

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**ROBERT P DENDY**  
Claimant

**APPEAL NO. 09A-UI-01493-LT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**DECKER TRUCK LINE INC**  
Employer

**OC: 12/28/08 R: 12**  
**Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

The claimant filed a timely appeal from the January 20, 2009, reference 01, decision that denied benefits. After due notice was issued, a telephone conference hearing was held on February 18, 2009. Claimant participated. Employer participated through Doreen Coppinger and Sandy Loany and was represented by John Fatino, Attorney at Law. Claimant's Exhibit A was received. Employer's Exhibit 1 was received.

**ISSUE:**

The issue is whether quit the employment without good cause attributable to the employer or if he was discharged for reasons related to job misconduct sufficient to warrant a denial of unemployment benefits

**FINDINGS OF FACT:**

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant most recently worked full-time as an over-the-road driver and was employed from September 30, 2004 until December 3, 2008 when he was discharged. His last day worked was September 3, 2008. On September 4 he requested Family Medical Leave Act (FMLA) leave effective September 13, 2008 and agreed to use two weeks' vacation pay for first two weeks' FMLA. The FMLA was set to expire on November 27, 2008. On September 16, 2008 claimant had a triple bypass and on November 18 he became dizzy while running on a treadmill at home. He checked himself into a local hospital and tests were negative but his local treating physician Dr. Lee, a DOT certified cardiologist, had him wear a heart monitor about the size of a beeper for thirty days. On November 26 claimant had a follow-up visit with Dr. Lee, who released him to return to work without restriction because of a clear EKG. His medical documentation was faxed to the company physician, Dr. Snook, on December 1, 2008. Because claimant had not undergone 30 days of the heart monitor testing employer would not allow claimant to return to work and terminated his employment because he was not fully released to return to work and his FMLA period had expired. He filed a claim for unemployment insurance benefits effective December 28, 2008, more than 30 days after the monitoring test began.

## 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 section 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.

871 IAC 24.25(35) provides:

Voluntary quit without good cause. 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 from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:

(35) The claimant left because of illness or injury which was not caused or aggravated by the employment or pregnancy and failed to:

- (a) Obtain the advice of a licensed and practicing physician;
- (b) Obtain certification of release for work from a licensed and practicing physician;
- (c) Return to the employer and offer services upon recovery and certification for work by a licensed and practicing physician; or
- (d) Fully recover so that the claimant could perform all of the duties of the job.

Although claimant did return to offer his services after the November 26 full medical clearance from his treating physician, employer refused to allow him to return to work. Given employer's argument that he was terminated from employment at the expiration of FMLA leave, the claimant was and is not required to return to the employer to offer services after the medical recovery because he had already been involuntarily terminated from the employment. Thus, the separation was a discharge.

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.

871 IAC 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.

Iowa Code section 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.

871 IAC 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.

Even accepting employer's argument that claimant was still under medical care at the expiration of the FMLA leave period, no misconduct has been established since absences due to reported illness are excused and claimant maintained adequate communication with employer about his medical status. Benefits are allowed, provided claimant is otherwise eligible. The record supports claimant's argument that he was fully medically able to work effective November 26, 2008.

**DECISION:**

The January 20, 2009, reference 01, decision is reversed. The claimant was discharged for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

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Dévon M. Lewis  
Administrative Law Judge

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Decision Dated and Mailed

dml/pjs