

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

PATRICK K MUSOY
Claimant

TYSON FRESH MEATS INC
Employer

APPEAL 16A-UI-07241-LJ-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 06/05/16
Claimant: Appellant (1)

Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(7) – Excessive Unexcused Absenteeism

STATEMENT OF THE CASE:

The claimant filed an appeal from the June 27, 2016, (reference 01) unemployment insurance decision that denied benefits based upon a determination that claimant voluntarily quit due to a non-work-related illness or injury. The parties were properly notified of the hearing. A telephone hearing was held on July 19, 2016. The claimant, Patrick K. Musoy, participated. The employer, Tyson Fresh Meats, Inc., participated through Kristi Rossiter, HR employment 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 as a ham skinner from April 29, 2014, until this employment ended on June 1, 2016, when he quit.

Claimant reported to Health Services on May 18, 2016, complaining of knee pain due to a non-work-related automobile accident. That day, Nurse Angela Cramer told claimant to see his personal doctor and return to work with a doctor's note showing he was capable of working. Nurse Cramer also instructed claimant to call in each day until he brought in his doctor's note, reporting the reason for his absence.

On May 26, 2016, claimant's doctor faxed a note to the employer. (Exhibit A) This note states claimant was seen by the doctor that day and can return to work without restrictions. This note does not address the reason for claimant's absences on May 19 through May 25, and claimant did not call in those days to report he would not be at work. Claimant came to work on May 30, 2016, and brought another copy of the doctor's note. At this time, the employer would generally tell the employee that he had been discharged, as he was a no-call/no-show for multiple consecutive days. However, claimant was a good worker, and the employer gave him the

benefit of the doubt. Rossiter testified that Saul, claimant's supervisor, spoke with him and instructed him to get documentation regarding the reason for his absences on May 19 through 25 in order to return to work. Claimant never returned to work after this conversation, and no medical provider submitted documentation regarding claimant's absences for the dates in question.

Claimant testified that on May 30, Saul told him that he was discharged. Claimant testified he tried to call in every day that he was absent, but his badge was deactivated so he could not use the automated call-in system. Rossiter contests this. She testified that claimant's badge would have worked during that time. Additionally, Rossiter explained that he could have called in to her or someone else in HR directly, rather than use the automated system. Alternatively, claimant could have reported to the worksite and spoken with someone.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was not discharged but voluntarily quit his employment without good cause attributable to the employer. Benefits are withheld.

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 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 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). The claimant has the burden of proving that the voluntary leaving was for good cause attributable to the employer. Iowa Code § 96.6(2) (amended 1998). Generally, when an individual mistakenly believes they are discharged from employment, but was not told so by the employer, and they discontinue reporting for work, the separation is considered a quit without good cause attributable to the employer. *LaGrange v. Iowa Dep't of Job Serv.*, (No. 4-209/83-1081, Iowa Ct. App. filed June 26, 1984).

This case rests in part on the credibility of the parties. It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made

inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds Rossiter provided more credible testimony than claimant. Rossiter's statements were consistent and reasonable. In contrast, claimant made several contradictory statements. Additionally, it is unclear why claimant did not take any steps to reach out to the human resources department directly if, in fact, his badge was not working as early as May 19. It is difficult to believe that claimant continued to try and call in each day and received the same error in response each day and never tried another method of communicating with the employer.

In this case, claimant mistakenly believed that the employer discharged him from employment, and he stopped reporting to work. However, Rossiter credibly testified that claimant was not discharged and was able to return to work, provided he produce documentation justifying his absences from May 19 through May 25. Since claimant did not follow up with management personnel or the owner, and his assumption of having been fired was erroneous, his failure to continue reporting to work was an abandonment of the job. Benefits are withheld.

Alternatively, this case could be analyzed as a discharge from employment. 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*, 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. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins*, supra.

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 neither reported to work as scheduled nor notified the employer that he was not able to report to work. When claimant returned on May 30, the employer could have ended his employment. However, Rossiter credibly testified that the employer gave him an opportunity to return with a doctor's note explaining his absences between May 19 and May 25. Claimant never returned with such a note. Additionally, claimant never reported any of his absences after May 30 or submitted any documentation from a medical provider explaining his whereabouts. Even if claimant had never been warned for attendance concerns in the past, his failure to provide a doctor's note for his absences between May 19 and 25 after being instructed to do so, coupled with his failure to return to work or report his absences after May 30, is disqualifying misconduct. Under either analysis, benefits are withheld.

DECISION:

The June 27, 2016, (reference 01) unemployment insurance decision is affirmed. Claimant voluntarily quit his employment without good cause attributable to the employer. 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 Johnson
Administrative Law Judge

Decision Dated and Mailed

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