

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

**MEKONENN H TEKLU**  
Claimant

**SWIFT PORK COMPANY**  
Employer

**APPEAL 16A-UI-12654-JCT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 10/30/16**  
**Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct  
Iowa Code § 96.5(1) – Voluntary Quitting

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the November 22, 2016, (reference 01) unemployment insurance decision that denied benefits based upon separation. The parties were properly notified about the hearing. A telephone hearing was held on December 13, 2016. The claimant participated personally and through two Amharic interpreters from CTS Language Link. Sreweyni Wgebru, girlfriend of the claimant and employee for Swift Pork Company, also testified for the claimant. The employer participated through Regelio Bahena, human resources supervisor. The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

**ISSUE:**

Did the claimant voluntarily quit the employment with good cause attributable to employer or was the claimant discharged for disqualifying job-related misconduct?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a trolley washer and was separated from employment on September 24, 2016. The evidence is disputed as to whether he quit or was discharged.

The claimant last performed work on July 22, 2016, at which time, he requested time off to tend to his father, who was ill, and resides in Africa. The claimant had not applied for FMLA before with this employer, and was instructed that he had until August 8, 2016, to have his father's doctor complete the paperwork, and return it to the employer. The claimant understood that if he did not submit the paperwork, his absences would be unexcused. Prior to discharge, the claimant had no warnings for attendance issues.

There was no agreed upon day of return for the claimant when he left, and went to Africa. While the claimant was in Africa, beginning in July until October 15, 2016, he coordinated to have a friend call the attendance line each day to report his absences because he could not call daily from Africa. He also stated he completed the FMLA paperwork in August with his father's doctor and attempted to fax it from Africa to the fax number furnished on the form. The

employer reports it was not received, and consequently, sent the claimant a letter on September 8, 2016, advising the claimant that he had 10 days to submit the paperwork. The claimant was still in Africa and did not receive the letter until he returned. The claimant also did not respond to a phone call made by the employer on September 22, 2016, because his phone was not in service. Throughout the period the claimant was in Africa, he continued to report his absence each day (by way of a friend's help) and after eleven weeks, he returned to Iowa. He attempted to visit the employer on October 17, 2016, but was denied access by security, and informed he was discharged. His girlfriend, Sreweyni Wgebru, who is also an employee, also went to the employer with a copy of his FMLA papers (since she could clear the security check point) and presented the employer a copy of the completed FMLA papers. Ms. Wgebru stated that when she presented the papers, the employer took them briefly to make a copy for their possession. Mr. Bahena denied the employer received the documents.

### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant did not quit, but was discharged from employment. Further, the administrative law judge concludes the claimant was not discharged due to job-related misconduct.

Iowa unemployment insurance law disqualifies claimants who voluntarily quit employment without good cause attributable to the employer or who are discharged for work-connected misconduct. Iowa Code §§ 96.5(1) and 96.5(2)a. A voluntary quitting of employment requires that an employee exercise a voluntary choice between remaining employed or terminating the employment relationship. *Wills v. Emp't Appeal Bd.*, 447 N.W.2d 137, 138 (Iowa 1989); *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438, 440 (Iowa Ct. App. 1992). A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980). The administrative law judge is not persuaded the claimant intended to quit his employment but rather went on a planned leave of absence to visit his ailing father in Africa. The claimant requested the leave of absence properly and attempted to fax them from Africa to the employer at the fax number he was given. The employer ultimately moved forward with separation when the documentation was not received. However, the claimant also attempted to return to work after eleven weeks of a leave of absence that he believed to be covered under FMLA, but was told he had been discharged by the security staff. In this case, the claimant did not have the option of remaining employed nor did he express intent to terminate the employment relationship. Where there is no expressed intention or act to sever the relationship, the case must be analyzed as a discharge from employment. *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438 (Iowa Ct. App. 1992).

The next issue is whether the claimant was discharged for job-related misconduct.

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.

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).

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The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See *Lee v. Employment Appeal Board*, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990)

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.* Assessing the credibility of the witness and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for a current act of work-connected misconduct as defined by the unemployment insurance law.

The credible evidence presented is the claimant's separation occurred because the employer did not receive required FMLA paperwork to support the claimant's extended absences. Logically, it is the claimant's responsibility to furnish the necessary paperwork to protect his employment, but the unique circumstances in this case cannot be ignored. The claimant was not located stateside during the tenure of his eleven week leave of absence, but rather in Africa. So it was not practical to expect the employer could check in with the employer as another

employee caring for a family member in Iowa or even in the United States could easily do. Consequently, the employer was also unable to make contact with the claimant by phone or mail since he was in Africa, to notify him that paperwork had not yet been received. The claimant recognized the paperwork was important and attempted to fax it from Africa. It was not received for unknown reasons, but the administrative law judge is persuaded the claimant made a good faith effort. Further, the evidence supports he attempted to follow employer policies inasmuch as he coordinated someone to make his daily calls to the attendance line for him while he was in Africa, where it was impracticable for him to do so himself. He further attempted to return to work and attempted to resubmit the paperwork but was denied. The credible evidence does not support that the claimant willfully or negligently or intentionally disregarded the employer's directive to complete the required FMLA paperwork. Rather, he made a good faith effort, while residing in Africa, but it was unsuccessful.

In the absence of any warnings, for any reason, the administrative law judge concludes at most, the claimant's failure to confirm receipt of the FMLA paperwork with the employer was an isolated incident of poor judgment and inasmuch as the employer had not previously warned claimant about the issue leading to the separation, it has not met the burden of proof to establish that the claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. The employer has not met its burden of proof to establish a current or final act of misconduct, and, without such, the history of other incidents need not be examined. The claimant may have had good business reasons to discharge the claimant, but misconduct as defined by Iowa unemployment insurance law, has not been established. The claimant is allowed benefits, provided he is otherwise eligible for benefits.

Nothing in this decision should be interpreted as a condemnation of the employer's right to terminate the claimant for violating its policies and procedures. The employer had a right to follow its policies and procedures. The analysis of unemployment insurance eligibility, however, does not end there. This ruling simply holds that the employer did not meet its burden of proof to establish the claimant's conduct leading to separation was misconduct under Iowa law.

**DECISION:**

The November 22, 2016, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. The benefits claimed and withheld shall be paid, provided he is otherwise eligible.

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Jennifer L. Beckman  
Administrative Law Judge

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Decision Dated and Mailed

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