

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ANTHONY B PANGBURN
Claimant

APPEAL NO: 09A-UI-16287-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

GOOD SAMARITAN SOCIETY INC
Employer

OC: 09/27/09

Claimant: Respondent (1)

Section 96.5-2-a – Discharge
Section 96.5-1 – Voluntary Leaving

STATEMENT OF THE CASE:

Good Samaritan Society, Inc. (employer) appealed a representative's October 23, 2009 decision (reference 01) that concluded Anthony B. Pangburn (claimant) was qualified to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was convened on December 4 and reconvened and concluded on December 11, 2009. The claimant participated in the hearing. Fred Metcalf appeared on the employer's behalf. During the hearing, Employer's Exhibits One through Four were entered into evidence. 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 on September 27, 2004. He worked part time (approximately 20 hours per week) as a dietary assistant in the employer's long-term care nursing and assisted living facility. He worked on a schedule with rotating days. His last day of work was August 30, 2009.

The claimant has an underlying medical condition, cystic fibrosis. He also occasionally suffers from other medical issues. On August 31 he advised the employer that he needed leave to be off work for an undetermined amount of time due to possible gall bladder surgery. On September 17 the claimant's doctor provided the employer with a statement confirming that the claimant had been hospitalized from September 4 through September 9 for gall bladder surgery, and indicating he would be released to return to work during the week of September 21. On a release dated September 11 and provided to the employer on September 14 the doctor had indicated the claimant could return to work on September 22.

The employer scheduled the claimant to work on September 23. The employer did not act to communicate this to the claimant. The prior practice had been that the employer would contact the claimant to inform him when he was being scheduled to work. The claimant had come into the employer's premises on September 22 on some other business, but no one mentioned to him he was scheduled to work the next day.

The claimant did not report for work at 4:00 p.m. on September 23 as scheduled. The employer unsuccessfully attempted to call the claimant. At approximately 5:00 p.m. the claimant's mother called the employer to advise the employer the claimant was going to the emergency room due to some concerns regarding his surgical sutures. On September 24 the claimant came into the facility to drop off a note excusing him from work through September 28. However, he was then advised that the note was not needed as he no longer had a job. The employer asserted that the claimant had voluntarily quit by not returning to work on September 23 after his leave expired.

The claimant had multiple prior absences and times he had worked shorter than scheduled shifts. Virtually all of these were due to medical issues. He had not been given any warning his job was in jeopardy due to his attendance.

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.

Rule 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 and an action to carry out that intent. Bartelt v. Employment Appeal Board, 494 N.W.2d 684 (Iowa 1993); Wills v. Employment Appeal Board, 447 N.W.2d 137, 138 (Iowa 1989). The employer asserted that the claimant was not discharged but that he quit by not returning to work after a leave of absence. While an employee's failure to return to employment after a leave of absence can result in an inference of a quit, that inference does not withstand scrutiny in the context of this case, particularly when the claimant had been in contact with the employer on September 22. 871 IAC 24.22(2)j. 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 a discharge for purposes of unemployment insurance. 871 IAC 24.26(21).

The issue in this case is then whether the employer discharged the claimant for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue is not whether the employer was right or even had any other choice but to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate decisions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988). A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the

employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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. 871 IAC 24.32(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

The reason the employer effectively discharged the claimant was his absence from work. Excessive unexcused absences can constitute misconduct, however, in order to establish the necessary element of intent, the final incident must have occurred despite the claimant's knowledge that the occurrence could result in the loss of his job. Cosper, supra; Higgins v. IDJS, 350 N.W.2d 187 (Iowa 1984). The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's October 23, 2009 decision (reference 01) is affirmed. The claimant did not voluntarily quit and the employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

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