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: 06A-UI-04783-RT
OC: 04/09/06 R: 01
Claimant: Appellant (5)

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, Dennis E. Miller, filed a timely appeal from an unemployment insurance decision dated April 28, 2006, reference 01, denying unemployment insurance benefits to him because he left work voluntarily without good cause attributable to the employer. After due notice was issued, a telephone hearing was held on May 18, 2006, with the claimant participating. Jerry Ruhland, Plant Superintendent; Juan Huerta, Kill Floor Supervisor; and Bill Brennan, Plant Manager; participated in the hearing for the employer, Iowa Lamb Corporation, doing business as Iowa Lamb Processing. Jeanine Wilkson was available to testify for the employer but not called because her testimony would have been repetitive and unnecessary. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment

insurance records for the claimant. When the administrative law judge began the hearing at 2:01 p.m. the employer had not called in a telephone number where witnesses could be reached. The employer called at 2:12 p.m. and left a telephone number with the Appeals Section which the administrative law judge called at 2:15 p.m. and the employer participated in the balance of 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, most recently as a full-time employee in offal pack, from August 24, 1998, until he separated from his employment on April 4 or 7, 2006. On April 4, 2006, the claimant asked his supervisor, Juan Huerta, Kill Floor Supervisor and one of the employer's witnesses, if he could have off from 9:15 a.m. or 9:30 a.m. until 1:00 p.m. to get money and then obtain his stepson's cap and gown for his stepson's graduation. Exactly what Mr. Huerta responded is uncertain but apparently indicated in some way that the claimant could leave. However, Mr. Huerta began to reprimand the claimant for his attendance. Mr. Huerta asked the claimant if he should pull the claimant's work record and the claimant said yes go ahead and then got mad. Words escalated and the claimant told Mr. Huerta three times "fuck you" and then punched out on the time clock and left. The claimant never returned to work that day. During this incident Mr. Huerta used no profanity at the claimant.

On that day, April 4, 2006, at approximately 3:00 p.m. the claimant called and spoke to Bill Brennan, Plant Manager and one of the employer's witnesses. The claimant asked about his job and Mr. Brennan told the claimant that he would call the claimant back. However, Mr. Brennan did not call the claimant back so the claimant called Mr. Brennan at 6:30 a.m., the next day, April 5, 2006. Mr. Brennan told the claimant that he would have to talk to Jerry Ruhland, Plant Superintendent and one of the employer's witnesses. Mr. Brennan told the claimant that he would have Mr. Ruhland call him. Mr. Ruhland did not so the claimant called Mr. Brennan again on April 5, 2006 about his job and Mr. Brennan told the claimant that he would have Mr. Ruhland or Mr. Huerta call the claimant. On April 7, 2006, Mr. Huerta called the claimant and the claimant asked Mr. Huerta if he still had a job and Mr. Huerta told the claimant that he was not needed any more.

The claimant had four absences in 2006. The claimant was absent on February 11, 2006 because of his birthday but this was approved by the employer. The claimant was absent on March 3, 2006 because of problems with his house. In early March the claimant had a house fire and needed to work on his house. On March 10, 2006 and again on April 1, 2006, the claimant was absent as a no-call/no-show without notifying the employer, both absences again for his house or possibly for a doctor's appointment. The claimant received two verbal warnings in 2006 about his attendance and two verbal warnings and a written warning in 2005 for his attendance.

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.

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.

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

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 first issue to be resolved is the character of the separation. The claimant maintains that he was discharged on April 7, 2006 when his supervisor, Juan Huerta, Kill Floor Supervisor and

one of the employer's witnesses, told the claimant that he was not needed anymore. The employer maintains that the claimant voluntarily quit when he punched the time clock and walked out early on April 4, 2006 and did not return to work later that day. It is true that the claimant punched out on the time clock and left work early on April 4, 2006 and did not return to work. However, the claimant did call the employer that day and two times the next day inquiring about his job. These phone calls belie a quit. Accordingly, the administrative law judge concludes that the claimant did not voluntarily quit but was discharged on April 7, 2006 pursuant to the telephone call with Mr. Huerta.

In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. Excessive unexcused absenteeism is disqualifying misconduct and includes tardies and necessarily requires the consideration of past acts and warnings. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). 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 was discharged for disqualifying misconduct, including, excessive unexcused absenteeism. The claimant was discharged for two reasons, an incident with his supervisor on April 4, 2006 and attendance.

Concerning the incident on April 4, 2006, the claimant asked his supervisor, Juan Huerta, Kill Floor Supervisor and one of the employer's witnesses, if he could be off work from 9:15 a.m. or 9:30 a.m. until 1:00 p.m. in order to run some errands for his stepson who was graduating. Whether Mr. Huerta gave the claimant explicit permission is uncertain but apparently Mr. Huerta said something to the claimant that either he could leave or that he could do what he had to do. Mr. Huerta then began to reprimand the claimant for attendance and the claimant took offense and got mad and swore at Mr. Huerta saying to him "fuck you" three times. The claimant then punched out on the time clock early and left and did not return that day. The claimant had no good reason for not returning other than he was upset and he figured that Mr. Huerta was upset too. Mr. Huerta did not use any profanity at the claimant. Even the claimant concedes that he used the profanity as set out above and that he was mad and that he did punch out early and leave and never returned. The administrative law judge believes that these actions on the part of the claimant were deliberate acts constituting a material breach of his duties and obligations arising out of his worker's contract of employment and evince a willful or wanton disregard of the employer's interests and are disqualifying misconduct. In Myers v. Employment Appeal Board, 462 N.W.2d 734 (Iowa App. 1990), the Iowa Court of Appeals held that the use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct even in the case of isolated incidents or situations in which the target of abusive name-calling is not present. Here, the claimant's language was most definitely offensive and confrontational and the target of the name-calling was present and because of the claimant's repeated use of profanity, the administrative law judge does not believe that the profanity was an isolated incident.

Concerning the claimant's attendance, the evidence establishes that the claimant had in 2006, in addition to the occasion on April 4, 2006 when he left work early and never returned, three absences. At least two of which were not properly reported to the employer. Even the claimant concedes that one was not properly reported to the employer and he had no answer or reason as to why he did not notify the employer. Mr. Huerta credibly testified that the claimant had two such absences as a no/call-no/show. These absences were due to the need of the claimant to work on his house which had burned in early March of 2006. The claimant received two verbal warnings from Mr. Huerta in 2006 as well as two verbal warnings in 2005 and one written warning. The claimant knew or should have known that the employer was concerned about his

attendance. The administrative law judge concludes that the two absences as a no-call/no-show and the occasion when the claimant left work early on April 4, 2006 were, even if for reasonable cause, not properly reported and are excessive unexcused absenteeism and disqualifying misconduct. Even if the claimant had permission to leave work on April 4, 2006, the employer no doubt expected the claimant to return because that was part of the claimant's request. However, the claimant did not do so and had no good reason for not doing so other than he was mad and thought that the supervisor was mad but this is due to the claimant's actions.

In summary, and for all the reasons set out above, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct and, as a consequence, he is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until, or unless, he requalifies for such benefits.

Even should the claimant's separation be considered a voluntary quit, the administrative law judge would conclude that the claimant voluntarily quit without good cause attributable to the employer and would still be disqualified to receive unemployment insurance benefits. It appears that the claimant quit because he had a personality conflict with his supervisor and left after being reprimanded for attendance but neither of these are good cause attributable to the employer. Accordingly, even should the claimant's separation be considered a voluntary quit, the administrative law judge would conclude that the claimant left his employment voluntarily without good cause attributable to the employer and he would still be disqualified to receive unemployment insurance benefits.

DECISION:

The representative's decision of April 28, 2006, reference 01, is modified. The claimant, Dennis E. Miller, is not entitled to receive unemployment insurance benefits, until, or unless, he requalifies for such benefits, because he was discharged for disqualifying misconduct.

cs/pjs