

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

DYLAN R DRAKE
Claimant

TYSON FRESH MEATS INC
Employer

APPEAL 21A-UI-08367-LJ-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 01/31/21
Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge from Employment
Iowa Code § 96.5(1) – Voluntary Quit from Employment
Iowa Code § 96.4(3) – Ability to and Availability for Work

STATEMENT OF THE CASE:

On March 24, 2021, the claimant, Dylan R. Drake, filed an appeal from the March 16, 2021 (reference 01) unemployment insurance decision that denied benefits based upon a determination that claimant voluntarily quit his employment on October 24, 2020. The parties were properly notified of the hearing. A telephonic hearing was held at 8:00 a.m. on Monday, June 7, 2021. The claimant, Dylan R. Drake, participated. The employer, Tyson Fresh Meats, Inc., did not register a participant and did not participate in the hearing. No exhibits were offered during the hearing.

ISSUES:

Did the claimant quit the employment without good cause attributable to the employer or was he discharged for reasons related to job misconduct sufficient to warrant a denial of unemployment benefits?

Is the claimant able to and available for work?

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 forklift operator, from February 24, 2020, until October 24, 2020, when he was discharged.

Claimant last reported to work and performed his job sometime in October 2020. He was then absent for a substantial period of time due to COVID-19. Claimant explained that he attended a family function and was exposed to a relative who later tested positive for COVID-19. Therefore, claimant went into self-quarantine to prevent exposing his coworkers and the food products at work to the virus.

Claimant called the employer's automated attendance system each day to report that he would not be at work. The system does not give employees an opportunity to state a reason for being

absent. Claimant also spoke to HR several times to explain what was happening and to update them on his condition. Claimant found them to be understanding and supportive, and during the last conversation he had with them, they discussed claimant returning to work.

On Saturday, October 24, claimant's phone was lost. He heard from his sister, who is his emergency contact on file with the employer, that the employer had fired him. Claimant had no prior knowledge that his job was in jeopardy due to absences or any other reason.

Claimant has had no exposure to COVID-19 since opening his claim for benefits effective January 31, 2021. He has been healthy, in town, and available to accept employment. Claimant has actively sought employment and has applied for jobs involving driving, delivery, and forklift operating. Claimant has also applied for plumbing positions, as he has plumbing experience. Claimant hopes to obtain his CDL which will open up additional job possibilities.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant's separation is not disqualifying. Further, the administrative law judge concludes claimant is able to and available for work.

The first issue to be determined is whether claimant voluntarily quit his employment or was discharged.

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.

Iowa unemployment insurance law disqualifies claimants who voluntarily quit employment without good cause attributable to the employer or who are discharged for work-connected misconduct. Iowa Code §§ 96.5(1) and 96.5(2)a. The burden of proof rests with the employer to show that the claimant voluntarily left the employment. *Irving v. Empl. App. Bd.*, 15-0104, 2016 WL 3125854, (Iowa June 3, 2016). A voluntary quitting of employment requires that an employee exercise a voluntary choice between remaining employed or terminating the employment relationship. *Wills v. Emp't Appeal Bd.*, 447 N.W.2d 137, 138 (Iowa 1989); *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438, 440 (Iowa Ct. App. 1992). It 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 there is no expressed intention or act to sever the relationship, the case must be analyzed as a discharge from employment. *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438 (Iowa Ct. App. 1992).

Here, there is no evidence in the record that claimant severed the employment relationship. Rather, claimant's unchallenged testimony established that the employer chose to end claimant's employment. Therefore, this case will be analyzed as a discharge, and the employer bears the burden of establishing disqualifying misconduct.

The next issue to be determined is whether claimant was discharged for disqualifying, job-related 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.

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *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).

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*, 321 N.W.2d at 6; *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*, 734 N.W.2d at 554. 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.

The employer has not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Here, claimant's final absence was related to his self-quarantine due to exposure to COVID-19. This is reasonable grounds to be absent from work. As the last absence was related to reasonable grounds, no final or current incident of unexcused absenteeism occurred which establishes

work-connected misconduct. Since the employer has not established a current or final act of misconduct, the history of other incidents need not be examined. Accordingly, benefits are allowed based on this separation.

The final issue to be determined is whether claimant is able to and available for work.

Iowa Code § 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".

Iowa Admin. Code r. 871-24.22(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.

Here, claimant is physically able for work. He has been available for work since opening his claim at the end of January 2021. Claimant has actively and earnestly sought work each week he filed for benefits. The administrative law judge finds claimant is able to and available for work. Benefits are allowed.

DECISION:

The March 16, 2021 (reference 01) unemployment insurance decision is reversed. Claimant did not quit but was discharged from employment for no disqualifying reason. Claimant is able to and available for work. Benefits are allowed, provided he is otherwise eligible.



Elizabeth A. Johnson
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June 21, 2021
Decision Dated and Mailed

lj/ol