

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KEITH L TINDELL

Claimant

APPEAL NO. 10A-UI-09862-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DRK1 LLC

INDIAN VILLAGE APARTMENTS

Employer

OC: 05/30/10

Claimant: Respondent (2-R)

Iowa Code Section 96.5(1) – Voluntary Quit

STATEMENT OF THE CASE:

The employer filed a timely appeal from the June 30, 2010, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on August 30, 2010. Claimant Keith Tindell provided a telephone number for the hearing, but was not available at that number at the time of the hearing. Tammy Sutton, Property Manager, represented the employer and presented additional testimony through Gerald Gillitzer, owner.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Keith Tindell was employed by Indian Village Apartments as a full-time maintenance man. Mr. Tindell started the employment in November 2009 and last appeared and performed work for the employer on May 9, 2010. Mr. Tindell's usual working hours were 8:00 a.m. to 5:00 p.m., Monday through Friday. Tammy Sutton, Property Manager, was Mr. Tindell's immediate supervisor. Shane Sutton is Ms. Sutton's brother and also a maintenance man at Indian Village Apartments.

Mr. Tindell was scheduled to work on May 10, 2010, but did not appear for work or make direct contact with the employer. If Mr. Tindell needed to be absent from the employment, the employer's policy required that he telephone Ms. Sutton before the start of her shift. If he was unable to do that, he was required to make contact as soon as he was able and to provide documentation indicating why he could not make contact earlier. On May 10, 2010, Shane Sutton provided Tammy Sutton with a medical excuse that excused Mr. Tindell from work through May 13, 2010 and that released him to return to work on May 14, 2010. The document indicated that Mr. Tindell had been seen at an Emergency Room on May 9, 2010. Shane Sutton explained to Tammy Sutton that Mr. Tindell had been assaulted on May 8. Ms. Sutton did not inquire further regarding whether or when Mr. Sutton spoke directly to Mr. Tindell.

Ms. Sutton deemed the written medical excuse sufficient notice of Mr. Tindell's need to be off work through May 13 and looked for him to return on May 14, 2010.

Mr. Tindell did not return to work on May 14 or make further contact with the employer. When Mr. Tindell did not appear, Ms. Sutton asked her brother whether he knew why Mr. Tindell had not returned. Shane Sutton told Tammy Sutton that Mr. Tindell needed to undergo surgery on May 16 in connection with the May 8 assault. Ms. Sutton did not inquire further about whether and when Mr. Sutton had contact with Mr. Tindell. The employer did not hear further from Mr. Tindell.

Over the course of several days, Gerald Gillitzer, owner, attempted to reach Mr. Tindell by telephone at Mr. Tindell's home phone number. Mr. Gillitzer was never able to speak directly with Mr. Tindell. Mr. Gillitzer left messages, but did not hear back from Mr. Tindell. Mr. Gillitzer eventually concluded Mr. Tindell was not returning to the employment and hired a replacement. The employer then learned that Mr. Tindell had applied for unemployment insurance benefits.

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.

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.

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.

When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

In considering an understanding or belief formed, or a conclusion drawn, by an employer or claimant, the administrative law judge considers what a reasonable person would have concluded under the circumstances. See Aalbers v. Iowa Department of Job Service, 431 N.W.2d 330 (Iowa 1988) and O'Brien v. Employment Appeal Bd., 494 N.W.2d 660 (1993).

Mr. Tindell failed to make himself available for the hearing and thereby failed to present any evidence to indicate an involuntary separation from the employment or a voluntary quit for good cause attributable to the employer. The weight of the evidence in the record establishes that the employer reasonably concluded that Mr. Tindell had quit the employment after Mr. Tindell failed to appear or make further contact with the employer on or after May 14, 2010. The evidence indicates that Mr. Tindell separated for personal reasons and not for good cause attributable to the employer, who continued to have work available for Mr. Tindell at the time he ceased appearing for work. Mr. Tindell is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits paid to Mr. Tindell.

Iowa Code section 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code section 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received would constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The Agency representative's June 30, 2010, reference 01, decision is reversed. The claimant voluntarily quit the employment without good cause attributable to the employer. The claimant is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged.

This matter is remanded to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs