IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

SCOTT HOODJER
Claimant

BUTLER COUNTY
Employer

APPEAL NO. 13A-UI-05730-BT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 04/14/13
Claimant: Respondent (2/R)

Iowa Code § 96.5(2)(a) - Discharge for Misconduct
Iowa Code § 96.3-7 - Overpayment

STATEMENT OF THE CASE:

Butler County (employer) appealed an unemployment insurance decision dated May 6, 2013, reference 01, which held that Scott Hoodjer (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on June 20, 2013. The claimant participated in the hearing. The employer participated through Liz Williams, Mindy Pecha and Donis Dralle. Employer's Exhibits One and Two and Claimant's Exhibits A, B, and C were admitted into evidence.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was employed as a full-time maintenance supervisor from November 2, 2009 through April 16, 2013 when he was discharged for three no-call/no-shows or three absences wherein he failed to contact the employer. The employer's policy provides that there are three types of separations: 1) termination; 2) resignation; and 3) abandonment of position. An employee who is absent from duty for one workday without notifying their department head shall be deemed to have resigned their position."

The new county auditor took over in her position at the beginning of January 2013. On January 25, 2013, she advised the claimant that he was not a department head and could not come and go at will but must report for his regular work shift. The claimant and his wife were expecting a baby and the claimant mentioned to the county auditor that he did not know whether he wanted to take off two weeks of work in the mornings or exactly what he wanted to do. The claimant had vacation available and had worked sufficient hours to qualify for leave under the Family Medical Leave Act (FMLA). An employee is eligible to take FMLA for the birth of the employee's newborn child and the claimant introduced the employer's FMLA policy at the unemployment appeal hearing.

The employer's Family Medical Leave Policy has the following notice requirements: "If employee knows in advance that he/she will be taking leave because of birth, adoption or placement of a foster child in their home, or because of planned medical treatment for himself/herself or a covered family member, the employee must notify his/her Department Head in writing using a 'Request for Family/Medical Leave' from at least thirty (30) days in advance." The claimant did not give his Department Head specific and/or written notice that he wanted to take leave or vacation. He sent her a text at 3:45 a.m. on April 11, 2013 to report his absence due to the impending birth of his baby.

The claimant was a no-call/no-show on April 12 and 15, 2013. The county auditor called him and sent him an email on April 15, 2013 asking when he planned on returning to work. The claimant said he would return to work on Tuesday, April 16, 2013. However, he did not report to work on time and did not call the employer to report his absence on Tuesday. The claimant subsequently arrived for his 6:00 a.m. shift at 8:30 a.m. and was discharged that day.

The claimant filed a claim for unemployment insurance benefits effective April 14, 2013 and has received benefits after the separation from employment.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the reasons for the claimant's separation from employment qualify him to receive unemployment insurance benefits. The claimant is not qualified to receive unemployment insurance benefits if he voluntarily quit without good cause attributable to the employer or if the employer discharged him for work-connected misconduct. Iowa Code §§ 96.5-1 and 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. In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980) and *Peck v. Employment Appeal Bd.*, 492 N.W.2d 438 (Iowa Ct. App. 1992). The claimant did exhibit the intent to quit by failing to call or report to work for two consecutive days and failing to call or report to work on time for a third day. However, his return to work on the third day demonstrated the intent to continue working. Since the claimant did not have the requisite intent necessary to sever the employment relationship so as to treat the separation as a "voluntary quit" for unemployment insurance purposes, it must be treated as a discharge.

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:
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> 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.
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> 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.

The employer has the burden to prove the discharged employee is disqualified for benefits for misconduct. *Sallis v. Employment Appeal Bd.*, 437 N.W.2d 895, 896 (Iowa 1989). The claimant was discharged on April 16, 2013 after he was a no-call/no-show for three consecutive work days. Two consecutive no-call/no-show absences can constitute job misconduct. *Boehm v. IDJS*, (Unpublished, Iowa App. 1986). The claimant missed work due to the birth of his daughter and while the reasons for his absences are reasonable, his failure to report the absences are not. He could have taken vacation or family medical leave as both were available to him. The county auditor had previously warned him that he could not come and go at will and the employer's work rules clearly state that an employee is deemed to have resigned their position if they are absent for one work day without notifying their department head.

Even if the claimant mistakenly believed that he was not required to report his absences for those two work days, his supervisor's telephone call on April 14, 2013 put him on notice that his behavior was not acceptable and that he did have to properly report his absences. Yet, he was a no-call/no-show on the very next day when he failed to report to work on time and/or failed to call his employer to say why. His actions demonstrate a willful or wanton disregard of the standard of behavior the employer has the right to expect from an employee, as well as an intentional and substantial disregard of the employer's interests and of the employee's duties and obligations to the employer. Work-connected misconduct as defined by the unemployment insurance law has been established in this case and benefits are denied.

Iowa Code § 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 § 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 could 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 unemployment insurance decision dated May 6, 2013, reference 01, is reversed. The claimant is not eligible to receive unemployment insurance benefits because he was discharged from work for misconduct. Benefits are withheld 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 matter is remanded to the Claims Section for investigation and determination of the overpayment issue.

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Susan D. Ackerman
Administrative Law Judge

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Decision Dated and Mailed

sda/pjs