BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319

JOSHUA A CORSON

Claimant,

and

SWIFT & COMPANY

Employer.

HEARING NUMBER: 09B-UI-01413

EMPLOYMENT APPEAL BOARD
DECISION

N O T I C E

THIS DECISION BECOMES FINAL unless (1) a request for a REHEARING is filed with the Employment Appeal Board within 20 days of the date of the Board's decision or, (2) a PETITION TO DISTRICT COURT IS FILED WITHIN 30 days of the date of the Board's decision.

A REHEARING REQUEST shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in DISTRICT COURT within 30 days of the date of the denial.

SECTION: 96.5-2-a

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE DENIED

The employer appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. A majority of the Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board REVERSES as set forth below.

FINDINGS OF FACT:

The claimant, Joshua A. Corson, worked for Swift & Co. from January 17, 2007 through November 10, 2008 as a full-time production worker on the second shift cut floor. (Tr. unnumbered p. 1, 4-5) The employer has an attendance policy, i.e., point system, (contained in employee manual and union contract) that also establishes if a person is absent for three days as a no call/no show, that person is considered to have voluntarily quit. (Tr. 2, 5) That policy also mandates that if a person knows he or she will be absent, that person must contact the employer within one hour of their scheduled report time. (Tr. 2, 5)

Mr. Corson had ongoing attendance problems for which the majority of his absences were directly related to the care of his premature son. (Tr. 9, 13) The employer placed him on FMLA for

approximately one month; and subsequently, put him on short-term disability for an additional month in an effort to work with him. (Tr. 13) Finally, on November 3, 2008, the employer placed Mr. Corson on a 90-day probationary contract that disallowed him from missing any more work. (Tr. 7, 8)

On November 10th, 2008, Mr. Corson contacted the employer to request time off to go down to Florida with his fiancé to see her dying grandfather. (Tr. 6-7) The employer advised the claimant against going, as the claimant was already on his last attendance point and the employer couldn't guarantee he'd have a job when he returned. (Tr. 6, 9-10, 13) The claimant was absent, initially, from November 11th, 12th, and 13th without contacting the employer. (Tr. unnumbered p. 1, 5, 13)

Mr. Corson and his fiancé returned to Iowa on November 20, 2008. (Tr. 11) The following day, he returned to the employer in an attempt to return to his job; however, the employer had no position available for him. (Tr. 3, 5-6, 12)

The claimant applied for and was initially awarded unemployment benefits. In a subsequent appeal, he prevailed. However, in this appeal, his qualification has been overturned.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.6(2) (2003) provides, in pertinent part:

> ... If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision in finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The claimant does not dispute that he had numerous absences, most of which were attributable to the hospitalization and care for his premature infant. Mr. Corson does not dispute that the employer placed him on a 90-day probationary contract for which he was disallowed any additional leave from work. Thus, when the claimant approached the employer about taking additional time, and the employer refused his request citing his 90-day contract, Mr. Corson knew, or at the very least should have known that his job was in jeopardy should he acquire any further absences.

This case was initially determined as a misconduct case for which misconduct was not established. At first blush, we might agree, as most of the claimant's absences in which he accumulated so many points were excusable under the precepts of Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The Cosper court held that absences due to illness, which are properly reported, are excused and not misconduct. However, Mr. Corson's separation resulted from his acquiring additional absences in light of his 90-day probationary contract, and in spite of his advice not to go. His failure to comply with that contract was insubordination, particularly in light of the employer's forewarning. Yet the record clearly establishes that Mr. Corson willingly chose to go against the employer's directive as well as the 90-day contract. Continued failure to follow reasonable instructions constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990).

Although the final incident may arguably be considered a single act of misconduct, the court in Diggs v. Employment Appeal Board, 478 N.W.2d 432, 434 Iowa App. 1991) (citing Henry, 391 N.W.2d at 736), held that "In order to be disqualified from benefits for a single incident of misconduct, the misconduct must be a deliberate violation or disregard of standards of behavior which the employer has a right to expect of employees." While we sympathize with the claimant's concern for his family situation, it is not reasonable to expect the employer's interests to be continually undermined by an employee's constant absenteeism. When the claimant told the employer, "... well, I'm going to go down there... it's a family situation and... that was it...," (Tr. 9-10) his behavior was explicitly defiant of the employer's refusal to allow him time off. Given his prior excessive absences, coupled with the employer's prior attempts to accommodate his absences, the claimant showed no regard for the employer's interests. For this reason, we would disagree with the administrative law judge's determination. On the contrary, we would conclude that Mr. Corson showed a blatant disregard fro the employer's interests and the employer satisfied their burden of proving disqualifying misconduct.

This case could, alternatively, be analyzed as a voluntary quit given the employer's work rule, which sets forth that three days of being a no call/no show shall result in such a separation. (Tr. 2, 5)

Iowa Code section 96.5(1) (2007) provides:

> An individual shall be disqualified for benefits: *Voluntary Quitting*. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

871 IAC 24.25 provides:

> *Voluntary quit without good cause*. In general, a voluntary quit means discontinuing the employment because the employer 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:
>
> (4) The claimant was absent for three days without giving notice to employer in violation of company rule.

The claimant has the burden of proving that the voluntary leaving was for good cause attributable to the employer. Iowa Code §96.6(2) (amended 1998).

Although the claimant argues that the employer told him not to report each day of his absences, his testimony is not credible in light of the employer's undisputed testimony that Mr. Corson was advised not to go in the first place. (Tr. 6, 9-10, 13) Why then would the employer turn around and tell him not to report? This would be an inconsistent position for the employer; that is, to warn the claimant on the one hand; and on the other hand, 'seal his fate'. The record clearly demonstrates that the employer exhausted all avenues to accommodate Mr. Corson and his family situation. (Tr. 13) The last time the employer heard from the claimant was on November 10th. The claimant knew that if he left and failed to contact the employer (November 11th, 12th, 13th), he would be out of a job. The fact that he did it anyway, exemplifies the intent and overt act necessary to establish that the claimant's desire to sever his employment relationship with the employer. "[Q]uitting requires an intention to terminate employment accompanied by an overt act carrying out the intent." FDL Foods, Inc. v. Employment Appeal Board, 460 N.W.2d 885, 887 (Iowa App. 1990), accord Peck v. Employment Appeal Board, 492 N.W.2d 438 (Iowa App. 1992). Mr.. Corson's three days of no call/no show placed him squarely within the purview of the company's work rule and Iowa law. Thus, his separation can be, alternatively, characterized as a voluntary quit without good cause attributable to the employer.

DECISION:

The administrative law judge's decision dated February 24, 2009 is **REVERSED**. The claimant was discharged for disqualifying misconduct. Accordingly, he is denied benefits until such time he has worked in and was paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. In addition, the Board would note that although this decision disqualifies the claimant for receiving benefits, those benefits already received shall ***not*** result in an overpayment

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Elizabeth L. Seiser

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Monique F. Kuester

AMG/fnv

DISSENTING OPINION OF JOHN A. PENO:

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety.

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John A. Peno

AMG/fnv