

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**STEVEN R KIRKPATRICK**  
Claimant

**APPEAL NO. 14A-UI-01090-VST**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**DEERY BROTHERS INC**  
Employer

**OC: 12/29/13**  
**Claimant: Respondent (5)**

Section 96.5-1 – Voluntary Quit  
Section 96.5-2-a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

The employer filed an appeal from a representative's decision dated January 23, 2014, reference 01, which held that the claimant was eligible for unemployment insurance benefits. After due notice, a hearing was held on March 4, 2014, by telephone conference call. The claimant participated personally. Employer participated by Terry Mertens, general manager. Jackie Nolan served as hearing representative. The record consists of the testimony of Terry Mertens and the testimony of Steven Kirkpatrick. Official notice is taken of agency records.

**ISSUE:**

Whether the claimant was separated from his employment for any disqualifying reason.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a car dealership located in West Burlington, Iowa. The claimant was hired on October 17, 2013, as a full-time product specialist. His last day of work was December 23, 2013. He left early that day due to his son being sick.

The claimant called in sick on December 24, 2013. The employer's policy requires an individual to call in one hour prior to the start of the shift if he or she is going to be absent. On December 16, 2013, the claimant called the sales manager, Tim Heiniger, and informed him that he was sick and had injured his back and would not be back to work until he had seen his chiropractor on December 30, 2013. Mr. Heiniger said "okay" and we will see you when you get back. The claimant did not call in again but he produced a doctor's slip that excused him from work. This slip was faxed to the employer on December 30, 2013. The claimant returned to work on January 2, 2014. The employer did not allow the claimant to return to work as the employer believed that the claimant had abandoned his job.

## REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5-1 provides:

An individual shall be disqualified for benefits:

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.

A quit is a separation initiated by the employee. 871 IAC 24.1(113)(b). In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 698, 612 (Iowa 1980) and Peck v. EAB, 492 N.W.2d 438 (Iowa App. 1992). 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. See 871 IAC 24.25.

Iowa Code section 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.

871 IAC 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.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Excessive unexcused absenteeism is one form of misconduct. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). The concept

includes tardiness and leaving early. Absence due to matters of personal responsibility, such as transportation problems and oversleeping, is considered unexcused. See Harlan v. IDJS, 350 N.W.2d 192 (Iowa 1984). Absence due to illness and other excusable reasons is deemed excused if the employee properly notifies the employer. See Higgins, supra, and 871 IAC 24.32(7). The employer has the burden of proof to show misconduct.

The claimant is eligible for unemployment insurance benefits. The evidence established that the claimant did not quit his job. The claimant credibly testified that he informed his employer on December 26, 2013, that he was ill and that he would not be able to return to work for a few days until he saw his chiropractor on December 30, 2013. The claimant admitted that he did not call in after December 26, 2013, but thought it was unnecessary since his employer had approved his absence. The claimant had every intention of returning to work.

If one views this case as a discharge for misconduct, the claimant is still not disqualified for misconduct. The claimant was absent for personal illness, which is an excused absence. The employer knew the claimant was gone due to personal illness because the claimant had personally informed the employer on December 26, 2013, that he would be absent until at least December 30, 2013, due to personal illness. The claimant's information was confirmed by a slip from his chiropractor. The claimant could reasonably rely on his employer's statement that "we'll see you in a couple of days" and would not have to call the employer every day. The claimant was absent for personal illness properly reported. This is not unexcused absenteeism under Iowa law. Benefits are allowed.

**DECISION:**

The decision of the representative dated January 23, 2014, reference 01, is modified with no change in effect. Unemployment insurance benefits are allowed, if the claimant is otherwise eligible.

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Vicki L. Seeck  
Administrative Law Judge

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Decision Dated and Mailed

vls/pjs