

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

PHILLIP L DAVIS
Claimant

APPEAL NO: 11A-UI-07533-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

NCS PEARSON INC
Employer

OC: 04/03/11
Claimant: Appellant (2/R)

Section 96.5-1 – Voluntary Leaving - Layoff

STATEMENT OF THE CASE:

Phillip L. Davis (claimant) appealed a representative's May 31, 2011 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after an at least temporary separation from employment from NCS Pearson, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on July 7, 2011. The claimant participated in the hearing. The employer's third party representative responded to the hearing notice by reporting that the employer was opting not to participate in the hearing. 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?

FINDINGS OF FACT:

The claimant started working for the employer in about November 2007. He works full time hours (37.5 hours per week) as a seasonal/temporary worker on an overnight schedule in the employer's Cedar Rapids, Iowa office handling, scanning and packaging of college testing materials. The normal season is from late October or early November into about April.

The claimant returned to the employer in late October or early November 2010 and worked on his regular basis through on or about February 25, 2011. He then became ill, resulting in him being off work for about one week, the week of February 28. On about March 6 he called and spoke with the employer's human resources representative, indicating that he was well enough to return to work. She told the claimant that he should not come back at that time because the work for the season was almost done.

The claimant had originally established an unemployment insurance benefit year effective April 27, 2008. After the end of his work with the employer in 2010 he was able to reopen that claim effective April 11, 2010, and he received emergency unemployment compensation (EUC)

for each week under that claim until those benefits were exhausted July 24, 2010. He was then able to reopen another benefit year that had been established April 26, 2009 with an additional claim effective July 25, and he began receiving additional EUC benefits under that claim for each week thereafter until those benefits were exhausted April 2, 2011. He then established his new benefit year effective April 3, 2011, triggering the employer's initial protest to that claim. However, the claimant did not report his wages earned with the employer on his weekly claims made since returning to the employment from the beginning of October or early November 2010 through his last day of work on or about February 25. Also, the claimant made a weekly claim and received unemployment insurance benefits for the week ending March 5, the week he indicated he was off work due to illness.

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.

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 accompanied by an overt act of carrying out that intention. Bartelt v. Employment Appeal Board, 494 N.W.2d 684 (Iowa 1993). The employer initially asserted that the claimant was not discharged but that he voluntarily quit. 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 another form of separation.

871 IAC 24.1(113)a provides:

Separations. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.

a. Layoffs. A layoff is a suspension from pay status (lasting or expected to last more than seven consecutive calendar days without pay) initiated by the employer without prejudice to the worker for such reasons as: lack of orders, model changeover, termination of seasonal or temporary employment, inventory-taking, introduction of laborsaving devices, plant breakdown, shortage of materials; including temporarily furloughed employees and employees placed on unpaid vacations.

The separation was attributable to a lack of work by the employer and was a layoff, either permanent or temporary. Benefits are allowed.

An issue as to whether the claimant's eligibility for work the week ending March 5, 2011 as not being able and available for work arose as a consequence of the hearing. This issue was not included in the notice of hearing for this case, and the case will be remanded to the Claims Section for an investigation and preliminary determination on that issue. 871 IAC 26.14(5). Further, Agency records in conjunction with the claimant's testimony regarding his employment indicate the claimant was receiving income that should have been reported to reduce his benefits after he returned to work in the fall of 2010. This is a matter not included on the notice of hearing, and the administrative law judge is without jurisdiction to make a ruling on the issue.

This matter is remanded to the Investigations and Recovery Unit to determine if the claimant was receiving wages that he failed to report.

DECISION:

The representative's May 31, 2011 decision (reference 01) is reversed. The claimant did not voluntarily quit and the employer laid off the claimant for lack of work. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible. The matter is remanded to the Claims Section for investigation and determination of the able and available issue for the week ending March 5. The matter is also remanded to Quality Control for investigation and determination of the unreported wage issue.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs