IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

THOMAS J PENISTON
Claimant

TEXAS ROADHOUSE HOLDINGS LLC
Employer

APPEAL NO: 14A-UI-06690-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 06/01/14
Claimant: Respondent (1)

Section 96.5-2-a – Discharge
Section 96.5-1 – Voluntary Leaving

STATEMENT OF THE CASE:

Texas Roadhouse Holdings, L.L.C. (employer) appealed a representative's June 18, 2014 decision (reference 01) that concluded Thomas J. Peniston (claimant) was qualified to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on July 21, 2014. Thomas Kuiper of Equifax/TALX Employer Services appeared on the employer's behalf and presented testimony from two witnesses, Robin Blommers and Brandi Webster. Based on the evidence, the arguments of the employer, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was there a disqualifying separation from employment either through a voluntary quit without good cause attributable to the employer or through a discharge for misconduct?

OUTCOME:

Affirmed. Benefits allowed if otherwise eligible.

FINDINGS OF FACT:

The claimant started working for the employer on June 10, 2013. He worked part time (about 20 hours per week) as a server at the employer's Coralville, Iowa restaurant. His last day of work was December 9, 2013.

The claimant was normally scheduled to work on Saturday, Sunday, and Monday. He had been scheduled for evening shifts on December 14 and December 15. On December 14 he was able to find someone to cover the first portion of his shift, but not the later portion of his shift. He called the employer at about 3:00 p.m. to report that he had not been able to find anyone to cover the portion of the shift from 4:00 p.m. to 9:00 p.m., and that he would not be able to work that shift because he was out of town for his daughter's birthday. The employer's policies

require that employees find their own coverage and that if they fail to do so and then do not work the shift themselves, they will be considered to have voluntarily quit by job abandonment.

On December 15 the claimant had found no one to cover for him and did not report for his shift. The employer called him at about 4:15 p.m., 15 minutes after the scheduled start time for the shift. The claimant indicated he would not be at work as he was still out of town for his daughter's wedding. The employer then indicated that he would not have a job to return to because of the employer's policy.

The claimant had not had prior absences or warnings for absences.

Agency records indicate that the claimant is not currently otherwise eligible due to a more recent separation from employment.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not eligible for unemployment insurance benefits if he quit the employment without good cause attributable to the employer or was discharged for work-connected misconduct. Iowa Code §§ 96.5-1; 96.5-2-a.

Rule 871 IAC 24.25 provides that, 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. A voluntary leaving of employment requires an intention to terminate the employment relationship and an action to carry out that intent. *Bartelt v. Employment Appeal Board*, 494 N.W.2d 684 (Iowa 1993); *Wills v. Employment Appeal Board*, 447 N.W.2d 137, 138 (Iowa 1989). The employer asserted that the claimant was not discharged but that he voluntarily quit by job abandonment by missing his shift on December 15 and not obtaining coverage. A three-day no-call/no-show in violation of company rule can be found to show an intent to quit. Rule 871 IAC 24.25(4). However, a one or two day no-call/no-show or absence does not establish this intent. The administrative law judge concludes that the employer has failed to satisfy its burden that the claimant voluntarily quit. Iowa Code § 96.6-2. As the separation was not a voluntary quit, it must be treated as a discharge for purposes of unemployment insurance. Rule 871 IAC 24.26(21).

The issue in this case is then whether the employer discharged the claimant for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue is not whether the employer was right or even had any other choice but to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. Rule 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa

1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. Rule 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, 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. Rule 871 IAC 24.32(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

The reason the employer effectively discharged the claimant was his two-day absence from work. Excessive unexcused absenteeism can constitute misconduct. Rule 871 IAC 24.32(7). While the two-day absence would be considered unexcused, these two days alone do not establish excessive unexcused absenteeism. The employer has not met its burden to show disqualifying misconduct. *Cosper*, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits because of this separation.

DECISION:

The representative's June 18, 2014 decision (reference 01) is affirmed. The claimant did not voluntarily quit and the employer did discharge the claimant but not for disqualifying reasons. The claimant would be qualified to receive unemployment insurance benefits, if he was otherwise eligible, which he currently is not.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

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