IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

LAWRENCE L ECHOLS
Claimant

DEE ZEE INC
Employer

APPEAL NO: 13A-UI-04503-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 03/17/13
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Lawrence L. Echols (claimant) appealed a representative's April 4, 2013 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment with Dee Zee, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on May 23, 2013. The claimant participated in the hearing. Lacey Litchliter 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:

Reversed. Benefits allowed.

FINDINGS OF FACT:

After a prior period of employment with the employer, the claimant most recently started working for the employer on March 19, 2012. He worked full-time as an assembly worker on the first shift in the employer's truck accessory manufacturing facility. His last day of work was February 1, 2013. The employer discharged him on that date. The reason asserted for the discharge was excessive absenteeism.

On February 1 the claimant met with the plant manager. The plant manager reviewed the claimant's points and told the claimant he was being discharged. The claimant was only allowed to accrue 44 points before he would face discharge, and as of February 1 he was at 48 points. He had accrued the most recent points by missing five hours of work on January 28, for which he was assessed five points. The reason he had accrued those points was because he had a medical appointment for his children that afternoon which was mandated by the

Department of Human Services. Most of the claimant's other points were also due to taking his children to other DHS mandated appointments.

While the plant manager had told the claimant on February 1 that he was discharged due to his attendance, the employer apparently did not promptly process the termination. The claimant's immediate manager, who was below the plant manager and who had not participated in the February 1 meeting, considered the claimant to be a no-call/no-show for work on February 4, February 5, and February 6, and submitted paperwork to the human resources department indicating that the claimant should be processed as having voluntarily quit by job abandonment as a three-day no-call/no-show in violation of company policy. During some of those days the claimant had been making some contacts within the company to try to see if he could return to the employment despite being told on March 1 that he was discharged, but when he stopped in to pick up his paycheck on February 7 it was confirmed to him by human resources that his employment 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). A three-day no-call/no-show in violation of company rule can be considered to be a voluntary quit. 871 IAC 24.25(4). The employer asserted that the claimant was not discharged but that he voluntarily quit by job abandonment as a three-day no-call/no-show in violation of company policy. Asserting that the separation did not occur until after February 1, the employer relies exclusively on the third-hand account from a human resources person who did not participate in the February 1 meeting between the claimant and the plant manager, but who relied upon the second hand information from a lower-level manager who also did not participate in the February 1 meeting. Assessing the credibility of the witnesses 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 voluntarily quit as of February 6 by job abandonment, as compared having already been discharged on February 1. 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); *Peck v. Employment Appeal Board*, 492 N.W.2d 438 (Iowa App. 1992).

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).

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). The question is not whether the employer was right 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 matters. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988).

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).

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). Subsequent to the discharge, the employer asserts that the claimant had some improperly reported absences on February 4, February 5, and February 6, but as these incidents occurred after the discharge on February 1, these incidents cannot now be used to establish misconduct. *Larson v. Employment Appeal Board*, 474 N.W.2d 570 (Iowa 1991). The final occurrence was the claimant's leaving five hours early on January 28 to take his children to the required medical appointment. Because the final occurrence was due to a reasonable ground that is treated as excused and non-intentional for purposes of assessing misconduct, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct and no disqualification is imposed. 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 April 4, 2013 decision (reference 01) is reversed. 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.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

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