

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

WILLIAM R BIGGS
Claimant

APPEAL NO: 13A-UI-11807-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**CLINTON STAFFING COMPANY
ALLSTAR STAFFING**
Employer

**OC: 04/28/13
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge
Section 96.5-1 – Voluntary Leaving

STATEMENT OF THE CASE:

Clinton Staffing Company / Allstar Staffing (employer) appealed a representative's October 9, 2013 decision (reference 03) that concluded William R. Biggs (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 November 13, 2013. The claimant participated in the hearing. Jane Brown appeared on the employer's behalf. 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.

ISSUE:

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?

OUTCOME:

Affirmed. Benefits allowed.

FINDINGS OF FACT:

The employer is a temporary employment firm. The claimant began taking assignments with the employer on February 7, 2012. His final assignment began on February 27, 2012. He worked full time as a machine operator at the employer's Clinton, Iowa business client on a shift from 3:30 p.m. to 12:00 a.m. His last day on the assignment was May 10, 2013. The assignment ended because the business client considered the claimant to have voluntarily quit by a no-call, no-show.

The claimant had called in an absence on May 13, 2013 due to his car breaking down out of town. He had previously in 2013 missed about five full and partial days of work, all due to personal illness; he was diagnosed with Chronic Obstructive Pulmonary Disease (COPD) at about this time in early May. He had not been given any warnings with regard to his attendance.

The claimant had been unable to sleep for several days prior to the afternoon of May 14. He had been intending on reporting for his shift at 3:30 p.m. that day, but at about 2:00 p.m. he took a prescription medication he had just been prescribed for anxiety, and then sat down in a chair in his home. He fell asleep and did not awaken until after about 6:00 a.m. the morning of May 15. By that time the employer's business client had determined to treat his no-call, no-show for his May 14 shift to be a voluntary quit. When the claimant spoke to the employer on the morning of May 15 he was informed that his assignment was ended.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not eligible for unemployment insurance benefits if he quit the employment without good cause attributable to the employer or was discharged for work-connected misconduct. Iowa Code §§ 96.5-1; 96.5-2-a.

Rule 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 and an action to carry out that intent. *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 he voluntarily quit by being a no-call, no-show for his shift on May 14. A three-day no-call, no-show in violation of company rule can be considered to be a voluntary quit; a one-day no-call, no-show does not satisfy this provision. 871 IAC 24.25(4). 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).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer.

871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, 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(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

The reason the employer effectively discharged the claimant was his attendance. Excessive unexcused absenteeism can constitute misconduct. 871 IAC 24.32(7). A determination as to whether an absence is excused or unexcused does not rest solely on the interpretation or application of the employer's attendance policy. 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. 871 IAC 24.32(7); *Cosper*, supra; *Gaborit v. Employment Appeal Board*, 734 N.W.2d 554 (Iowa App. 2007). In this case, it is clear that the claimant's failure to report his absence was not volitional, as the no-call, no-show was also caused by the illness. Further, the employer has not established excessive prior absences which would be considered unexcused, and the claimant had not previously been warned that future absences could result in termination. *Higgins v. IDJS*, 350 N.W.2d 187 (Iowa 1984). The employer has failed to meet its burden to establish misconduct. *Cosper*, supra. The claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's October 9, 2013 decision (reference 03) 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.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs