

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

PHILLIP P GROSS
Claimant

APPEAL 16A-UI-08393-DB-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

HOFFMAN MANUFACTURING INC
Employer

**OC: 07/10/16
Claimant: Appellant (5)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant/appellant filed an appeal from the July 25, 2016 (reference 01) unemployment insurance decision that denied benefits based upon its determination that he voluntarily quit work on July 7, 2016 when he failed to report to work for three days in a row and did not notify his employer. The parties were properly notified of the hearing. A telephone hearing was held on August 30, 2016. The claimant, Phillip P. Gross, participated personally. The employer, Hoffman Manufacturing Inc., participated through President Jeffrey Hoffman.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Did claimant voluntarily quit the employment with good cause attributable to employer?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a shop employee and certified painter. He was employed from September 12, 2005 to July 8, 2016. His immediate supervisor was Mike Balch. Claimant worked Monday through Friday with occasional weekend overtime hours.

The employer does not have any written policy regarding attendance or absenteeism. The employer has a verbal policy in place that employees must notify their supervisor or Mr. Hoffman within an hour after their scheduled start time that they will be absent that day. Claimant was aware of this policy as he had called his supervisor in the past if he was going to be absent. The employer does not have a written or verbal policy in place regarding the fact that an employee is considered to voluntarily quit if they do not call in or show up for work for three consecutive work days.

On June 29, 2016 claimant was arrested and confined in jail until July 7, 2016. He did not work on June 30, 2016 as this was his scheduled day off. He was scheduled to work but did not work on July 1, July 5, July 6, July 7, or July 8, 2016.

On July 1, 2016 claimant's wife called Mr. Hoffman and stated that claimant would not be in to work on this date. She did not say why he would not be in to work or that he was confined in

jail. Mr. Hoffman found out that claimant was in jail when he heard the news over the radio on July 4, 2016. On July 5, 2016 many other employees heard this news as well and reported this to Mr. Hoffman. Claimant's daughter also works for this employer and she did not report that claimant was confined in jail and would not be able to work; however, she did pick up claimant's check for him on Friday, July 1, 2016.

Claimant was charged with two counts of possession of a controlled substance, one count of possession of drug paraphernalia, one count of carrying contraband into a correctional facility, and one count of operating a vehicle while intoxicated. Claimant has pled not guilty to the charges against him and no trial has been held at this time. The underlying acts leading to the charges against claimant occurred while claimant was off duty and off company property.

Claimant went to the employer's premises on Friday, July 8, 2016 to speak to Mr. Hoffman. Mr. Hoffman told him that he was being discharged for absenteeism and for drugs. Mr. Hoffman told claimant that he could not have this kind of behavior going on with his employees.

Claimant had received previous discipline during the course of his employment. Claimant received a three day suspension for a no call no show and a three day suspension for being in a car with another employee during break while that employee was smoking marijuana.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for job-related misconduct. Benefits are denied.

First, it must be determined whether the separation was a voluntary quitting or a discharge from employment.

Iowa Code §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.

Claimant has the burden of proving that the voluntary leaving was for good cause attributable to the employer. Iowa Code § 96.6(2). The employer has the burden of proving that a claimant's departure from employment was voluntary. *Irving v. Emp't Appeal Bd.*, No. 15-0104, 2016 WL 3125854 (Iowa June 3, 2016). "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". *Id.* (citing *Cook v. Iowa Dept. of Job Service*, 299 N.W.2d 698, 701 (Iowa 1986)).

The term "voluntary" requires volition and generally means a desire to quit the job. *Id.* (citing *Bartelt v. Emp't Appeal Bd.*, 494 N.W.2d 684, 686 (Iowa 1993); *Wills v. Emp't Appeal Bd.*, 447 N.W.2d 137, 138 (Iowa 1989); *Cook*, 299 N.W.2d at 701 (Iowa 1986); *Moulton v. Iowa Emp't Sec. Comm'n*, 34 N.W.2d 211, 213 (1948)). There must be substantial evidence to show that claimant's absence from work was voluntary. Incarceration, in and of itself, can never be considered volitional or voluntary. If the leaving was not voluntary, then there is no analysis into whether or not the employee left with good cause attributable to the employer because the case must be analyzed as a discharge. *Irving v. Emp't Appeal Bd.*, No. 15-0104, 2016 WL 3125854 (Iowa June 3, 2016)(citing *Ames v. Emp't Appeal Bd.*, 439 N.W.2d 669, 673-74)(Iowa 1989)(employees refusing to go to work and cross union picket line due to the risk of violence associated with crossing the picket line was not a voluntary quitting of employment)).

However, predicate acts that lead to incarceration can rise to a level of conduct which would disqualify a claimant from receiving benefits. *Id.* Those predicate acts must be volitional and must lead to an absence from the workplace which results in a loss of employment. *Id.* Further, the circumstances that led to the incarceration must establish volitional acts of a nature sufficient to allow a fact finder to draw the conclusion that the employee, by his or her intentional acts, has purposively set in motion a chain of events leading to incarceration, absence from work, and ultimate separation from employment. *Id.* Lastly, if an employee fails to notify the employer of the status of his or her incarceration, or engages in deception regarding the incarceration, that may result in a voluntary quit or disqualifying misconduct. *Id.* The analysis must also consider whether or not the employee was capable of notifying the employer of the status of the incarceration and the steps the employee took to notify the employer.

If the claimant's leaving of employment was voluntary, the next step is to analyze whether or not the claimant left for good cause attributable to the employer. Iowa Code § 96.6(2). "Good cause" for leaving employment must be that which is reasonable to the average person, not the overly sensitive individual or the claimant in particular. *Uniweld Products v. Indus. Relations Comm'n*, 277 So.2d 827 (Fla. Dist. Ct. App. 1973). If the claimant's leaving of employment was not voluntary, the case must be analyzed as a discharge case and the burden of proof falls to the employer. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

Claimant did not voluntarily leave his employment. Claimant did not desire to quit his job. Therefore, this case must be analyzed as a discharge.

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).

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and the employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

Iowa Admin. Code r.871-24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

In the context of disqualification for unemployment benefits based on misconduct, the question is whether the employee engaged in a "deliberate act or omission," conduct "evinced 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 conduct with "carelessness or negligence of such degree of recurrence as to manifest equal culpability." See Iowa Admin. Code r. 871 – 24.32(1)(a). Further, 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. See Iowa Admin. Code r. 871 – 24.32(7). However, excessive absences are not considered misconduct unless unexcused. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6, 10 (Iowa 1982). For example, 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); *Gaborit v. Emp't Appeal Bd.*, 743 N.W.2d 554 (Iowa Ct. App. 2007).

Claimant was arrested and unable to work due to his incarceration. Claimant immediately notified a family friend when he was arrested to make arrangements to pick up his vehicle. Claimant's wife called and reported claimant's absence on July 1, 2016 but did not state that he was incarcerated and would not be to work the following week. No contact was made by claimant or on behalf of claimant following July 1, 2016 until July 8, 2016. Claimant's daughter worked for this same employer but did not notify the employer that he would be absent due to incarceration. Mr. Hoffman was only notified of claimant's incarceration when he heard it over the radio. Mr. Hoffman had no way to know whether or not claimant was coming to work or not.

Claimant knew and understood the employer's verbal reporting policy for absenteeism as he had previously called prior to his scheduled shift start time to report previous absences. He had also received a three day suspension for a no call no show prior to this final incident. It was clear claimant knew that he had to either call to report his absence or have someone else call on his behalf and report each day he would be absent. He did not do this nor did he make arrangements for another person to notify the employer about each of his absences.

While claimant's incarceration was involuntary and his absences due to incarceration were for good cause, he did not properly notify the employer of his absences even though he could have asked someone to call the employer on his behalf on each day that he was going to be absent

due to incarceration. Claimant had to ability to make arrangements to have his vehicle safely returned but did not make arrangements to notify his employer that he would be absent. Claimant was absent without properly reporting those absences on July 5, 6, 7, and 8, 2016.

Excessive absenteeism has been found when there has been seven unexcused absences in five months; five unexcused absences and three instances of tardiness in eight months; three unexcused absences over an eight-month period; three unexcused absences over seven months; and missing three times after being warned. See *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 192 (Iowa 1984); *Infante v. Iowa Dep't of Job Serv.*, 321 N.W.2d 262 (Iowa App. 1984); *Armel v. EAB*, 2007 WL 3376929*3 (Iowa App. Nov. 15, 2007); *Hiland v. EAB*, No. 12-2300 (Iowa App. July 10, 2013); and *Clark v. Iowa Dep't of Job Serv.*, 317 N.W.2d 517 (Iowa App. 1982). Claimant's absences were unexcused because they were not properly reported. His four consecutive unexcused absences are excessive. As such, benefits are withheld.

DECISION:

The July 25, 2016 (reference 01) unemployment insurance decision denying benefits is modified with no change in effect. Claimant was discharged for job-related misconduct. Unemployment insurance benefits shall be withheld in regards to this employer until such time as claimant is deemed eligible.

Dawn R. Boucher
Administrative Law Judge

Decision Dated and Mailed

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