

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

TRACY L HATCHER
Claimant

LENNOX INDUSTRIES INC
Employer

APPEAL 19A-UI-03302-CL-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 08/05/18
Claimant: Appellant (2)

Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.4(3) – Ability to and Availability for Work
Iowa Admin. Code r. 871-24.22(2) – Able & Available - Benefits Eligibility Conditions

STATEMENT OF THE CASE:

The claimant filed an appeal from the April 16, 2019, (reference 02) unemployment insurance decision that denied benefits based upon a separation from employment. The parties were properly notified about the hearing. A telephone hearing was held on May 9, 2019. Claimant participated. Employer participated through human resource employee Brent McDowell and was represented by Treve Lumsden.

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?
Is the claimant able to work and available for work effective March 31, 2019?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for employer on March 10, 1986. Claimant last worked as a full-time material handler. Claimant was separated from employment on March 5, 2019.

Employer has a policy stating that three consecutive no-call/no-show absences will result in separation from employment. Claimant was aware of the policy.

Claimant's last day of work was August 20, 2018. On August 23, 2018, claimant was physically assaulted outside of work. The assault put claimant in a coma. When claimant came out of the coma on August 30, 2018, he had contusions on his head, a broken nose, could not see, and had an injured tail bone. Claimant was also diagnosed with Post Traumatic Stress Disorder.

Claimant applied for and was approved for short-term disability benefits. Employer's short-term disability benefits are administered by MetLife. When claimant was approved for the benefits, he was automatically given an excused leave of absence from work.

On February 6, 2019, MetLife sent claimant a letter stating his short-term disability benefits would end on February 20, 2019. Claimant received the letter. The letter did not instruct claimant he must return to work thereafter or face termination.

On February 12, 2019, employer sent claimant a letter by certified mail. The letter stated that claimant's short-term disability benefits were ending on February 20, 2019, and claimant either had to return to work or apply for a medical leave of absence. Claimant never received the letter.

Claimant's medical provider would not release him to return to work until March 31, 2019.

At the end of February 2019, claimant called human resource employee Brent McDowell and his supervisor to talk about the fact that his short term disability benefits were ending and he could not return to work. Neither person answered. Claimant left both individuals a voice message stating that he had not been released to return to work, so even though his short-term disability benefits were running out, he could not yet return. Neither McDowell nor the supervisor returned claimant's call.

Claimant did not appear for work on February 21, 2019, or seek a further leave of absence. Claimant did not report his absence on that date or any time thereafter.

Employer considered claimant's absence on February 21, 22, and 25, 2019, to be no-call/no-show absences.

On March 5, 2019, employer sent claimant a letter terminating his employment due to consecutive no-call/no-show absences.

Claimant's union filed a grievance on his behalf. The grievance process has not concluded as of the date of the hearing.

On April 6, 2019, claimant's advocate sent a letter to employer, asking employer to allow claimant to return to work and stating that he had been released to return to work on March 31, 2019.

Employer has not yet returned claimant to work.

REASONING AND CONCLUSIONS OF LAW:

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

A preliminary issue is whether claimant was discharged or voluntarily resigned. Either way it is analyzed, claimant's separation from employment is not disqualifying.

If claimant was discharged from employment, it is employer's burden to show it was for job-related misconduct.

Iowa Code § 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *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). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000).

Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986). Poor work performance is not

misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

In this case, claimant did not receive the letter from employer stating he must return to work or request medical leave by February 21, 2019. Claimant was aware that his short-term disability benefits were ending, which is why he called his employer to inquire as to what he needed to do next. Employer did not return his call.

Employer has not met its burden to show that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning when he did not return to work or call in to report his absence on February 21, 2019. Claimant was not aware of what his obligations were at that point, although he did make a good faith attempt to find out. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given.

Employer failed to establish claimant was terminated for misconduct.

Alternatively, if the separation is analyzed as a voluntary resignation, claimant is still qualified to receive benefits.

Iowa Code section 96.5(1)d provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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. But the individual shall not be disqualified if the department finds that:

d. The individual left employment because of illness, injury or pregnancy upon the advice of a licensed and practicing physician, and upon knowledge of the necessity for absence immediately notified the employer, or the employer consented to the absence, and after recovering from the illness, injury or pregnancy, when recovery was certified by a licensed and practicing physician, the individual returned to the employer and offered to perform services and the individual's regular work or comparable suitable work was not available, if so found by the department, provided the individual is otherwise eligible.

Iowa Admin. Code r. 871-24.25(35) 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:

(35) The claimant left because of illness or injury which was not caused or aggravated by the employment or pregnancy and failed to:

- (a) Obtain the advice of a licensed and practicing physician;
- (b) Obtain certification of release for work from a licensed and practicing physician;
- (c) Return to the employer and offer services upon recovery and certification for work by a licensed and practicing physician; or
- (d) Fully recover so that the claimant could perform all of the duties of the job.

In this case, the medical professional treating claimant recommended that claimant not return to work until March 31, 2019, because of a non-work related medical condition. Claimant notified employer this was the case. After claimant fully recovered and was released by his doctor, he returned to employer to offer his services but employer has not yet allowed him to return.

Claimant established his separation is not disqualifying, if it is analyzed as a quit.

Claimant is not disqualified from receiving benefits based on his separation from employment.

The next issue is whether he is able to and available for work as of March 31, 2019, the date he reopened his claim for unemployment insurance benefits.

Iowa Code section 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.

In this case, the professional treating claimant for his non-work related medical condition released him to return to work effective March 31, 2019, with no restrictions. Therefore, claimant is eligible for unemployment insurance benefits as of that date.

DECISION:

The April 16, 2019, (reference 02) unemployment insurance decision is reversed. The claimant was separated from employment for no disqualifying reason. Claimant is able to and available for work effective March 31, 2019. Claimant is allowed benefits, provided he is otherwise eligible.

Christine A. Louis
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Decision Dated and Mailed

cal/scn