

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BARBARA J MERRITT
Claimant

APPEAL NO: 08A-UI-03350-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

STELLAR INDUSTRIES INC
Employer

OC: 10/07/07 R: 02
Claimant: Respondent (1)

Section 96.5-2-a – Discharge
Section 96.5-1 – Voluntary Leaving
Section 96.7-2-a(2) – Charges Against Employer’s Account

STATEMENT OF THE CASE:

Stellar Industries, Inc. (employer) appealed a representative’s March 28, 2008 decision (reference 07) that concluded Barbara J. Merritt (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 April 21, 2008. The claimant participated in the hearing. Pam Jones appeared on the employer’s behalf and presented testimony from one other witness, Dave Eibins. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

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? Is the employer’s account subject to charge?

FINDINGS OF FACT:

The claimant started working for the employer on October 22, 2007. She worked full time as a janitor in the employer’s equipment manufacturing business on a 2:00 p.m. to 10:30 p.m., Monday through Friday schedule. Her last physical day of work was February 5, 2008.

The claimant was undergoing military training which occasionally required her to be absent from work. She had been prescheduled and preapproved to be off for a training period in North Dakota from February 10 through February 25. In addition, in order to deal with a certification needed before that training, the claimant obtained additional orders for training in Mankato, Minnesota for February 7 and February 8, and used February 6 for travel and preparation.

There had not been a specific arrangement or plan set with the employer as to what day she would be returning to work. The employer had intended on discussing better communication and planning with the claimant for her absences upon her return, but had not said anything prior

to February 5. The employer determined unilaterally that the claimant could have off February 26 for travel but that it would expect her back to work as of February 27.

Due to poor weather in North Dakota and Minnesota, while the claimant did complete her training on February 25 she did not arrive back in Garner where she then lived and where the employer's business is located until February 26. Upon her arrival she discovered there had been several problems that had arisen during her absence including an issue with her landlord and some property damage and a legal issue with her daughter, as well as a legal issue relating to her own divorce. She spent the rest of the day February 26 and all of February 27 dealing with those problems, and did not think to call the employer to discuss when she was returning to work.

When the claimant did not report for work at 2:30 p.m. on February 27, the employer issued a letter indicating that it was taking her failure to return to work that day as a voluntary quit. There had not been any prior disciplinary action taken against the claimant.

The claimant established an unemployment insurance benefit year effective October 7, 2007. She filed an additional claim effective the week beginning February 24, 2008.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not eligible for unemployment insurance benefits if she quit the employment without good cause attributable to the employer or was discharged for work-connected misconduct.

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.

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 accompanied by an overt act of carrying out that intention. 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 she quit by job abandonment by not returning to work for her shift on February 27, 2008. However, ordinarily a one-day no-call, no-show does not constitute a voluntary quit by job abandonment. 871 IAC 24.25(4). Nor in the context of this case does the claimant's no-call, no-show for her shift February 27 demonstrate an intent to end her employment. 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. 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).

The focus of the definition of misconduct is on acts or omissions by a claimant that “rise to the level of being deliberate, intentional or culpable.” Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer’s interest, such as found in:
 - a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
 - b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:
 - a. Manifest equal culpability, wrongful intent or evil design; or
 - b. Show an intentional and substantial disregard of:
 1. The employer’s interest, or
 2. The employee’s duties and obligations to the employer.

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.

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.

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.

The reason the employer effectively discharged the claimant was her unexcused absence from work on February 27, 2008. Excessive unexcused absences can constitute misconduct, however, in order to establish the necessary element of intent, the final incident must have occurred despite the claimant's knowledge that the occurrence could result in the loss of her job. Cosper, supra; Higgins v. IDJS, 350 N.W.2d 187 (Iowa 1984). The claimant had not previously been warned that future absences could result in termination. Higgins, supra. 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.

The final issue is whether the employer's account is subject to charge. An employer's account is only chargeable if the employer is a base period employer. Iowa Code § 96.7. The base period is "the period beginning with the first day of the five completed calendar quarters immediately preceding the first day of an individual's benefit year and ending with the last day of the next to the last completed calendar quarter immediately preceding the date on which the individual filed a valid claim." Iowa Code § 96.19-3. The claimant's base period began July 1, 2006 and ended June 30, 2007. The employer did not employ the claimant during this time, and therefore the employer is not currently a base period employer and its account is not currently chargeable for benefits paid to the claimant.

DECISION:

The representative's March 28, 2008 decision (reference 07) is affirmed. The claimant did not voluntarily quit and the employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible. The employer's account is not subject to charge in the current benefit year.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs