IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JONATHAN D WEAVER
Claimant

COLLEGE COMMUNITY SCHOOL DISTRICT
Employer

APPEAL NO. 09A-UI-17191-SWT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/18/09
Claimant: Appellant (5)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

The claimant appealed an unemployment insurance decision dated November 6, 2009, reference 01, that concluded he voluntarily quit employment without good cause attributable to the employer. A telephone hearing was held on December 22, 2009. The parties were properly notified about the hearing. The claimant participated in the hearing. Jim Rotter participated in the hearing on behalf of the employer with a witness, Richard Whitehead.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant worked full time as a janitor from February 6, 2006, to July 15, 2009. His immediate supervisor when his employment ended was Kate Woode. The director of business services is Jim Rotter. Richard Whitehead is the superintendent of schools. He was informed and understood that under the employer's work rules, employees were required to notify their supervisor if they were not able to work as scheduled and would be considered to have voluntarily quit employment after three days of absence without notice.

The claimant has had a history of being absent from work beyond what his sick leave and other paid time allowed. He had been warned about excessive absenteeism. In November 2008, custodial supervisor, John Randles, denied the claimant request for sick leave for a day after he had text messaged a coworker that he would not be at work. He was warned at that time that text messaging was not an acceptable method of notifying the employer of an absence and he was to call his direct supervisor if he was unable to work as scheduled.

On January 21, 2009, Randles warned the claimant about his excessive absenteeism because he had requested five days of “absence without pay” during the fiscal year because he did not have paid leave to cover the absences. He was informed that “absence without pay” would only be approved for personal illness for which submitted a doctor’s excuse and other absences would be treated as “absences without leave.” On March 30, 2009, the claimant called his direct supervisor, Steve Snyder, to report that he would not be at work because his car had

broken down. Snyder had instructed the claimant to call Randles. The claimant failed to call Randles as instructed. Randles recommended to Whitehead that the absence be considered an absence without leave and warned that any further absence without leave could result in his termination from employment.

The claimant is in the Iowa National Guard. He was order to full-time duty from July 15 to September 30, 2009. He notified his supervisors about this and was on approved leave during this period. The claimant had also submitted all of his days of required drill duty to his supervisors during the spring of 2009, which included October 2-4, 2009. Also, the claimant had requested and received approval from his supervisor to have October 1, 2009, off for vacation.

Despite that the claimant had provided documentation requesting time off until October 5, 2009, Randles and Rotter, mistakenly believed he was scheduled to work on October 1 and 2, and considered him absent without notice on these days.

The claimant was ill and unable to work on October 5, 2009. He went to his doctor on October 5 and his doctor excused him from working from October 5-9 and released him to return to work on October 12. The claimant sent a text message to Kate Woode before the start of his shift stating that he had returned from Guard duty but was off work on medical leave for the week. Woode responded "okay, thanks for let me know." She notified Randles about the message she had received. The claimant had the doctor's office fax in the excuse to the employer.

The claimant was ill and unable to work on October 12, 2009. He went to his doctor on October 12, and his doctor excused him from working October 12-14 and released him to return to work on October 15. The claimant sent a text message to Kate Woode before the start of his shift stating that he ill and unable to work. Woode responded, "Thanks for letting me know." The claimant had the doctor's office fax in the excuse to the employer.

The claimant was ill and unable to work on October 15, 2009. He went to his doctor on October 15, and his doctor excused him from working October 15-16 and released him to return to work on October 19. The claimant sent a text message to Kate Woode before the start of his shift stating that he ill and unable to work. Woode responded, "Thanks take care." The claimant had the doctor's office fax in the excuse to the employer.

The claimant was sick and unable to work on October 19. There is no evidence he notified Woode on October 19 about being unable to work. Instead, Whitehead called the claimant that morning and asked him if he was reporting to work. The claimant replied that he was not able to work and was going to see his doctor and expected to be back to work on October 20. He went to the doctor on October 19 complaining of chest pains. His doctor released him to work effective October 20. This doctor's excuse was faxed to the employer.

The claimant did not report work and did not call or text a supervisor on October 20. He did not see a doctor on October 20 or afterward. Whitehead was out of the office on October 20, and did not call the claimant.

The claimant spoke with Whitehead on October 21. Whitehead asked him if he was reporting to work that day. He told Whitehead he was in horrible pain and could not get out of bed. Whitehead said he needed to come into work or would be terminated. The claimant then asked if Whitehead was saying that he was fired if he did not report to work that day. Whitehead responded affirmatively and said, "That is what it has come down to." After asking the claimant

again whether he was coming in, Whitehead said, "Take care" and hung up the phone. The claimant reasonably believed he had been fired at that point.

On October 21, 2009, Rotter sent a letter to the claimant detailing his history of excessive absenteeism and informing him if he was not able to provide the employer with a doctor's explanation for leave under the Family and Medical Leave Act (FMLA) immediately, the employer would be forced to terminate his employment. The claimant never received the letter.

On October 26, 2009, Rotter sent a second letter to the claimant informing him he was considered to have voluntarily quit employment because he was absent without notice on October 20, 21, 22, and 23 and because he had not provided any further clarifying information from a doctor regarding his absences.

REASONING AND CONCLUSIONS OF LAW:

The 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. To voluntarily quit means a claimant exercises a voluntary choice between remaining employed or discontinuing the employment relationship and chooses to leave employment. To establish a voluntary quit requires that a claimant must intend to terminate employment. Wills v. Employment Appeal Board, 447 N.W.2d 137, 138 (Iowa 1989); Peck v. Employment Appeal Board, 492 N.W.2d 438, 440 (Iowa App. 1992).

The findings of fact show how I resolved the disputed factual issues in this case by carefully assessing of the credibility of the witnesses and reliability of the evidence and by applying the proper standard and burden of proof. Unfortunately, the task is made more difficult when the evidence from both parties is suspect in some way.

As an initial matter, I am convinced the conversations between the claimant and Whitehead happened on October 19 and 21. The claimant testified about phone records that would support his version that the final phone call with Whitehead was on October 20, but he did not submit them before the hearing and are not part of the evidence. Rotter's letter on October 21 refers to the conversation as being on that morning. Additionally, it is logical that Whitehead would talk to the claimant on October 21 since he was out of the office on October 20 and the claimant was absent from work without notice or a doctor's excuse on October 20.

It would be easy for me to paint the claimant as not credible because he got the dates wrong and decide that he was being untruthful about what Whitehead said to him on October 21, but I am equally convinced that Whitehead told him that he would be *(not could be)* terminated if he did not report to work that day. The claimant had missed work without notice on October 20 and had presented no doctor's slip covering that absence. Based on the past warnings he had been given, he was subject to discharge since he had been told in March 2009 that if he had any further absences without leave, he could be terminated. The claimant had exhausted all paid leave. Whitehead asserts the letter is illogical if he already discharged the claimant, but I think it probable that when Whitehead communicated to Rotter what he had done, the employer was concerned about the FMLA implications of the discharge and sent the letter for that purpose. I am stuck by some of the language in the letter that does not square with what either Whitehead or the claimant said regarding the phone conversation. For example, the letter says Whitehead said, "if you were no longer able to perform the functions of your job that you would need to resign." Nothing like that was mentioned in the testimony.

Deciding if the claimant was discharged does not end the matter, because I still have to decide if the discharge was for misconduct.

The issue in this case is whether the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. The rules define misconduct as (1) deliberate acts or omissions by a worker that materially breach the duties and obligations arising out of the contract of employment, (2) deliberate violations or disregard of standards of behavior that the employer has the right to expect of employees, or (3) carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design. 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 misconduct within the meaning of the statute. 871 IAC 24.32(1).

871 IAC 24.32(7) provides that 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 claimant had a history of absenteeism that included instances where he did not properly report his absences and for which he was disciplined.

I am focusing on the claimant's absences starting October 5, 2009. The employer asserted that the claimant had not notified the employer about his absences on October 1 and 2, but I believe the claimant's testimony that he had informed his supervisors about the drill days and had gotten approval to take October 1 off work.

Although the claimant was absent for work due to illness from October 5 – 19, he violated the employer's notification policy and the warning he had received by sending text message to his supervisor instead of phoning her. He had been told this was not an acceptable way of communicating an absence but disregarded the instructions he had been given by Randles. He was absent without any notice on October 20. He had been released to return to work that day. He has provided no medical excuse for missing work that day. Consequently, the claimant was discharged for excessive unexcused absenteeism, which is work-connected misconduct under the law.

DECISION:

The unemployment insurance decision dated November 6, 2009, reference 01, is modified with no change in the outcome. The claimant is disqualified from receiving unemployment insurance

benefits until he has been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

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Steven A. Wise
Administrative Law Judge

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Decision Dated and Mailed

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