

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

LEONARD D MOTEN
Claimant

HILTON WORLDWIDE INC
Employer

APPEAL 15A-UI-06712-JP-T
ADMINISTRATIVE LAW JUDGE
DECISION

OC: 05/17/15
Claimant: Appellant (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from the June 8, 2015, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on July 10, 2015. Claimant participated. Employer participated through director of human resources, Michelle Clark. Employer exhibits 1 through 4 were admitted with no objection. Claimant's exhibits A and B were admitted with no objection.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed part time as a banquet server/setup from November 14, 2014, and was separated from employment on April 20, 2015, when he was discharged.

Claimant had a surgery scheduled for March 4, 2015. Claimant provided the employer with a doctor's note listing the surgery date and that he would be unable to work until April 1, 2015, when he could return to work without restrictions. Employer Exhibit 1. Claimant discussed his surgery and his need to miss time with the employer. The employer excused claimant from work until after April 1, 2015. Claimant's surgery date was changed from March 4, 2015 to April 8, 2015 because he could not find a ride on March 4, 2015. Ms. Clark spoke with claimant a few times after February 27, 2015, but before April 1, 2015. Claimant never mentioned his surgery date had changed. After April 1, 2015, claimant did not return to work. The employer attempted to contact claimant multiple times with no success. Employer Exhibit 2. On April 20, 2015, the employer terminated claimant's employment because claimant failed to contact the employer after April 1, 2015. After April 20, 2015, claimant contacted the employer and let them know he could return to work on May 18, 2015. The employer then received on May 1, 2015 a new doctor's note showing the surgery date of April 8, 2015. Employer Exhibit 3. In this second doctor's note, it provides that claimant may return to work, but "[n]o lifting over 20 pounds for: Until 5/18/2015". Employer Exhibit 3 Claimant made two phone calls to the employer's main

line on April 1, 2015. Claimant Exhibit A. One phone call was for a rounded time of three minutes and the other phone call was for a rounded time of one minute. Claimant Exhibit A.

According to the employer, claimant's last day of work was February 27, 2015. According to the claimant, his last day of work was March 6, 2015, but he did not work the rest of March because he was not put on the schedule.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct. Benefits are denied.

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).

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).

It is my duty, as the 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 appearance, 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).

The 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. The administrative law judge reviewed the exhibits submitted by both parties. While the employer did not present Jeremiah Sinclair to provide sworn testimony or submit to cross-examination, the combination of Ms. Clark's written statement, Employer's Exhibits 1 through 4 and Ms. Clark's testimony, when compared to claimant's recollection of the event, establish the employer's evidence as credible. An employer is entitled to expect its employees to report to work as scheduled or to be notified when and why the employee is unable to report to work. Inasmuch as the claimant failed to report for work after April 1, 2015 or notify the employer that his surgery date was changed to April 8, 2015, claimant is considered to have abandoned his job.

The administrative law judge does not find Claimant Exhibit A to be persuasive that claimant contacted the employer to notify them his surgery date was changed. Claimant said he spoke to Mr. Sinclair on the first call and Ms. Clark on the second call. However, the calls were to the main hotel line and only for one and three minutes respectively. Claimant also testified that his last day of work was March 6, 2015 and not February 27, 2015. He further testified that he did not work the rest of March because he was not put on the schedule. The administrative law judge also does not find this persuasive. Claimant's testimony implies he was placed on the schedule (last day of work) within two days of not having a ride to his initial surgery. The employer has presented substantial and credible evidence that claimant's last day of work was February 27, 2015. Claimant's second doctor's note, Employer Exhibit 3, also does not appear to preclude claimant from returning to work for a period of time after his surgery on April 8, 2015, it just sets a lifting restriction.

The employer has presented substantial and credible evidence that claimant failed to return to work after April 1, 2015, provide an updated doctor's note notifying the employer that his surgery date was changed, or have communication with the employer between April 2, 2015 and April 20, 2015. This is disqualifying misconduct. Benefits are denied.

DECISION:

The June 8, 2015, (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he 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/css