IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JOEL E SMITH
Claimant

BRANDFX LLC
Employer

APPEAL NO. 17A-UI-10921-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/01/17
Claimant: Respondent (5)

Iowa Code Section 96.5(2)(a) – Discharge
Iowa Code Section 96.4(3) – Able & Available

STATEMENT OF THE CASE:

The employer filed a timely appeal from the October 23, 2017, reference 01, decision that allowed benefits to the claimant, provided he was otherwise eligible, and that held the employer's account could be charged for benefits, based on the claims deputy's conclusion that the claimant was discharged on September 27, 2017 for no disqualifying reason. After due notice was issued, a hearing was held on November 13, 2017. Claimant Joel Smith participated. Teresa Cordova, Human Resources Assistant, represented the employer. Exhibits 1 through 6 were received into evidence. The administrative law judge took official notice of the fact-finding materials and marked them as Department Exhibits D-1 through D-5. The administrative law judge took official notice of the Agency's administrative record of benefits disbursed to the claimant (DBRO) and the Agency's administrative record of the weekly unemployment insurance claims (KCCO).

ISSUES:

Whether Mr. Smith separated from the employment for a reason that disqualifies him for unemployment insurance benefits.

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: BrandFx, L.L.C. manufactures commercial truck storage components and employs 85 people in Swea City, Iowa. Joel Smith commenced his full-time employment with BrandFx in 2013 and last performed work for the employer on or about June 5, 2017. Mr. Smith worked as a machine operator in the employer's welding department. Mr. Smith's regular duties included running a band saw in welding department, ironworking, ordering materials, conducting a periodic inventory, operating a forklift and assisting welders who needed help with reading blueprints and who needed help with laying out components to be welded. The employer disclosed in the initial job application that the work required Mr. Smith to be able to lift over 50 pounds on a regular basis. In the course of performing his work duties, Mr. Smith would routinely lift items weighing from three pounds to 70 pounds. About 50 to 60 percent of the work required lifting items weighing greater than 20 pounds. Mr. Smith's regular work hours were 6:00 a.m. to

2:30 p.m., Monday through Friday. From the start of 2017, the employer regularly required Mr. Smith to work and extra hour of 1.5 hours of overtime added to the end of his regular work hours.

On June 6, 2017, Mr. Smith suffered serious injury when the motorcycle he was riding struck a coyote. Mr. Smith was off-duty and away from work at the time. During the collision, Mr. Smith was thrown from his motorcycle. Following the collision, Mr. Smith was not immediate aware of the extent of his injuries. A friend transported Mr. Smith home. The next morning, Mr. Smith could not get out of bed without assistance. Before a friend transported Mr. Smith to the hospital, Mr. Smith spoke to the Welding Department Supervisor, Brian Blocker, to notify him of the motorcycle accident and that the friend was taking Mr. Smith to the hospital. Mr. Smith was admitted to the hospital and was diagnosed with a broken neck, five broken ribs, and a punctured lung. Mr. Smith underwent surgery to stabilize his cervical spine and his ribs.

Mr. Smith quickly discerned that he would be off work for an extended period. Mr. Smith enlisted his sister to go to the workplace to retrieve an application for leave under the Family and Medical Leave Act (FMLA). On June 9, Mr. Smith completed the employee portion of the leave application form and had his sister deliver the completed form to the employer.

Mr. Smith remained in the hospital until June 16, 2017. He was then discharged to home, but not released to return to work. Mr. Smith's health care provider advised him he would need to be off work for three months.

On June 16, 2017, Michael Thorn, A.P.R.N., of Mayo Clinic Trauma/General Surgery, completed a FMLA Certification of Health Care Provider in support of Mr. Smith's need for a medical leave of absence. Nurse Practitioner Thorn indicated on the form that Mr. Smith had a cervical spine fracture and would need to wear a cervical collar for three months, from June 7 to September 7, 2017. Nurse Practitioner Thorn indicated that Mr. Smith suffered rib fracture and that his rib fracture needed to stabilize. Nurse Practitioner Thorn indicated that Mr. Smith would require ongoing pain management and had been prescribed benzodiazepines and narcotics for pain. Nurse Practitioner Thorn indicated that Mr. Smith had been referred for orthopedic spine surgery for cervical fracture fixation and rib fracture stabilization. Nurse Practitioner Thorn indicated that Mr. Smith was expected to be incapacitated until September 7, 2017. Nurse Practitioner Thorn indicated that Mr. Smith was unable to lift more than 15 pounds and unable to rotate his neck due to the cervical collar.

On June 19, 2017, Janiece Runge, Human Resources Manager, completed the employer portion of the FMLA leave application. Ms. Runge approved the FMLA leave request through September 7, 2017 and provided a September 8, 2017 return-to-work date.

On June 28, 2017, Mr. Smith met with the orthopedic surgeon, Ahmed Nassr, M.D., of Mayo Clinic. Dr. Nassr advised Mr. Smith that he would need to be off work for three months from that appointment date. That meant that Mr. Smith would not be released to return to work until September 28, 2017. Dr. Nassr provided Mr. Smith with an Activity/Work Status Report that indicated he would need to be off work for three months from the date of the appointment. Mr. Smith provided the document to the employer.

On July 5, 2017, Ms. Runge sent Mr. Smith a letter in which she referenced a FMLA leave of absence approved through September 5, 2017. Ms. Runge wrote in the letter that if Mr. Runge needed an extension of the leave, he would need to provide medical documentation showing the medical need for the extension. Ms. Runge wrote that in the absence of a request to extend the leave or return to the employment by September 6, 2017, the employer would assume that Mr. Smith was not planning to return to the employment. Ms. Runge added that the employer would require "a full duty release signed by your doctor before allowing you to return to work."

As the September 6, 2017 return to work date approached, Ms. Runge approved a three-week extension of the leave of absence.

On September 26, 2017, Mr. Smith had a follow-up appointment with Dr. Nassr. At that time, Dr. Nassr released Mr. Smith to return to full-time work with a 20-pound lifting restriction. The release document also restricted Mr. Smith to occasional (33 percent of the work day) twisting/turning, bending/stooping, squatting/kneeling. The release document indicated that Mr. Nassr could perform work that required reaching above his shoulder level frequently (up to 66 percent of the work day). Dr. Nassr indicated on the Activity/Work Status Report that the restrictions would be in place for three months.

Mr. Smith presented the September 26, 2017 medical release to the employer on that same day, but the employer declined to return Mr. Smith to the employment or engage in meaningful discussion regarding whether there were aspects of Mr. Smith's regular duties that he could perform with the medical restrictions and reasonable accommodation of his medical condition. Mr. Smith offered to work in other departments where the work was less physically taxing, but the employer declined to provide such accommodation. Instead, the employer notified Mr. Smith that the employer could no longer hold his position, was severing the employment relationship, and that Mr. Smith could reapply once he was released to return to work with no restrictions.

Mr. Smith established a claim for unemployment insurance benefits that was effective October 1, 2017. Since that time, Mr. Smith has actively sought employment in Swea City and surrounding communities that he could perform within 20-pound lifting limit and the associated restrictions. Mr. Smith has continued to make himself available for full-time employment. Mr. Smith continues under the medical restrictions imposed on September 26, 2017. Those restrictions do not prevent Mr. Smith from performing many types of work available in the labor market that includes Swea City and surrounding communities.

REASONING AND CONCLUSIONS OF LAW:

Workforce Development rule 871 IAC 24.1(113) provides as follows:

> Separations. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.
> a. Layoffs. A layoff is a suspension from pay status initiated by the employer without prejudice to the worker for such reasons as: lack of orders, model changeover, termination of seasonal or temporary employment, inventory–taking, introduction of laborsaving devices, plant breakdown, shortage of materials; including temporarily furloughed employees and employees placed on unpaid vacations.
> b. Quits. A quit is a termination of employment initiated by the employee for any reason except mandatory retirement or transfer to another establishment of the same firm, or for service in the armed forces.
> c. Discharge. A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.
> d. Other separations. Terminations of employment for military duty lasting or expected to last more than 30 calendar days, retirement, permanent disability, and failure to meet the physical standards required.

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 Iowa Administrative Code rule 871-24.25.

In *Prairie Ridge Addiction Treatment Servs. v. Jackson and Emp't Appeal Bd.,* 810 N.W.2d 532 (Iowa Ct. App. 2012), the claimant, Ms. Jackson, who had been injured in a non-work related automobile accident requested a leave of absence so that she could recover from her injury. The employer approved the initial request. The employer also approved an extension of the leave of absence. The employment ended when the employer decided to terminate the employment, rather than grant an additional extension of the leave of absence. The claimant had not yet been released to return to work at the time the employer deemed the employment terminated. The Iowa Court of Appeals held that Ms. Jackson had not voluntarily quit the employment. The Iowa Court of Appeals further held that because Ms. Jackson had not voluntarily quit, she was not obligated to return to the employer upon her recovery to offer her services in order to be eligible for unemployment insurance benefits. The effect of the court's decision was to treat the separation as a discharge from the employment.

In *Wills v. Employment Appeal Board*, the Supreme Court of Iowa held that an employee did not voluntarily separate from employment where the employee, a C.N.A., presented a limited medical release that restricted the employee from performing significant lifting, and the employer, as a matter of policy, precluded the employee from working so long as the medical restriction continued in place. See *Wills v. Employment Appeal Board*, 447 N.W.2d 137 (Iowa 1989). In *Wills*, the Court concluded that the employer's actions were tantamount to a discharge.

The employer had an obligation to provide the claimant with reasonable accommodations that would allow her to continue in the work. See *Sierra v. Employment Appeal Board*, 508 N.W. 2d 719 (Iowa 1993).

Mr. Smith did not voluntarily separate from the BrandFx employment. Instead, the employer elected to discharge Mr. Smith from the employment effective September 26, 2017, rather than engage in a discussion regarding reasonable accommodations that would allow him to continue in the employment. The employer also elected not extend the leave of absence.

Iowa Code section 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 disqualification shall continue 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).

Because the discharge was not based on misconduct, the discharge does not disqualify Mr. Smith for unemployment insurance benefits or relieve the employer's account of liability for benefits. Mr. Smith is eligible for benefits, provided he meets all other eligibility requirements. The employer's account may be charged.

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.

Iowa Admin. Code r. 871-24.22(2) 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.

> (2) Available for work. The availability requirement is satisfied when an individual is willing, able, and ready to accept suitable work which the individual does not have good cause to refuse, that is, the individual is genuinely attached to the labor market. Since, under unemployment insurance laws, it is the availability of an individual that is required to be tested, the labor market must be described in terms of the individual. A labor market for an individual means a market for the type of service which the individual offers in the geographical area in which the individual offers the service. Market in that sense does not mean that job vacancies must exist; the purpose of unemployment insurance is to compensate for lack of job vacancies. It means only that the type of services which an individual is offering is generally performed in the geographical area in which the individual is offering the services.

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.

Because the employer elected to terminate the employment relationship, the test of whether Mr. Smith is able and available for work is not whether he is able and available for the work he used to perform for BrandFx but whether he is able and available for work within his medical restrictions, work that a reasonable person would conclude would be available the applicable labor market. A reasonable person would conclude that many types of work in Swea City and the surrounding communities could be performed with a 20-pound lifting restriction. Mr. Smith has continued to be available for full-time work and has continued to engage in an active and earnest search for such work. Accordingly, Mr. Smith has met the able and available requirements since he established his claim for benefits and is eligible for benefits, provided he meets all other eligibility requirements.

DECISION:

The October 23, 2017, reference 01, decision is modified as follows. The claimant was discharged on September 26, 2017 for no disqualifying reason. The claimant has been able to work, available for work, and has been actively and earnestly engaged in a search for new employment since he established his claim for benefits. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

_____
James E. Timberland
Administrative Law Judge

_____
Decision Dated and Mailed

jet/rvs