

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

FLINT J HILLMAN
Claimant

APPEAL NO: 10A-UI-03462-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

AGRI STAR MEAT & POULTRY LLC
Employer

OC: 01/31/10
Claimant: Respondent (2/R)

Section 96.5-1 – Voluntary Leaving
Section 96.5-2-a – Discharge
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

Agri Star Meat & Poultry, L.L.C. (employer) appealed a representative's February 24, 2010 decision (reference 01) that concluded Flint J. Hillman (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on April 16, 2010. The claimant received the hearing notice and responded by calling the Appeals Section on March 15, 2010. He indicated that he would be available at the scheduled time for the hearing at a specified telephone number. However, when the administrative law judge called that number at the scheduled time for the hearing, the claimant was not available; therefore, the claimant did not participate in the hearing. Trenton Gorton appeared on the employer's behalf. One other witness, Laura Althouse, was available on behalf of the employer but did not testify. During the hearing, Employer's Exhibits One, Two, and Three were entered into evidence. Based on the evidence, the arguments of the employer, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was there a disqualifying separation from employment either through a voluntary quit without good cause attributable to the employer or through a discharge for misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on April 22, 2009. He worked full time as a second shift maintenance mechanic in the employer's beef and poultry slaughter and processing facility. He typically worked four to six ten-hour shifts per week. His last day of work was January 20, 2010.

Prior to the claimant's shift, an employee on the first shift had found a cigar box containing drug paraphernalia in an unoccupied locker in maintenance workers' locker room, an area with restricted access. The paraphernalia included a metal spoon, a small syringe, cotton swabs, a

metal tube with what appeared to be marijuana residue, and a plastic bag containing a small amount of a green leafy substance consistent with that of marijuana. The claimant's locker was the closest occupied locker to where the box was found.

Several hours after the start of the claimant's shift, he was summoned to the office of Mr. Gorton, the health, safety, and workers' compensation director. The employer had arranged for medical personnel and law enforcement personnel to be available on site to administer drug and alcohol tests. The claimant was informed that the employer was directing him to submit to testing due to reasonable suspicion under its drug and alcohol policy. The claimant became agitated and indicated that he had recently used marijuana and would not be able to pass the test. After calming down, he then asked what his options were. Mr. Gorton told him he could either submit to the drug and alcohol tests and see what the results would be, or he could not take the tests and quit. The claimant responded he would not be able to pass the test so he would quit. He then signed the separation paper, turned in his gear, and left.

The claimant established a claim for unemployment insurance benefits effective January 31, 2010. The claimant has received unemployment insurance benefits after the separation.

REASONING AND CONCLUSIONS OF LAW:

A voluntary quit is a termination of employment initiated by the employee – where the employee has taken the action which directly results in the separation; a discharge is a termination of employment initiated by the employer – where the employer has taken the action which directly results in the separation from employment. 871 IAC 24.1(113)(b), (c). A claimant is not eligible for unemployment insurance benefits if he quit the employment without good cause attributable to the employer or was discharged for work-connected misconduct. Iowa Code §§ 96.5-1; 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. A voluntary leaving of employment requires an intention to terminate the employment relationship and an action to carry out that intent. Bartelt v. Employment Appeal Board, 494 N.W.2d 684 (Iowa 1993); Wills v. Employment Appeal Board, 447 N.W.2d 137, 138 (Iowa 1989). The claimant did express or exhibit the intent to cease working for the employer and did act to carry it out. The claimant would be disqualified for unemployment insurance benefits unless he voluntarily quit for good cause.

The claimant has the burden of proving that the voluntary quit was for a good cause that would not disqualify him. Iowa Code § 96.6-2. Leaving because of unlawful, intolerable, or detrimental working conditions would be good cause. 871 IAC 24.26(3), (4). Quitting in order to avoid submitting to a legally permissible drug or alcohol test is would not be a good cause. Iowa law authorizes drug or alcohol testing where the employer has reasonable suspicion that the employee has used alcohol or other drugs in violation of the employer's written policy, including evidence that an employee has possessed or used drugs while working or while on the employer's premises. Iowa Code § 730.5(1)i(6). Quitting to avoid submitting to a test is not the same as quitting when given a choice between quitting and being discharged – the employer had not made a determination as to whether to pursue discharge and would not have done so until after the drug test results would have come back. The claimant has not provided evidence to conclude that the employer's conditions were unlawful, intolerable or detrimental. The claimant has not satisfied his burden. Benefits are denied.

In the alternative, in the event the separation is not viewed as a voluntary quit, the results are the same. A separation will not be considered to be a voluntary quit if the claimant did not have the option to continue his employment, but could either quit or be discharged. 871 IAC 24.26(21). As noted above, here his choice was not immediately between quitting or being discharged, but between quitting and submitting to testing. However, given the claimant's admission to drug use, since submitting to testing would most likely have led to a positive result and then to discharge, discharge might have been inevitable had the claimant not quit rather submitted to testing. If the separation is not considered to be a voluntary quit, it must be treated as a discharge for purposes of unemployment insurance.

The issue then would become whether the employer effectively discharged the claimant for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue is not whether the employer was right or even had any other choice but to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate decisions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988). A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. 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. 871 IAC 24.32(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

The claimant's admission of drug use contrary to the employer's policy and his refusal to submit to testing shows 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. The employer effectively discharged the claimant for reasons amounting to work-connected misconduct.

The unemployment insurance law 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. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits

on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code § 96.3-7. In this case, the claimant has received benefits but was ineligible for those benefits. The matter of determining the amount of the overpayment and whether the claimant is eligible for a waiver of overpayment under Iowa Code § 96.3-7-b is remanded the Claims Section.

DECISION:

The representative's February 24, 2010 decision (reference 01) is reversed. The claimant voluntarily left his employment without good cause attributable to the employer. In the alternative, he was effectively discharged for disqualifying reasons. As of January 20, 2010, benefits are withheld until such time as the claimant 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 and whether the claimant is eligible for a waiver of any overpayment.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs