IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

THOMAS ROBERTS Claimant **HOM FURNITURE INC** Employer	**APPEAL 21A-UI-14681-ML-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 03/28/21** **Claimant: Appellant (2)**

Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

On June 28, 2021, Thomas Roberts (claimant/appellant) filed an appeal from the June 17, 2021 (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified of the hearing. A telephone hearing was held on August 12, 2021. The claimant, Thomas Roberts, participated personally. The employer, Hom Furniture, Inc., participated through Daniel Lentz.

ISSUE(S):

I. Was the separation a layoff, discharge for misconduct, or voluntary quit without good cause?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

Claimant worked for the employer as a full-time sales consultant. Claimant's first day of employment was April 11, 2019. The last day claimant worked on the job was January 3, 2021. The employer considered his date of separation to be January 13, 2021. Kyle Chance and Jeff Lyle were claimant's immediate supervisors.

The employer has an attendance policy which is outlined in its employee handbook. The attendance policy treats three consecutive no call / no shows as job abandonment. Claimant acknowledged receipt of the employee handbook.

At hearing, the employer asserted that claimant abandoned his job position when he failed to present to work for three consecutive shifts the week of January 7, 2021. Claimant did not report to work between January 7, 2021, and January 11, 2021. Claimant asserts he did not intend to quit and he did not abandon his job. Claimant further asserts at least one of his supervisors was aware he was not going to be able to make said shifts due to illness. Claimant was operating under the impression that he was on a medical leave of absence until he received the January 13, 2021, separation letter.

Claimant exhausted his vacation and sick leave time in the weeks leading up to January, 2021. Claimant had recently switched medications for his diabetes and took time off in an attempt to adjust to said medications. According to claimant, this prompted the employer to talk to claimant about his rights under ADA and FMLA. The employer told claimant they could provide him with the paperwork he needed for the same.

Claimant presented to work for his regularly scheduled shift on January 3, 2021. A few days prior to said shift, claimant had passed out at work due to low blood sugar. Approximately one hour into his shift on January 3, 2021, Claimant felt as though he was going to pass out again. Because Mr. Chance and/or Mr. Lyle were helping customers, claimant told one of his co-workers what had happened and that he needed to leave. Claimant sat in his truck for a period of time to collect himself before driving home. Later that evening, claimant believes he texted one of his supervisors to discuss what had happened.

On Monday, January 4, 2021, or Tuesday, January 5, 2021, claimant e-mailed Mr. Lyle to notify him that he was in the hospital and receiving treatment for his diabetes. Mr. Lyle asked Claimant to keep him updated on his medical status. Claimant told Mr. Lyle that he would contact him once he had been released from the hospital.

On or about Tuesday, January 12, 2021, Claimant called Mr. Chance and told him that he was ready to come in and get the paperwork for his primary care physician to fill out. Instead of working with claimant to establish a time in which he could come in and get the paperwork, Mr. Chance told Claimant that he needed to call with Mr. Lyle. Claimant testified it was at this point he became concerned about his employment status. He subsequently received the January 13, 2021, separation letter in the mail.

Mr. Chance and Mr. Lyle did not present as witnesses at the evidentiary hearing to rebut claimant's testimony.

The employer provided that claimant's attendance record was not a significant issue prior to January, 2021.

REASONING AND CONCLUSIONS OF LAW:

The administrative law judge concludes as follows:

Iowa Code §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 voluntary quitting means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer and requires an intention to terminate the employment. *Wills v. Emp't Appeal Bd.*, 447 N.W. 2d 137, 138 (Iowa 1989). A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980); *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438 (Iowa Ct. App. 1992).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id*.

After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using his own common sense and experience, the administrative law judge accepts claimant's testimony as credible. Claimant's supervisors were not called as witnesses to rebut claimant's testimony. The most effective means to participate in an unemployment appeal hearing is to provide live testimony from a witness with firsthand knowledge of the events leading to the separation. While it is clear Mr. Lentz was generally aware of the circumstances surrounding claimant's separation from employment, he lacked firsthand knowledge of claimant's interactions with Mr. Chance and Mr. Lyle. The Iowa Supreme Court has ruled that if a party has the power to produce more explicit and direct evidence than it chooses to present, the administrative law judge may infer that evidence not presented would reveal deficiencies in the party's case. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976).

Having accepted claimant's testimony as credible, I find claimant notified his employer of his anticipated absences between January 7, 2021, and January 11, 2021. Claimant had no intention of quitting his employment. As such, it cannot be said that claimant had three consecutive no call/no shows. It cannot be said that claimant abandoned his job. Claimant's case will be analyzed as a discharge for excessive unexcused absenteeism.

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 provides in relevant part:

> 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).

The employer bears the burden of proving that a claimant is disqualified from receiving benefits because of substantial misconduct within the meaning of Iowa Code section 96.5(2). *Myers v. Emp't Appeal Bd*., 462 N.W.2d 734, 737 (Iowa Ct. App. 1990). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988).

Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). The focus is on deliberate, intentional, or culpable acts by the employee. When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman, Id.* 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. *Newman*, *Id*.

Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct **except for illness or other reasonable grounds** for which the employee was absent and that were properly reported to the employer. Iowa Admin. Code r. 871-24.32(7) (emphasis added); see *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 190, n. 1 (Iowa 1984) holding "rule [2]4.32(7)…accurately states the law." The requirements for a finding of misconduct based on absences are therefore twofold. First, the absences must be excessive. *Sallis v. Emp't Appeal Bd.*, 437 N.W.2d 895 (Iowa 1989). The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins*, 350 N.W.2d at 192 (Iowa 1984). Second, the absences must be unexcused. *Cosper,* 321 N.W.2d at 10 (Iowa 1982). The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused either because it was not for "reasonable grounds," *Higgins*, 350 N.W.2d at 191 or because it was not "properly reported." *Higgins*, 350 N.W.2d at 191 (Iowa 1984) and *Cosper*, 321 N.W.2d at 10 (Iowa 1982). Excused absences are those "with appropriate notice." *Cosper*, 321 N.W.2d at 10 (Iowa 1982).

Absences in good faith, for good cause, with appropriate notice, are not misconduct. *Id*. at 10. They may be grounds for discharge but not for disqualification of benefits because substantial disregard for the employer's interest is not shown and this is essential to a finding of misconduct. *Id*.

Absences due to properly reported illness cannot constitute work-connected misconduct since they are not volitional, even if the employer was fully within its rights to assess points or impose discipline up to or including discharge for the absence under its attendance policy. Iowa Admin. Code r. 871-24.32(7); *Cosper*, 321 N.W.2d at 9; *Gaborit v. Emp't Appeal Bd.*, 734 N.W.2d 554 (Iowa Ct. App. 2007). Medical documentation is not essential to a determination that an absence due to illness should be treated as excused. *See Gaborit*, 734 N.W.2d at 555-558. An employer's no-fault absenteeism policy or point system is not dispositive of the issue of qualification for unemployment insurance benefits.

In this case, claimant credibly testified that his supervisors were aware of the fact he was in the hospital and unavailable for his regularly scheduled shifts between January 7, 2021, and January 11, 2021. The employer did not call Mr. Chance or Mr. Lyle at hearing to rebut claimant's testimony. Again, absences due to properly reported illness cannot constitute work-connected misconduct since they are not volitional. I find claimant's absences between January 7, 2021, and January 11, 2021, were properly reported or excused under Iowa law.

The employer has failed to establish that the claimant was discharged for job-related misconduct which would disqualify him from receiving benefits. Benefits are allowed.

DECISION:

The June 17, 2021 (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible.

Michael J. Lunn
Administrative Law Judge
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August 27, 2021
Decision Dated and Mailed

mjl/kmj