

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DEAN L GRANDON
Claimant

APPEAL NO: 13A-UI-08144-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FERGUSON ENTERPRISES INC
Employer

OC: 06/16/13
Claimant: Appellant (4)

Section 96.5-2-a – Discharge
Section 96.4-3 – Able and Available

STATEMENT OF THE CASE:

Dean L. Grandon (claimant) appealed a representative's July 3, 2013 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment with Ferguson Enterprises, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on August 26, 2013. The claimant participated in the hearing. Deb Damage appeared on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was the claimant discharged for work-connected misconduct? Was the claimant eligible for unemployment insurance benefits by being able and available for work?

OUTCOME:

Modified. Benefits allowed as of July 7, 2013.

FINDINGS OF FACT:

The claimant started working for the employer on April 4, 2005. He worked full time as a UPS associate in the shipping department of the employer's Waterloo, Iowa plumbing distribution business. His last day of work was March 5, 2013. The claimant went on a medical leave of absence as of March 6, 2013. The employer discharged the claimant on June 7, 2013. The reason asserted for the discharge was expiration of the claimant's medical leave.

The claimant underwent heart surgery. His FMLA (Family Medical Leave) expired May 22, 2013; the employer provided the claimant with further medical leave through June 7. However, when the claimant was not released by his doctor as able to return to work by that date, and the prognosis was that the claimant might not be released until as late as August 1, the employer

determined that due to business needs it could no longer hold the position open, and discharged the claimant.

The claimant was ultimately released by his doctor without any restrictions as of July 8, 2013. He immediately informed the employer, but at that time the employer did not have a position open for the claimant.

REASONING AND CONCLUSIONS OF LAW:

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). The question is not whether the employer was right 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 matters. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988).

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).

Excessive unexcused absenteeism can constitute misconduct. 871 IAC 24.32(7). A determination as to whether an absence is excused or unexcused does not rest solely on the interpretation or application of the employer's attendance policy. 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. 871 IAC 24.32(7); *Cosper*, supra; *Gaborit v. Employment Appeal Board*, 734 N.W.2d 554 (Iowa App. 2007). The FMLA provisions in particular were enacted to be an employee protection and shield, not a sword to be used by an employer as a weapon against the employee. Because the claimant's absence from work which caused the employer to terminate the employment was related to properly reported illness or other reasonable grounds, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct and no disqualification is imposed. The employer has failed to meet its burden to establish misconduct. *Cosper*, supra. The claimant's

actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.¹

With respect to any week in which unemployment insurance benefits are sought, in order to be eligible the claimant must be able to work, is available for work, and is earnestly and actively seeking work. Iowa Code § 96.4-3. A person under doctor's orders to be off work is not able and available for work. 871 IAC 24.22(1)(a); 871 IAC 24.23(35).

Prior to the benefit week beginning July 7, 2013, the claimant was not permitted to work due to his medical restrictions. As of the week beginning July 7 the claimant is released for work, and is able and available for work. As of July 7 benefits are allowed, if the claimant is otherwise eligible.

DECISION:

The representative's July 3, 2013 decision (reference 01) is modified in favor of the claimant. The employer did discharge the claimant but not for disqualifying reasons. As of July 7, 2013 the claimant is able and available for work. As of that date the claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

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¹ The representative's decision had characterized the separation as a voluntary quit because the claimant had not returned to work at the end of his leave of absence. 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 of employment. 871 IAC 24.1(113)(b)(c). A claimant is not eligible for unemployment insurance benefits if he quits employment without good cause attributable to the employer or was discharged for work-connected misconduct. Iowa Code §§ 96.5-1; 96.5-2-a.

Here, it was clearly the employer's decision to end the employment, not the claimant's. Further, even if the separation was treated as a voluntary quit by virtue of not returning to the employment at the end of the leave of absence, the quit would fall under the provisions of Iowa Code § 96.5-1-d and 871 IAC 24.25(35). Where a claimant has been compelled to leave employment due to a medical or health issue not caused or aggravated by the work environment, but the claimant is subsequently recovers and is released to return to work by his physician and does seek to return to employment with the employer, the claimant will then be eligible to receive unemployment insurance benefits.