IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

KEMAL M MANDZIC Claimant **DEE ZEE INC** Employer	**APPEAL 16A-UI-11330-DL-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 09/25/16** **Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1)d – Voluntary Quitting/Illness or Injury
Iowa Admin. Code r. 871-24.25(35) – Separation Due to Illness or Injury

STATEMENT OF THE CASE:

The claimant filed an appeal from the October 13, 2016, (reference 01) unemployment insurance decision that denied benefits based upon voluntarily quitting the employment. The parties were properly notified about the hearing. A telephone hearing was held on November 3, 2016. Claimant participated through CTS Language Link Bosnian language interpreter and was represented by Christopher Coppola, Attorney at Law. Employer participated through human resource specialist Sarah Tew. Employer's Exhibit A was received. Claimant's Exhibits 1 through 5 were received.

ISSUES:

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 as a full-time machine operator from July 2002, through September 22, 2016. He injured his right hip, groin and back at work on February 11, 2015, and again on September 14, 2016, when a supervisor pulled him by his belt, he fell, he suffered a back strain injury and was seen at the emergency room. (Claimant's Exhibits 1 and 5) On July 25 he was released to light duty working eight hours per day with a five pound lifting restriction. (Employer's Exhibit A p. 5) Employer physician Curt Smith , D.O. of Iowa Ortho examined claimant on September 1, 2016, and released him to modified work with a five-pound lifting restriction and non-repetitive bending, twisting, kneeling, squatting and stooping. He was directed to sit, stand and walk as needed. (Claimant's Exhibit 4-8) He was allowed to work four hours per day from July 25 through September 20. (Employer's Exhibit A p. 4) The most recent work release without restriction and declaration of maximum medical improvement (MMI) was issued for the February 11 injury on September 20, 2016. (Employer's Exhibit A p. 2 and Claimant's Exhibit 3-17) On September 21 claimant told the employer he could work eight

hours per day but needed light duty work, which the employer did not have or did not offer. He refused to sign a voluntary quit separation form. (Employer's Exhibit A p. 1) He was unaware he could have filed for short-term disability or Family and Medical Leave Act (FMLA) leave and the employer did not suggest that or offer assistance. The employer and the insurance carrier were aware he was still under medical care for continuing pain involving the September 14, 2016, injury.

He filed petitions for the injuries before the Iowa Workers' Compensation Commissioner on September 7, 2016. (Claimant's Exhibit 1) A Functional Capacity Evaluation (FCE) was conducted at McFarland Clinic on October 3, 2016. (Claimant's Exhibit 2-1 through 2-7) Physical capabilities were also established. (Claimant's Exhibit 2-8 through 2-10) Claimant underwent an independent medical examination (IME) conducted by neurologist Irving Wolfe, D.O. on October 10, 2016, (Employer's Exhibit 3) and found maximum medical improvement (MMI) for the February 11, 2015, injury as September 20, 2016. (Claimant's Exhibit 3-17) He established light physical demands of work. (Claimant's Exhibit 3-17, 3-18)

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:
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> 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.

Disqualification from benefits pursuant to Iowa Code section 96.5(1) requires a finding that the quit was voluntary. *Geiken v. Lutheran Home for the Aged Ass'n*, 468 N.W.2d 223, 226 (Iowa 1991). An absence is not voluntary if returning to work would jeopardize the employee's health. A physician's work restriction is evidence an employee is not medically able to work. *Wilson Trailer Co. v. Iowa Emp't. Sec. Comm'n*, 168 N.W.2d 771, 775-6 (Iowa 1969).

Claimant's request for work consistent with his medical limitations, the employer's failure to advise him about short-term disability or FMLA as potential methods of retaining the employment and his refusal to sign the termination checklist indicating he quit establishes he was discharged and did not quit. Thus, the burden of proof remains with the employer.

Iowa Code section 96.5(2)a provides:

> **Causes for disqualification.**
>
> 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. *Reigelsberger v. Emp't Appeal Bd.*, 500 N.W.2d 64, 66 (Iowa 1993); *accord Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000).

Misconduct "must be substantial" to justify the denial of unemployment benefits. *Lee*, 616 N.W.2d at 665 (citation omitted). "Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of benefits." *Id.* (citation omitted). …the definition of misconduct requires more than a "disregard" it requires a "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." Iowa Admin. Code r. 871–24.32(1)(a) (emphasis added).

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 of proof in establishing disqualifying job misconduct. *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). 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).

Since at the time of the separation claimant was still under medical care with limitations for the September 14 injury, had not yet been released to return to work without restriction and no light

duty work was available or offered, no disqualifying reason for the separation has been established. Benefits are allowed, provided claimant is otherwise eligible.

Where an employee did not voluntarily quit but was terminated while absent under medical care, the employee is allowed benefits and is not required to return to the employer and offer services pursuant to the subsection d exception of Iowa Code section 96.5(1). *Prairie Ridge Addiction Treatment Servs. v. Jackson and Emp't Appeal Bd*., 810 N.W.2d 532 (Iowa Ct. App. 2012).

The claimant is not required to return to the employer to offer services after a full medical recovery because he has already been involuntarily terminated from the employment while under medical care.

DECISION:

The October 13, 2016, (reference 01) unemployment insurance decision is reversed. The claimant did not quit but was discharged for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

dml/pjs