IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

ANTWAIN O'NEAL-WASHINGTON Claimant **FLAGGER PROS USA LLC** Employer	**APPEAL 17R-UI-01062-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 11/13/16** **Claimant: Appellant (5)**

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 December 6, 2016, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on February 21, 2017. Claimant participated. Darrius O'Neal participated on claimant's behalf. Employer participated through Human Resources Manager Victoria Johnson.

ISSUE:

Did claimant voluntarily leave the employment with good cause attributable to the employer or did employer discharge the claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a flagger from June 23, 2016, and was separated from employment on November 9, 2016.

The employer has a written no-call/no-show policy that if an employee is a no-call/no-show to a job that they have accepted, it is considered job abandonment. Employees are supposed to call the employer twelve hours prior to the start of the shift if they are going to be absent. If an employee is sick or ill, they need to provide a doctor's note. If an employee needs time off, they are to inform the employer one week in advance in order to have the absence be excused. Employees are expected to accept all job offers and if an employee refuses two job sites within a season, then it is considered a job refusal. The employer pays employees one-way to the job site and the employee is responsible to pay for the other way.

On August 19, 2016, claimant received a verbal warning from Ms. Johnson for being three hours late to the job site. Ms. Johnson warned claimant he could not be late again. On September 8, 2016, claimant was a no-call/no-show. Claimant had fractured his foot the night before, but after he accepted the job. Claimant did not contact the employer to report his

absence. The employer contacted claimant after he did not report for work and was only able to get a hold of him after his scheduled start time. Ms. Johnson told claimant that he had to call the employer prior to his shift so that his shift could be covered. Claimant did not properly report this absence. Ms. Johnson gave claimant a verbal warning and documented it in his file. Ms. Johnson warned claimant that his job was in jeopardy if it happened again.

On November 8, 2016, the employer called claimant for a job on November 9, 2016. The employer told claimant that it would provide him a motel room for the night before (November 8, 2016). The employer pays for an employee's hotel room if the job site is over sixty miles from the employee's home address, which this job site was. The job started on November 9, 2016 at 7:00 a.m. Claimant told the employer he would accept the job. Claimant accepted the job before he spoke with Mr. Darrius O'Neal. Ms. Johnson always speaks directly to individual employee about whether they are accepting the job; she does not let another employee accept the job offer on behalf of a different employee. Ms. Johnson was the person that spoke to claimant. Ms. Johnson did not speak to Mr. Darrius O'Neal about the job. After claimant accepted the job on November 8, 2016, Mr. Darrius O'Neal spoke to a different manager, not Ms. Johnson, about the job. Mr. Darrius O'Neal told the employer that "we" could not make it because he did not have the gas to get there. Mr. Darrius O'Neal testified that he when he used the term "we", he was referring to claimant and himself. After Mr. Darrius O'Neal rejected the job, claimant did not contact the employer to inform it that he would not be working on November 9, 2016.

On November 9, 2016, the supervisor from the job site called Ms. Johnson and stated claimant did not arrive for work. Ms. Johnson called the hotel and discovered that claimant had not checked into the hotel room. Ms. Johnson then tried calling claimant three times, but he did not answer. At approximately 9:33 a.m., the site supervisor, Ms. Annette Davis, called claimant and he told her that he did not have enough money to go to the job. At 4:31 p.m., claimant called the employer and spoke to Ms. Johnson. Claimant stated that he thought the employer would assume he was out of gas. Claimant did not say why he thought the employer would think that. Claimant did not ask about another job. Ms. Johnson told claimant that because he was a no-call/no-show, the employer considered it job abandonment. Claimant stated he would turn in his equipment to Ms. Davis. The employer had work available for claimant. Claimant and Mr. Darrius O'Neal have worked on different job sites in the past.

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 due to job-related misconduct. Benefits are denied.

It is the duty of an administrative law judge and 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, as the finder of fact, 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. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). 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 evidence you believe; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. This administrative law judge finds the employer's version of events to be more credible than claimant's recollection of those events.

Iowa Code § 96.5-1 provides:

> An individual shall be disqualified for benefits:
>
> 1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

Iowa Admin. Code r. 871-24.25(4) 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:
>
> (4) The claimant was absent for three days without giving notice to employer in violation of company rule.

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).

A voluntary quitting means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer and requires an intention to terminate the employment. *Wills v. Emp't Appeal Bd.*, 447 N.W. 2d 137, 138 (Iowa 1989); *see also* Iowa Admin. Code r. 871-24.25(35). 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).

Since claimant did not have three consecutive no-call/no-show absences as required by the administrative code rule in order to consider the separation job abandonment, the separation was a discharge and not a quit and the burden of proof falls to the employer.

Iowa Admin. Code r. 871-24.32(7) provides:

> (7) Excessive unexcused absenteeism. 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 employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. The term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." An absence is an extended tardiness, and an incident of tardiness is a limited absence. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187 (Iowa 1984). Absences due to illness or injury must be properly reported in order to be excused. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

An employer's absenteeism policy is not dispositive of the issue of qualification for benefits; however, an employer is entitled to expect its employees to report to work as scheduled or to be notified as to when and why the employee is unable to report to work. Prior to the final incident on November 9, 2016, claimant had two incidents of absenteeism. Claimant was warned on both occasions regarding his absenteeism, including being warned his job was in jeopardy on September 8, 2016 after he was a no-call/no-show. Although claimant was a no-call/no-show on September 8, 2016 due to an injury, he failed to properly report this absence to the employer. Claimant did not contact the employer to report he would be absent. The employer contacted claimant when he was a no-call/no-show to determine why he was not at work. Because claimant did not properly report his absence, this absence is considered unexcused.

Despite these prior warnings, claimant was absent from work on November 9, 2016. On November 8, 2016, claimant accepted a job that was approximately two hours away. The employer told claimant that it would get him a motel room for the night (the employer was paying for the motel room). Although Mr. Darrius O'Neal later rejected the job when it was offered to

him using the term "we" and he intended it to include claimant, claimant was personally responsible for accepting and rejecting jobs on his own. Claimant's argument that Mr. Darrius O'Neal's rejection of the job informed the employer that he was no longer working on November 9, 2016, is not persuasive. First, claimant and Mr. Darrius O'Neal spoke to different managers on November 8, 2016. Second, the employer made arrangements for claimant to work the job after he accepted it, including getting him a motel room. No evidence was presented that any similar arrangements were made for Mr. Darrius O'Neal. Furthermore, Ms. Johnson also credibly testified that each employee is individually responsible for accepting or rejecting a job.

On November 8, 2016, claimant accepted job for November 9, 2016 and the employer had gotten him a motel room. Claimant failed to contact Ms. Johnson or the employer and inform the employer that he could not work on November 9, 2016 due to transportation issues. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187 (Iowa 1984). The employer did not discover claimant was going to be absent from the job until he failed to report to work on November 9, 2016. This was claimant's third unexcused absence in less than six months of employment. Excessive absenteeism has been found when there has been seven unexcused absences in five months; five unexcused absences and three instances of tardiness in eight months; three unexcused absences over an eight-month period; three unexcused absences over seven months; and missing three times after being warned. *See Higgins*, 350 N.W.2d at 192 (Iowa 1984); *Infante v. Iowa Dep't of Job Serv.*, 321 N.W.2d 262 (Iowa App. 1984); *Armel v. EAB*, 2007 WL 3376929*3 (Iowa App. Nov. 15, 2007); *Hiland v. EAB*, No. 12-2300 (Iowa App. July 10, 2013); and *Clark v. Iowa Dep't of Job Serv.*, 317 N.W.2d 517 (Iowa App. 1982).

The employer has established that claimant was warned that further unexcused absences could result in termination of employment and the final absence was not excused. The final absence, in combination with the claimant's history of unexcused absenteeism, is considered excessive. Benefits are withheld.

DECISION:

The December 6, 2016, (reference 01) unemployment insurance decision is modified with no change in effect. Claimant did not quit but was discharged from employment due to job-related misconduct. Benefits are withheld until such time as claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

_____
Jeremy Peterson
Administrative Law Judge

_____
Decision Dated and Mailed

jp/rvs