

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CHRIS O SCHLINGLOFF
Claimant

APPEAL NO. 11A-UI-12928-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

AT&T MOBILITY SERVICES LLC
Employer

**OC:08/28/11
Claimant: Appellant (5)**

Section 96.5-1 – Voluntary Quit
Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from a decision of a representative dated September 21, 2011, reference 01, which held claimant ineligible for unemployment insurance benefits. This case was originally set for an in-person hearing in Davenport, Iowa, at the request of the claimant. Both parties wished to have representatives assist them at the hearing and those representatives wanted to participate by telephone. Only one outside line was available in the hearing room. After being informed of this, the claimant agreed to a telephone hearing. After due notice, a telephone conference hearing was scheduled for and held on November 2, 2011. Claimant participated. The claimant was represented by Vincent Riedy. Employer participated by Nicole Slavish, team manager; Patty Richey, customer service hiring manager; and Susan Collins, area manager. The employer was represented by David Williams. The record consists of the testimony of Chris Schlingloff; the testimony of Nicole Slavish; and the testimony of Patty Richey. Susan Collins did not testify.

ISSUE:

Whether the claimant was separated from his employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer provides cellular phone service. The claimant was hired on November 2, 2009, as a full-time customer service representative. The claimant's employment ended on September 1, 2011.

The claimant was arrested and put in jail at approximately 6:20 a.m. on August 25, 2011. The claimant was scheduled to work that day. He did not notify his employer that he would be absent. The claimant was also incarcerated on August 26, 2011, which was another scheduled work day. The claimant did not notify the employer that he would be absent.

The employer has a written attendance policy, of which the claimant was aware, that the accumulation of 12 attendance points would lead to termination. The claimant was given a written warning on May 20, 2011, that he was at 11 points and that his job was in jeopardy. The claimant was at 11.5 points prior to the two days he was absent due to his incarceration. He received two additional points for missing work on August 25, 2011, and August 26, 2011. As a result, he was terminated.

REASONING AND CONCLUSIONS OF LAW:

871 IAC 24.25(16) provides:

Voluntary quit without good cause. 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. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:

(16) The claimant is deemed to have left if such claimant becomes incarcerated.

The evidence in this case is uncontroverted that the claimant was terminated due to his incarceration on August 25, 2011, and August 26, 2011. Iowa law states that an individual is considered to have voluntarily quit without good cause attributable to the employer if he becomes incarcerated. The claimant is disqualified from receiving benefits due to his voluntary quit.

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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The claimant would also be disqualified from receiving benefits due to misconduct. Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Excessive unexcused absenteeism is one form of misconduct. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). The concept includes tardiness and leaving early. Absence due to matters of personal responsibility, such transportation problems and oversleeping, is considered unexcused. See Harlan v. IDJS, 350 N.W.2d 192 (Iowa 1984). The employer has the burden of proof to show misconduct.

The claimant knew that his job was in jeopardy due to excessive absenteeism when he received a written warning on May 20, 2011. He was at 11.5 attendance points just prior to his incarceration on August 25, 2011, and August 26, 2011. He was essentially a no-call/no-show on both days. The administrative law judge considers incarceration to be an unexcused absence, as the absence was due to matters of personal responsibility. The claimant exceeded the number of points under the employer's attendance policy. The claimant was terminated due to excessive unexcused absences. Benefits would be denied for this reason as well.

DECISION:

The representative's decision dated September 21, 2011, reference 01, is modified without effect. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/kjw