

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

MONICA M SANDOVAL
Claimant

APPEAL 16A-UI-13522-JP-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

MARSDEN BLDG MAINTENANCE LLC
Employer

**OC: 11/27/16
Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the December 12, 2016, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on January 12, 2017. Claimant participated. Employer participated through hearing representative Thomas Kuiper, human resources business partner Margarita Bernardino, and area manager Ericka McConnell. Claimant Exhibit A was admitted into the record with no objection.

ISSUE:

Did claimant voluntarily leave the employment with good cause attributable to the employer or did employer discharge the claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed part-time as a floater from July 6, 2015, and was separated from employment on November 4, 2016.

The employer has a written policy that requires employees to call off four hours before the start of their shift. The employer does not allow employees to send text messages to call off of work. The employer allows employees to be absent from work six times per year. The employer also has a no-call/no-show policy that after three consecutive no-call/no-shows the employer may consider it a voluntary quit. The employer has progressive disciplinary policy. Claimant was aware of the employer's policies.

Claimant's shift started at 5:30 p.m., Monday through Friday. The last day that claimant worked for the employer was on October 27, 2016. Claimant was scheduled to work on October 28, 2016. Claimant did not work on October 28, 2016. On October 28, 2016, claimant started her car to go to work and then went inside. When claimant came back outside, her car was stolen.

Claimant used her neighbor's phone to call the police. Claimant did not contact the employer about missing work on October 28, 2016.

Claimant was next scheduled to work on October 31, 2016. On October 31, 2016, claimant did not report to work. On October 31, 2016, claimant did not call the employer to report that she was going to be absent and she did not report to work at 5:30 p.m. On October 31, 2016, claimant did send text messages to Ms. McConnell. Claimant Exhibit A. Claimant asked Ms. McConnell where she needed to go and that her car was stolen. Claimant Exhibit A. Ms. McConnell told claimant she was not working, to contact Bernaldo, and she gave claimant Bernaldo's number. Claimant Exhibit A. Claimant then contacted Bernaldo on October 31, 2016 and was instructed to contact Gerard. Claimant Exhibit A. Bernaldo gave claimant Gerard's phone number. Claimant Exhibit A. Claimant then sent Gerard a text message asking where to go and that her car was stolen. Claimant Exhibit A. Claimant did not receive a response from Gerard. After sending Ms. McConnell, Bernaldo, and Gerard text messages on October 31, 2016, claimant did not report to the employer prior to the start of her shift and she did not call the employer. Claimant went to the employer around 7:00 p.m. on October 31, 2016, but she did not see anyone come out of the office and the doors were locked. Claimant then sent Ms. McConnell a text message saying she supposed she was fired and Ms. McConnell responded she was not aware and that she had given claimant Bernaldo's number. Claimant Exhibit A.

Claimant was next scheduled to work on November 1, 2016. Claimant did not report to work on November 1, 2016. Claimant did not contact the employer to report her absence on November 1, 2016.

Claimant was next scheduled to work on November 2, 2016. Claimant did not report to work on November 2, 2016. Claimant did not contact the employer to report her absence on November 2, 2016. On November 2, 2016, Ms. Bernardino sent a letter that the employer deemed claimant to have voluntary quit.

Claimant was next scheduled to work on November 3, 2016. Claimant contacted Bernaldo via text message on November 3, 2016. Claimant Exhibit A. Bernaldo asked claimant where she was at. Claimant Exhibit A. Claimant told Bernaldo that she was at "[h]ome but was going to go to office but [I don't] know[.]" Claimant Exhibit A. Bernaldo responded to claimant, "What happened, are you still with Marsden?" Claimant Exhibit A. Claimant responded that she wanted to still be employed, but was not sure the employer was going to accept her past couple of absences. Claimant Exhibit A. Bernaldo told claimant that he would find out and let her know. Claimant Exhibit A. Claimant did not report to work on November 3, 2016. Claimant did not report she would be absent on November 3, 2016. Claimant Exhibit A. On November 4, 2016, claimant received a letter from the employer that stated she had voluntarily quit.

Claimant had called the office prior to 5:30 p.m. to report her absences in the past. Claimant had eight absences prior to the no-call/no-shows that claimant called off. After claimant's car was stolen, she did not tell the employer she did not have a ride to work. Claimant did not ask the employer for a ride to work. Floaters are supposed to be at the office at 5:30 p.m. every day to get their assignments if they do not hear from the employer. The employer's front office is locked at 5:00 p.m., but the employees can use the back door. The employer's building is closed by 6:30 p.m. because the employees are off working on the job sites.

Claimant had two prior written warnings. On October 10, 2016, claimant received a final written warning due to a customer complaint. On May 26, 2016, claimant received a written warning due to a customer complaint.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was not discharged but voluntarily left the employment without good cause attributable to employer.

It is the duty of an administrative law judge and 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, as the finder of fact, 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. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). 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 evidence you believe; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. This administrative law judge reviewed the exhibit submitted. This administrative law judge finds the employer's version of events to be more credible than claimant's recollection of those events.

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 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 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 section 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 section 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.

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). The claimant has the burden of proving that the voluntary leaving was for good cause attributable to the employer. Iowa Code § 96.6(2) (amended 1998). Generally, when an individual mistakenly believes they are discharged from employment, but was not told so by the employer, and they discontinue reporting for work, the separation is considered a quit without good cause attributable to the employer. *LaGrange v. Iowa Dep't of Job Serv.*, (No. 4-209/83-1081, Iowa Ct. App. filed June 26, 1984).

The employer is entitled to establish reasonable work rules and expect employees to abide by them. The employer's work rule requiring employees to notify the employer prior to the start of their shift if an employee is going to be absent is a reasonable work rule. It is also reasonable for the employer to require employees that are going to be absent to make contact with the employer via a phone call and not a text message; requiring a phone call confirms that the employer actually received the notification the employee is going to be absent. It was also reasonable of the employer to require floaters, including claimant, to report to the office by 5:30 p.m. (claimant's start time) if the floater had not heard from the employer about where to report.

An employer is also entitled to expect its employees to report to work as scheduled or to be notified when and why the employee is unable to report to work. Although claimant sent text messages to the employer on October 31, 2016 informing Ms. McConnell and Gerard that her vehicle had been stolen, she did not tell the employer (Ms. McConnell, Bernaldo, or Gerard) that she would be absent from work on October 31, 2016. Instead of informing the employer she was going to be absent, claimant asked Ms. McConnell and Gerard were to go to start work, implying she was going to work despite her car being stolen. Ms. McConnell instructed claimant to contact Bernaldo because she was out of the office and Bernaldo instructed claimant to contact Gerard. When claimant did not hear from Gerard, instead of reporting to the office at the start of her shift as she was supposed to do, she waited until 7:00 p.m. to go to the office (the office is closed by 6:30 p.m.). Claimant then sent Ms. McConnell a text message saying she supposed she was fired and Ms. McConnell responded she was not aware and that she had given claimant Bernaldo's number. Claimant Exhibit A. Claimant then failed to contact the employer on November 1 and 2, 2016 regarding her absences. Claimant Exhibit A. Although claimant sent multiple text messages to the employer on October 31, 2016 and November 3, 2016, she did not tell the employer she was going to be absent from work on October 28, 2016, October 31, 2016, November 1, 2016, or November 2, 2016.

Inasmuch as the claimant failed to report for work or notify the employer for at least three consecutive workdays (October 28, 2016, October 31, 2016, November 1, 2016, and November 2, 2016) in violation of the employer policy and claimant is considered to have voluntarily left employment without good cause attributable to the employer. While claimant's leaving the employment may have been based upon good personal reasons, it was not for a good cause reason attributable to the employer according to Iowa law. Benefits must be denied.

DECISION:

The December 12, 2016, (reference 01) unemployment insurance decision is affirmed. Claimant voluntarily left the employment without good cause attributable to the employer. Benefits are withheld until such time as claimant has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

jp/rvs