

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

MARTIN J JAEGER
Claimant

TYSON FRESH MEATS INC
Employer

APPEAL 16A-UI-09569-DB-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 11/29/15
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

The claimant/appellant filed an appeal from the August 29, 2016 (reference 02) unemployment insurance decision that denied benefits based upon claimant's separation from employment. The parties were properly notified of the hearing. A telephone hearing was held on September 21, 2016. The claimant, Martin J. Jaeger, participated personally and through Attorney Benjamin Roth. The employer, Tyson Fresh Meats Inc., participated through Human Resources Clerk Kristi Fox.

ISSUES:

Did claimant voluntarily quit the employment with good cause attributable to employer?
Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a production worker. He was employed from June 7, 2010 until July 22, 2016. Casey Staley was claimant's immediate supervisor. Claimant was scheduled to work Monday through Friday each week from 7:00 a.m. to 4:00 p.m.

The employer has a written attendance policy stating that an employee must call in to notify the employer if they are going to be absent from their scheduled shift at least thirty minutes prior to the employee's scheduled shift start time. The policy further states that an employee incurs one point for an absence if they do not have a doctor's note due to illness and three points for a no-call no-show. If an employee reaches 10 points, they are subject to discharge from employment. The policy further states that if an employee does not call in or show up to work for five consecutive days they will be considered to have voluntarily quit. Claimant received a copy of this attendance policy during orientation.

The claimant's vehicle broke down and was not working in July of 2016. Claimant was absent from work on July 11, 2016; July 12, 2016; July 13, 2016; July 14, 2016; July 15, 2016; July 18, 2016; July 19, 2016; July 20, 2016; July 21, 2016; and July 22, 2016. Claimant did call in at

least thirty minutes prior to his scheduled shift start time on July 11, 12, 13, and 15, 2016. The other dates claimant was absent he did not call in thirty minutes prior to his scheduled shift start time to report his absence. Claimant was absent from work on all of these dates because he could not use his personal vehicle to travel to work.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes:

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.

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:

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.

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).

First it must be determined whether claimant quit or was discharged from employment. 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).

The decision in this case rests, at least in part, upon the credibility of the parties. The issue must be resolved by an examination of witness credibility and burden of proof. 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 her own common sense and experience, the administrative law judge finds that Ms. Fox's version of events is more credible than claimant's.

While the employer has the burden to establish the separation was a voluntary quitting of employment rather than a discharge, claimant has the burden of proving that the voluntary leaving was for good cause attributable to the employer. Iowa Code § 96.6(2). In this matter the employer has proven that the separation was a voluntary quitting.

Claimant was aware of the employer's policy which stated that if an employee failed to call in or show up for work for five consecutive days they were considered to have voluntarily quit. This policy was reviewed with the claimant during orientation. Claimant did not call in or show up to work for five consecutive days in a row. Claimant carried out his intent to quit by failing to show up for work or notify the employer of his absences. Claimant was not incapacitated or otherwise unable to come to work. While his vehicle was not in working order, claimant could have called a taxicab service or found someone else to drive him to work.

Iowa Admin. Code r. 871-24.25(4) provides:

Voluntary quit without good cause. 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. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code § 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code § 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:

(4) The claimant was absent for three days without giving notice to employer in violation of company rule.

Claimant's separation from employment was a voluntary quit without good cause attributable to the employer. As such, benefits are denied.

Even if claimant was considered to have been discharged, 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."

An absence can be unexcused either because it was not for "reasonable grounds," or because it was not "properly reported." *Id.* at 191. Absences related to issues of personal responsibility such as **transportation**, lack of childcare, and oversleeping is not considered excused. *Id.* (emphasis added).

In this case, the claimant's absences were due to issues of personal responsibility, such as finding transportation to work. Even if his absences were properly reported, which five of them were not, his absences were not excused.

Excessive absenteeism has been found when there has been seven unexcused absences in five months; five unexcused absences and three instances of tardiness in eight months; three unexcused absences over an eight-month period; three unexcused absences over seven months; and missing three times after being warned. See *Higgins*, 350 N.W.2d at 192 (Iowa 1984); *Infante v. Iowa Dep't of Job Serv.*, 321 N.W.2d 262 (Iowa App. 1984); *Armel v. EAB*, 2007 WL 3376929*3 (Iowa App. Nov. 15, 2007); *Hiland v. EAB*, No. 12-2300 (Iowa App. July 10, 2013); and *Clark v. Iowa Dep't of Job Serv.*, 317 N.W.2d 517 (Iowa App. 1982). Claimant's unexcused absences in this case were excessive and rose to the level of job-related misconduct.

DECISION:

The August 29, 2016 (reference 02) unemployment insurance decision is affirmed. The claimant voluntarily quit his employment without good cause attributable to the employer. Benefits are withheld in regards to this employer until such time as he is deemed eligible.

Dawn Boucher
Administrative Law Judge

Decision Dated and Mailed

db/