntary. *Geiken v. Lutheran Home for the Aged Ass'n*, 468 N.W.2d 223, 226 (Iowa 1991). An absence is not voluntary if returning to work would jeopardize the employee's health. *Wilson Trailer Co. v. Iowa Emp't. Sec. Comm'n*, 168 N.W.2d 771, 775-6 (Iowa 1969).

The claimant's workplace injury was the reason she could not return to work for several days. She followed the instructions she was given by the employer's onsite supervisor about going home and not returning to work until she was able. When she was able to work, she called the employer and learned that her position had been filled. Her assignment had an indeterminate ending. The employer did not request specific medical documentation before the claimant would be permitted to return to work.

The employer filled her position while the claimant was out on reported medical leave due to a work-related injury. Where an employee did not voluntarily quit but was terminated while absent under medical care, the employee is allowed benefits and is not required to return to the employer and offer services pursuant to the subsection (d) exception of Iowa Code § 96.5(1). *Prairie Ridge Addiction Treatment Servs. v. Jackson and Emp't Appeal Bd.*, 810 N.W.2d 532 (Iowa Ct. App. 2012).

The claimant is not required to return to the employer to offer services after the medical recovery because she has already been involuntarily terminated from the employment while under medical care. The involuntary termination from employment while under medical care was a discharge from employment. Thus, the burden of proof shifts to the employer.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). 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).

Inasmuch as the injury is considered work related for the purposes of unemployment insurance benefits only, even with restrictions the claimant has established her ability to work. Because the employer had no work available or was not willing to accommodate the work restrictions, benefits are allowed.

DECISION:

The May 8, 2015, (reference 01) decision is reversed. The claimant did not quit but was discharged for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

Kristin A. Collinson
Administrative Law Judge

Decision Dated and Mailed

kac/css