

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

JORDAN M GELLERSTEDT
Claimant

APPEAL NO. 09A-UI-14747-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**FIFTH DAY PEORIA LLC
TGI FRIDAYS**
Employer

OC: 09/06/09
Claimant: Appellant (2-R)

871 IAC 24.1(113) – Layoff

STATEMENT OF THE CASE:

Jordan Gellerstedt filed a timely appeal from the September 29, 2009, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on October 29, 2009. Mr. Gellerstedt participated personally and was represented by Attorney Stephen Stoll. Amanda Strauss, Office Manager, represented the employer. The administrative law judge took official notice of the documents submitted or generated in connection with the September 28, 2009 fact-finding interview.

ISSUE:

Whether Mr. Gellerstedt separated from the employment for a reason that disqualifies him for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Jordan Gellerstedt started his employment with TGI Fridays in Davenport on June 18, 2008 and last performed work for the employer on or about August 25, 2008. Mr. Gellerstedt was a full-time server. Amy Sparbel was the General Manager of the Davenport store. Ms. Sparbel separated from the employer in January 2009. Bob Curtis was another manager who worked at the Davenport store. Mr. Curtis recently separated from the employer. The employer witness lacks personal knowledge concerning Mr. Gellerstedt's employment and separation from the employment.

Toward the end of August 2008, Mr. Gellerstedt notified Ms. Sparbel of his need to participate in voluntary 30-day in-patient alcohol treatment program. Mr. Gellerstedt requested a medical leave so that he could participate in the treatment program. Though Mr. Gellerstedt had not worked for the employer long enough to qualify for leave under the Family and Medical Leave Act (FMLA), Ms. Sparbel approved the request for a 30-day medical leave. Ms. Sparbel told Mr. Gellerstedt that the employer would hold his position for him.

Upon successful completion of the in-patient treatment program, Mr. Gellerstedt returned to Ms. Sparbel to discuss his return to the employment. At that time, Ms. Sparbel told Mr. Gellerstedt that she had not held his position for him and that the employer did not have work for him. The employer had processed separation documentation on August 31, 2009.

REASONING AND CONCLUSIONS OF LAW:

Workforce Development rule 871 IAC 24.1(113) provides as follows:

Separations. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.

a. Layoffs. A layoff is a suspension from pay status initiated by the employer without prejudice to the worker for such reasons as: lack of orders, model changeover, termination of seasonal or temporary employment, inventory-taking, introduction of laborsaving devices, plant breakdown, shortage of materials; including temporarily furloughed employees and employees placed on unpaid vacations.

b. Quits. A quit is a termination of employment initiated by the employee for any reason except mandatory retirement or transfer to another establishment of the same firm, or for service in the armed forces.

c. Discharge. A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.

d. Other separations. Terminations of employment for military duty lasting or expected to last more than 30 calendar days, retirement, permanent disability, and failure to meet the physical standards required.

In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 698, 612 (Iowa 1980) and Peck v. EAB, 492 N.W.2d 438 (Iowa App. 1992). In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer. See 871 IAC 24.25.

When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

The employer did not provide testimony from anyone with personal knowledge of Mr. Gellerstedt's 2008 employment or separation from the employment. The employer witness was in recent contact with Manager Bob Curtis, who apparently had some personal knowledge of Mr. Gellerstedt's 2008 employment. The employer could have made Mr. Curtis available for the hearing, but did not. The weight of the evidence does not support the employer's assertion that Mr. Gellerstedt was suspended in connection with the August 16, 2008 Notation of Incident. The document indicates on its face that such suspension would only be considered at some future point if attendance issues continued. Mr. Gellerstedt was the only witness with firsthand knowledge of his employment.

The weight of the evidence indicates that Mr. Gellerstedt requested and was approved for a medical leave of absence. At the end of the approved leave, Mr. Gellerstedt returned and was told the employer would not re-employ him. When a worker returns at the end of an approved leave of absence and the employer elects not to provide further employment, the worker is deemed laid off from the employment. See 871 IAC 24.22(2)(j). The administrative law judge concludes that Mr. Gellerstedt was laid off and did not voluntarily quit the employment.

Iowa Code section 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 Code section 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.

Because Mr. Gellerstedt was laid off, the separation from the employment did not disqualify him for unemployment insurance benefits. Mr. Gellerstedt is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

Iowa Code section 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".

Mr. Gellerstedt's testimony and current commitment to a half-way house facility raises the question of whether Mr. Gellerstedt has met the work availability requirements of Iowa Code section 96.4(3) since he established his claim for benefits. The matter will be remanded to the Claims Division for determination of that issue.

DECISION:

The Agency representative's September 29, 2009, reference 01, decision is reversed. The claimant was laid off. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

This matter is remanded to the Claims Division for determination of whether the claimant has met the availability requirements of Iowa Code section 96.4(3) since he established his claim for benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css