

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JOHN M VAN EATON
Claimant

AABLE PEST CONTROL INC
Employer

APPEAL 15A-UI-09262-CL-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 07/26/15
Claimant: Appellant (3)

Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.4(3) – Ability to and Availability for Work
Iowa Admin. Code r. 871-24.22(2) – Able & Available - Benefits Eligibility Conditions

STATEMENT OF THE CASE:

The claimant filed an appeal from the August 13, 2015, (reference 01) unemployment insurance decision that denied benefits based upon a voluntary quit. The parties were properly notified about the hearing. A telephone hearing was held on September 2, 2015. Claimant participated. Employer participated through operations manager, Lori Price.

ISSUES:

Did claimant voluntarily leave the employment with good cause attributable to employer or did employer discharge claimant for reasons related to job misconduct sufficient to warrant a denial of 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 as a technician from March 16, 2014, and was separated from employment on January 16, 2015, when he was terminated.

In mid-December 2014, claimant injured his lower back. It was not a work-related injury. On January 16, 2015, claimant informed employer that he could no longer perform the essential functions of the job due to his back pain. Claimant informed employer he needed to have surgery on his back and the recovery would take anywhere from three to six months. Employer informed claimant he could reapply for his position when he was fully released.

Claimant underwent back surgery on February 2, 2015. Claimant's physician has not given him a full release to return to work. Claimant's physician issued restrictions of no repetitive bending, a lifting restriction of 50 pounds, and no prolonged standing or sitting. Because of these restrictions, claimant is unable to perform the essential functions of the job as a technician.

Claimant is applying for jobs as a sales representative, but has no experience working in sales.

REASONING AND CONCLUSIONS OF LAW:

The first issue is whether claimant was terminated for misconduct or voluntarily resigned without good cause attributable to the employer. 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). Claimant did not intend to quit his employment. Thus, I find he was terminated.

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).

Claimant was terminated because he was no longer able to perform the job due to medical reasons. Claimant was not terminated for misconduct.

The second issue is whether claimant is able 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 § 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in § 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 § 96.5, subsection 3 are waived if the individual is not disqualified for benefits under § 96.5, subsection 1, paragraph "h".

Iowa Admin. Code r. 871-24.22(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.

Here, due to his medical restrictions, claimant is not able and available to work. Claimant acknowledges he physically cannot perform the position of technician. Claimant states he is seeking sales positions. However, sales positions also require continuous standing and/or sitting. Additionally, claimant is not qualified for sales positions as he has no sales experience.

The court in *Gilmore v. Empl. Appeal Bd.*, 695 N.W.2d 44 (Iowa Ct. App. 2004) noted that:

"Insofar as the Employment Security Law is not designed to provide health and disability insurance, only those employees who experience illness-induced separations that can fairly be attributed to the employer are properly eligible for unemployment benefits." *White v. Emp't Appeal Bd.*, 487 N.W.2d 342, 345 (Iowa 1992) (citing *Butts v. Iowa Dep't of Job Serv.*, 328 N.W.2d 515, 517 (Iowa 1983)).

Since claimant is unable to perform his work duties due to a personal injury and the employer is not obligated to accommodate a non-work-related injury, he has not established his ability to or availability for work.

DECISION:

The August 13, 2015, (reference 01) unemployment insurance decision is modified in favor of respondent. The claimant is not able to work and available for work effective January 16, 2015. Benefits must be denied and are withheld until such time as claimant obtains a full release to return to regular duties without restriction.

Christine A. Louis
Administrative Law Judge
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Decision Dated and Mailed

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