IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

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Appeal Number: 05A-UI-01772-R
OC: 01/16/05 R: 02
Claimant: Appellant (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5-1 – Voluntary Quitting
Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant, Thomas N. Wisneski, filed a timely appeal from an unemployment insurance decision dated February 11, 2005, reference 01, denying unemployment insurance benefits to him. After due notice was issued, an in-person hearing was held in Des Moines, Iowa, at the claimant's request on March 22, 2005, with the claimant participating. The claimant was represented by Patricia Wengert, Attorney at Law. Dennis Munyon, John Fernandez, and Jim Coulson, were available to testify for the claimant, but not called because their testimony would have been unnecessary and repetitive. William Luke Seward, Executive Director, and Tonya Snider, Administrative Assistant to the Residence Director, participated in the hearing for the employer, Young Men's Christian Association.

On March 18, 2004, the claimant's attorney had hand delivered to the Appeals Section interrogatories for the employer. The interrogatories were sent by the Appeals Section on the same day to the employer certified mail return receipt requested. The interrogatories were received by the employer on March 21, 2005, a day before the hearing. The claimant's attorney had delivered interrogatories to the employer on March 17, 2005. The employer did not have sufficient time to answer the interrogatories prior to the hearing. At approximately 4:20 p.m., on Friday, March 18, 2005, the claimant's attorney called the administrative law judge and left a message to call her. The administrative law judge called the attorney at 4:33 p.m. on that day. The claimant's attorney requested a continuance to provide time for the employer to answer the interrogatories. However, both she and the claimant were available for the hearing at the time set. Because the appeal had been on file since February 17, 2005 and the notice for the hearing had been sent on March 11, 2005, the administrative law judge denied the request for a continuance because the claimant and his attorney had had sufficient time to prepare and file interrogatories before the hearing. The interrogatories could have, and should have, been filed contemporaneously with the appeal or any time thereafter. The administrative law judge therefore denied the request for a continuance, but informed the claimant's attorney that after the hearing on March 22, 2005, if additional evidence was necessary to decide the issues in the case, the administrative law judge could keep the record open and reschedule a hearing after any documents had been exchanged by the parties and/or to take additional evidence. The hearing was held and after the hearing the administrative law judge concluded that no further evidence was necessary for a proper resolution of this matter and so informed the parties. Because of this, there is no longer a need for the employer to answer the interrogatories and the interrogatories are now moot. The hearing was scheduled at 4:30 p.m. on March 22, 2005 and the claimant's attorney inquired about starting earlier. The administrative law judge informed the claimant's attorney that he could start earlier if the employer would consent. The administrative law judge called the employer and left a message for Stacy Haviland at 4:45 p.m. indicating that it would be possible to start the hearing at 3:30 p.m. instead of 4:30 p.m. Ms. Haviland called the administrative law judge at 3:27 p.m. on March 21, 2005 and indicated that a 3:30 p.m. start time would be acceptable to the employer. The administrative law judge called the claimant's attorney and informed her the hearing would start at 3:30 p.m. The hearing began when the record was opened at 3:34 p.m. and all necessary parties were present and participated in the hearing.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a full-time night auditor from January 20, 2003 until he separated from his employment on December 27, 2004. The claimant began employment part time, but became full time on June 9, 2003. At all material times hereto until November 1, 2004, the claimant reported directly to Kelli Foltz, Residence Director. At that time, the claimant was officially to report to Tonya Snider, Administrative Assistant to the Residence Director. However, the claimant was never officially informed of this and continued to consult with and report to Ms. Foltz. The claimant believed that at all material times hereto including after November 1, 2004 that his supervisor was Ms. Foltz and that he was to report to her. Ms. Snider reported to Ms. Foltz.

Part of the services provided by the employer are to rent rooms to individuals. The employer was involved in a program with the US Veterans Administration whereby the Veterans Administration would fund apartments for 25 veterans who were homeless. As part of his duties the claimant was involved in this program. In addition to the rent paid by the Veterans Administration, the employer also collected 30 percent of the income of the veterans so housed

in the employer's facility. Whether the employer was allowed to collect 30 percent of the veteran's income for rent is uncertain. However, the employer treated the Veterans Administration pensions received by the veterans residing in the employer's facilities, as income and collected 30 percent of that, as well as income from the veterans. The claimant began to suspect that this was incorrect. In a meeting in October, November, or December 2004, the claimant expressed certain concerns to William Luke Seward, Executive Director, and others present at a meeting about these matters. The exact concerns expressed by the claimant are uncertain but he did point out concerns about charging the veterans for rent at least to the extent that the veterans did not understand why they had to pay for their rooms when their rooms were being funded by the Veterans Administration. Nothing was resolved at that meeting. The claimant then immediately met with his supervisor, or the person that he reasonably believed to be his supervisor, Kelli Foltz, and expressed further concerns to her. They discussed the situation and apparently both were upset. The claimant believed that the veterans should not have to pay any rent for the rooms even if they had income. The claimant informed Ms. Foltz that he did not want to be part of this meaning the charging of the veterans for money the claimant believed was not suppose to be paid to the employer. Ms. Foltz indicated to the claimant that perhaps he should open this matter up.

The claimant also expressed concerns in emails to Ms. Foltz on a number of other occasions and then to the Veterans Administration. When nothing was done about these matters, the claimant determined to take a leave of absence to consider how next to proceed. He called Ms. Foltz and left a voice mail message on her telephone that he was taking a leave of absence and the claimant was then absent from December 27, 2004 to January 14, 2005. The employer believed that the claimant was absent during this period of time without properly notifying the employer. The employer has a rule or policy in its handbook, a copy of which the claimant received and for which he signed an acknowledgement indicating that an employee who is going to be absent or tardy must call the employee's supervisor before the start of the employee's shift and if the employee does not report to the employer for two or more consecutive days of absence, the employer shall consider that as a voluntary quit. The employer considered the claimant to have voluntarily quit when it failed to hear from the claimant between December 27, 2004 and January 14, 2005. When the claimant called the employer and spoke to Mr. Seward on January 17, 2005, he was told that he was considered to have quit and was no longer employed by the employer. The claimant then filed for unemployment insurance benefits.

An audit was conducted by the Veterans Administration in January of 2005 and the Veterans Administration determined that 12 veterans had been over charged for their rent and required the employer to reimburse the veterans the 30 percent of the veteran's pensions which had been taken by the employer as additional rent. During the period of time in question, the employer provided rooms for 25 veterans under the Veterans program and had approximately 100 veterans during the time that the employer was participating in the program. The program was relatively new to the employer. Ms. Foltz did not pass on the claimant's concerns to Mr. Seward.

The claimant had prior absences approximately in November and December 2003 where he missed several days because he was hung over from drinking alcohol. He informed Ms. Foltz of this. The claimant was given a chance to correct this behavior and did so and had been doing well thereafter. There was no evidence of recent absences on the part of the claimant except for vacation and illness. The only warning the claimant received for his attendance was an oral warning by Ms. Foltz following the claimant's absences in November and December 2003. When the claimant informed Ms. Foltz that he was taking a leave of absence

in his phone message on December 26, 2004 he indicated that it was because he had to go to California to deal with issues involving his son. However, that was not the reason for the claimant's leave of absence and he did not go to California. The employer did not learn of the real reason for the claimant's absences or that the claimant had given an incorrect reason for his absences until long after he had been separated.

REASONING AND CONCLUSIONS OF LAW:

The question presented by this appeal is whether the claimant's separation from employment was a disqualifying event. It was not.

Iowa Code section 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(4) 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:
>
> (4) The claimant was absent for three days without giving notice to employer in violation of company rule.

871 IAC 24.26(2), (3), (4) provide:

> Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:
>
> (2) The claimant left due to unsafe working conditions.
>
> (3) The claimant left due to unlawful working conditions.
>
> (4) The claimant left due to intolerable or detrimental working conditions.

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, (7) provide:

> 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 Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

> (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 first issue to be resolved is the character of the separation. The claimant maintains that he was discharged effective December 27, 2004 when he called William Luke Seward, Executive Director, on January 17, 2005 and was informed that the employer had treated his absences as a quit and that he no longer had a job. The employer maintains that the claimant voluntarily quit when he was absent from December 27, 2004 to January 14, 2005 and did not properly notify the employer in violation of the employer's rule that two consecutive absences without notification is a voluntary quit. Under the evidence here, the administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant voluntarily left his employment. The parties agree that the claimant was absent from December 27, 2004 to January 14, 2005 and there is no evidence that the claimant called anyone at the employer at anytime except for the voice mail message left with his supervisor or the person that he reasonably believed was his supervisor, Kelli Foltz, Residence Director, on December 26, 2004. The employer has a policy that provides that two or more consecutive absences without notifying the employer is considered a voluntary quit. There is no evidence that the employer officially approved the claimant's leave of absence. The claimant merely left a voice mail message stating that he was taking a leave of absence, but it does not appear that the employer approved the leave of absence. The claimant should have been aware that his leave had not been approved. There is no evidence that the claimant

thereafter called or informed the employer of any of the other absences. The employer's rule about two consecutive absences establishing a quit is in the employer's handbook, a copy of which the claimant received and for which he signed an acknowledgement. The claimant should have been aware of this rule and that he needed to call the employer every day of his absence or get official permission and approval from the employer for his leave of absence. The claimant did not do so. Accordingly, the administrative law judge concludes that the claimant voluntarily left his employment, effective December 27, 2004, when he failed to return to work or call the employer until January 17, 2005. It is true that the claimant called the employer and spoke to Mr. Seward on January 17, 2005 and at first blush this appears to belie a voluntary quit. However, what the claimant said when he called Mr. Seward was that they had something to talk about. There is no evidence that the claimant specifically indicated that he was ready to return to work or willing to return to work. Mr. Seward told the claimant that he had considered his absences a voluntary quit and the conversation ended. Accordingly, the administrative law judge concludes that the claimant left his employment voluntarily effective December 27, 2004. The issue then becomes whether the claimant left his employment without good cause attributable to the employer.

The administrative law judge concludes that the claimant has the burden to prove that he has left his employment with the employer herein with good cause attributable to the employer. See Iowa Code section 96.6-2. The administrative law judge concludes that the claimant has met his burden of proof to demonstrate by a preponderance of the evidence that he left his employment with the employer herein with good cause attributable to the employer. The claimant testified that he was concerned about the way the employer was funding the Veterans Administration (VA) Residence Program. After he expressed some concerns to Mr. Seward and expressed more concerns more frequently to Ms. Foltz, and nothing was done, the claimant believed that the employer was doing something wrong in its handling of the VA Residence Program and was not addressing his concerns. In O'Brien v. Employment Appeal Board, 494 N.W.2d 660, 662 (Iowa 1993) the Iowa Supreme Court held that an objective reasonable standard should be applied in determining whether a claimant left work voluntarily with good cause attributable to the employer. The Supreme Court further determined that under the reasonable belief standard, it is not necessary to prove the employer violated the law, only that it was reasonable for the employee to believe so. The administrative law judge concludes that there is a preponderance of the evidence that the claimant reasonably believed that the employer was violating the law. The claimant credibly testified that he had concerns about the charges made by the employer to veterans under the Veterans Administration Program. The claimant's beliefs and concerns were confirmed when the employer reimbursed 12 veterans for overpayment of moneys for rent. To resolve this issue, it is not necessary for the administrative law judge to conclude whether the employer violated the law or whether the acts of the employer were intentional or deliberate or merely accidental or negligent or a good faith error because the employer was confused about the rules and regulations for such program and believed that the veteran's pensions should be included in the earning of the veterans. The administrative law judge reaches no conclusion as to whether the employer was doing anything inappropriate or willful or intentional. It is only necessary that the claimant establish by a preponderance of the evidence that he reasonably believed that the employer was doing something inappropriate. The administrative law judge concludes that the claimant has met that burden. Mr. Seward testified that the employer reimbursed 12 veterans because the employer was taking 30 percent of the income, as it was appropriate to do, but including as income VA pensions which was inappropriate. Mr. Seward testified that he learned pursuant to the audit performed by the Veterans Administration that the VA pensions were not to be considered as income and that was the reason for the reimbursements. That may well be true. However, the administrative law judge concludes that the claimant had a reasonable belief that

the employer was doing something wrong and that this reasonable belief made his working conditions intolerable and detrimental and perhaps even unlawful.

The claimant expressed concerns of some sort to Mr. Seward at a meeting in October, November, or December 2004 and repeatedly expressed concerns to his supervisor or the person that he believed reasonably was his supervisor, Kelli Foltz. Ms. Foltz was the claimant's supervisor at least until November 1, 2004. There was evidence that at that time, Tonya Snider, Administrative Assistant to the Resident's Director, Kelli Foltz, became the claimant's supervisor. However, this was not done in writing and the claimant was never specifically told that Ms. Snider was his supervisor. Accordingly, the administrative law judge concludes that the claimant reasonably believed throughout this period of time that Ms. Foltz was his supervisor and it was to her that he should express such concerns. Although the claimant didn't specifically indicate that he would quit if his concerns were not addressed, he did tell Ms. Foltz that he did not want to be part of this meaning he did not want to be part of the employer carrying out what he believed to be improper charges for rooms to veterans. This certainly implies a threat to quit. The claimant gave the employer an opportunity to address his concerns prior to his quit. The fact that Ms. Foltz did not pass on the claimant's concerns at least to Mr. Seward, does not affect the notice that the claimant gave because he gave his notices to the person that he reasonably believed was his supervisor. It is not the claimant's fault that Ms. Foltz chose not to pass on his concerns.

In summary, and for all the reasons set out above, the administrative law judge concludes that the claimant left his employment voluntarily effective December 27, 2004, because he reasonably believed that his working conditions were intolerable and detrimental and perhaps unlawful and this is good cause attributable to the employer. The claimant gave a reasonable opportunity to the employer to address his concerns. When the employer did not address the claimant's concerns he quit. Therefore, the administrative law judge concludes that the claimant left his employment voluntarily with good cause attributable to the employer and, as a consequence, he is not disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant provided he is otherwise eligible.

Even should the claimant's separation be considered a discharge, the administrative law judge would conclude that the claimant is still not disqualified to receive unemployment insurance benefits because he was not discharged for disqualifying misconduct. The reason for the claimant's discharge could only be his attendance. The claimant was absent from December 27, 2004 to January 14, 2005. The claimant testified that he was absent during that period in order to review and consider what to do about his reasonable concerns about the employer's implementation of the Veterans Administration Program as discussed above. The claimant attempted to take a leave of absence and so informed the employer by telling Ms. Foltz in a voice mail. Even though the claimant's leave of absence was not approved, the claimant did notify the employer of his absences. Under the circumstances here, the administrative law judge would conclude that the claimant's absences were for reasonable cause and properly reported and were not excessive unexcused absenteeism and not disqualifying misconduct. The claimant did have some unexcused absences in 2003 but the employer decided to give the claimant a chance to correct his behavior and he did so and thereafter his attendance was satisfactory. The claimant received only one oral warning for his attendance and that was due to the absences in 2003. Excessive unexcused absenteeism is disqualifying misconduct and includes tardies but necessarily requires the consideration of past acts and warnings. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). Here, the claimant's previous absences, at least those that were unexcused, occurred in 2003 and he received only one oral warning for those absences. These absences and the resultant

oral warning are two remote in time to be considered and even if considered he only received one oral warning. Accordingly, the administrative law judge would conclude that claimant's absences were not excessive unexcused absenteeism and not disqualifying misconduct. Therefore, even if the claimant's separation should be considered a discharge, the administrative law judge would conclude that the claimant was not discharged for disqualifying misconduct and would still not be disqualified to receive unemployment insurance benefits.

The administrative law judge is concerned that the claimant gave a fictitious reason for his absences when he left the message for Ms. Foltz. However, the employer did not discover that this was a fictitious reason until long after the claimant had been separated. The fictitious reason given by the claimant to go to California to deal with issues with his son, would not have contributed to the claimant's separation whether it be a discharge or a quit.

DECISION:

The representative's decision dated February 11, 2005, reference 01, is reversed. The claimant, Thomas N. Wisneski, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he left his employment voluntarily with good cause attributable to the employer.

kjf/tjc