

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

SANDRO RIVERA COLON
Claimant

CONSUMERS SUPPLY DISTRIBUTING LLC
Employer

APPEAL 15A-UI-08973-DL-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 07/19/15
Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1)d – Voluntary Quitting/Illness or Injury
Iowa Admin. Code r. 871-24.25(35) – Separation Due to Illness or Injury
Iowa Code § 96.4(3) – Ability to and Availability for Work

STATEMENT OF THE CASE:

The claimant filed an appeal from the August 6, 2015, (reference 01) unemployment insurance decision that denied benefits based upon voluntarily quitting the employment. The parties were properly notified about the hearing. A telephone hearing was held on August 28, 2015. Claimant participated and was represented by Paul Lundberg, Attorney at Law. Employer participated through human resource manager Cecily Johnston. Claimant's Exhibits 1 and 2 were received.

ISSUES:

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 an extruder operator from August 4, 2014, and was separated from employment on May 27, 2015, when he was discharged. His last day of work was April 7, 2015, before surgery on April 8 for a personal medical condition. In mid-March 2015 he provided supervisor/manager Corey Weitzel, with a medical note that he would need to be absent for about three months with light duty restrictions for another month after that. (Claimant's Exhibit 1) Weitzel did not instruct him to do anything else before going on leave. Weitzel was not presented as a hearing witness. On April 7, Johnston spoke to claimant and told him he was not eligible for Family and Medical Leave Act (FMLA) leave but did not tell him the employer generally limits medical leave to four weeks and that period would end around May 8, 2015. The employer does not have a written policy governing the length of leaves of absence in the case of ineligibility for FMLA leave. On April 29 after paystubs were returned, Johnston called claimant and updated his address. She had a copy of Claimant's Exhibit 2 by then so was aware of the anticipated four-month recovery estimate and asked him about his readiness for light duty work and reminded him he was not eligible for FMLA leave. She did not tell him

that his leave time may expire within the next two weeks. He said he had a doctor's appointment the next day. She did not ask him to provide information from that appointment and told him she would contact him. (Employer's Exhibit C) On May 26, about six weeks after surgery claimant called Johnston to tell her he had another doctor appointment. She reminded him the employer needed his insurance premium payments and told him to call her after his appointment. He did not. The employer decided to terminate the employment on May 27 and sent claimant a termination letter at his address of record, which was returned as unclaimed. (Employer's Exhibit A) Claimant contacted Johnston on June 8, 2015, to inquire about his employment status. Johnston told him about the May 27 termination. Claimant told her he lost his phone.

He did not file his claim for unemployment insurance benefits until he was medically released to return to work, more than three months after his surgery, which is consistent with the medical estimate. (Claimant's Exhibits 1, 2) His effective claim date is July 19, 2015.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged for no disqualifying reason.

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).

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 issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). Absences due to properly reported illness cannot constitute work-connected misconduct since they are not volitional, even if the employer was fully within its rights to assess points or impose discipline up to or including discharge for the absence under its attendance policy. Iowa Admin. Code r. 871-24.32(7); *Cosper*, supra; *Gaborit v. Emp't Appeal Bd.*, 734 N.W.2d 554 (Iowa Ct. App. 2007).

Where an employee did not voluntarily quit but was terminated while absent under medical care, the employee is allowed benefits and is not required to return to the employer and offer services pursuant to the subsection d exception of Iowa Code section 96.5(1). *Prairie Ridge Addiction Treatment Servs. v. Jackson and Emp't Appeal Bd.*, 810 N.W.2d 532 (Iowa Ct. App. 2012).

An employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, employer incurs potential liability for unemployment insurance benefits related to that separation. The employer initiated the end of the voluntary medical leave period by terminating the employment prior to his medical release to return to work based upon a calendar measurement rather than the treating physician's opinion. The claimant is not required to return to the employer to offer services after the medical recovery because he has already been involuntarily terminated from the employment while under medical care. In spite of the expiration of the unofficial and undefined leave period, since claimant was still under medical care and had not yet been released to return to work without restriction as of the date of separation, no disqualifying reason for the separation has been established. While the claimant did not maintain communication with Johnston as she requested on May 26, the termination letter referred to the separation as being related to the length of time away from work, not his failure to communicate. Benefits are allowed, provided claimant is otherwise eligible.

Iowa Code § 96.4-3 provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

Iowa Admin. Code r. 871-24.22(1)a provides:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(1) Able to work. An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.

a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

Iowa Admin. Code r. 871-24.23(35) provides:

Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.

(35) Where the claimant is not able to work and is under the care of a physician and has not been released as being able to work.

To be able to work, "[a]n individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood." *Sierra v. Emp't Appeal Bd.*, 508 N.W.2d 719, 721 (Iowa 1993); *Geiken v. Lutheran Home for the Aged*, 468 N.W.2d 223 (Iowa 1991); Iowa Admin. Code r. 871-24.22(1). "An evaluation of an individual's ability to work for the purposes of determining that individual's eligibility for unemployment benefits must necessarily take into consideration the economic and legal forces at work in the general labor market in which the individual resides." *Sierra* at 723. This means that when evaluating whether a person with a protected disability is able and available to work we must take into account the reasonable accommodation requirements imposed on employers under federal, state, and local laws. *Id.*

Inasmuch as the medical condition was not work-related but employer involuntarily terminated the employment before he was released to return to work with or without restriction, and claimant has established his ability to and availability for work without restriction at the time he filed his unemployment insurance claim, benefits are allowed.

DECISION:

The August 6, 2015, (reference 01) unemployment insurance decision is reversed. The claimant did not quit but was discharged for no disqualifying reason. Claimant is able to and available for work effective July 19, 2015. Benefits are allowed, provided he is otherwise eligible.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/pjs