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

DUANE A CLARK
Claimant

APPEAL NO. 17A-UI-06648-S1-T

ADMINISTRATIVE LAW JUDGE
DECISION

HARSCO CORP
Employer

OC: 06/04/17
Claimant: Appellant (2R)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Duane Clark (claimant) appealed a representative's June 20, 2017, decision (reference 01) that concluded he was not eligible to receive unemployment insurance benefits because he voluntarily quit work with Harsco (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for July 18, 2017. The claimant was represented by Calla Parochetti, Attorney at Law, and participated personally. The employer provided a telephone number but could not be reached at the time of the hearing. The administrative law judge left a message for the employer. The claimant offered and Exhibit A was received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant worked for the employer from October 1, 1999, to August 25, 2016, as a full-time mobile crane operator. He took Family Medical Leave (FMLA) from August 25 to November 16, 2016, due to a heart murmur. He had open heart surgery on December 5, 2016. His additional benefits expired on March 1, 2017. The claimant continued on an unpaid leave of absence during his recovery until he returned to work on March 13 and 14, 2017.

On March 14, 2017, the claimant passed out at work due to a blockage to his heart and was again hospitalized. The claimant remained off work on an unpaid leave of absence. On May 5, 2017, the claimant's physician said the claimant could not return to his job and could not give a date he could safely return to his job in the future. On May 30, 2017, the employer told the claimant it did not have any other available positions and separated him from employment.

After the claimant's separation, on June 5, 2017, the claimant's physician released him to return to work with restrictions. He could not operate a vehicle or heavy machinery. He could also not lift over twenty-five pounds.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant did not voluntarily quit work without good cause attributable to the employer.

Iowa Code section 96.5(2)a provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

> 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 disqualification shall continue 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).

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 Services v. Jackson and Employment Appeal Board*, 810 N.W.2d 532 (Iowa Ct. App. 2012).

Issues surrounding separations of employment for medical reasons and subsequent entitlement to unemployment insurance benefits are among the most challenging in unemployment insurance law. The evidence in this case showed that the claimant was unable to return to work until shortly long after he had exhausted his FMLA leave and additional benefits. His doctor has never permitted him to return to full-time work with the employer. Iowa law requires that there be an intent on the part of the claimant to quit and an overt act that shows that intent. The

claimant here did not quit his job. He was separated from his employment by the employer. This is not a voluntary quit. Rather it is a non-disqualifying discharge and the claimant is eligible for unemployment insurance benefits provided he meets all other eligibility requirements. The issue of whether the claimant is able and available for work is remanded for determination.

DECISION:

The representative's June 20, 2017, decision (reference 01) is reversed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible. The issue of whether the claimant is able and available for work is remanded for determination.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/rvs