

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

CHRISTOPHER L BOZEMAN
Claimant

APPEAL 17A-UI-07504-NM-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

SUPERIOR LABELS INC
Employer

**OC: 06/18/17
Claimant: Appellant (2)**

Iowa Code § 96.6(2) – Timeliness of Appeal
Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.4(3) – Ability to and Availability for Work

STATEMENT OF THE CASE:

The claimant filed an appeal from the July 12, 2017, (reference 01) unemployment insurance decision that denied benefits based upon his discharge for leaving work without the employer's permission. The parties were properly notified of the hearing. A telephone hearing was held on August 11, 2017. The claimant participated and testified. The employer did not participate. Department's Exhibit D-1 was received into evidence.

ISSUES:

Is the appeal timely?
Was the claimant discharged for disqualifying job-related misconduct?
Is the claimant able to work and available for work?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: A disqualification unemployment insurance decision was mailed to the claimant's last known address of record on July 12, 2017. Claimant was out of the country from July 17 through 25, 2017 and did not receive the decision until he returned on July 25. The decision contained a warning that an appeal must be postmarked or received by the Appeals Bureau by July 22, 2017. The appeal was not filed until July 25, 2017, when claimant returned from his trip.

Claimant was employed full time as a shipping clerk from April 2015, until this employment ended on June 7, 2017, when he was discharged. On June 5, 2017, at approximately 4:00 p.m., claimant became suddenly ill and needed to leave work right away. Claimant could not immediately find a supervisor, but told a coworker he was leaving. Claimant did not make any further attempt to notify the employer of his reasons for leaving on June 5. The following day claimant was still ill. Claimant sent an email to the employer at least an hour before his shift was to start to inform them he was ill and would not be in. On June 7 claimant reported to work as normal. Claimant was told upon arriving to work that he had been considered to have voluntarily separated from employment on June 5, when he left work early without notice and took a personal photograph from his work space home with him. Claimant testified he had

placed the photo in his bag earlier in the day on June 5 because he wanted to replace the picture in the frame. Claimant did not indicate to anyone that he was quitting and retained possession on his key card. Claimant testified, other than his trip to Mexico for his brother's wedding, there have been no restrictions on his ability to or availability for work since he was separated from employment.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant's appeal is timely.

Iowa Code § 96.6(2) provides:

2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of § 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to § 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving § 96.5, subsection 10, and has the burden of proving that a voluntary quit pursuant to § 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving § 96.5, subsection 1, paragraphs "a" through "h". Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding § 96.8, subsection 5.

The claimant did not file his appeal in a timely manner, because he did not receive notice of the fact-finding decision until after the filing deadline had passed. Without notice of a disqualification, no meaningful opportunity for appeal exists. See *Smith v. Iowa Emp't Sec. Comm'n*, 212 N.W.2d 471, 472 (Iowa 1973). Claimant filed his appeal immediately upon receiving a copy of the decision on July 25, 2017. Therefore, the appeal shall be accepted as timely.

The next issue that must be decided is whether the claimant was discharged from employment for disqualifying misconduct. For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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).

Iowa Admin. Code r. 871-24.32(7) provides:

(7) Excessive unexcused absenteeism. 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.

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). 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). Excessive absences are not considered misconduct unless unexcused. 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*, supra; *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. *Gaborit*, supra.

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* at 192. Second, the absences must be unexcused. *Cosper* at 10. The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused either because it was not for "reasonable grounds," *Higgins* at 191, or because it was not "properly reported," holding excused absences are those "with appropriate notice." *Cosper* at 10. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins, supra*.

An employer's no-fault absenteeism policy or point system is not dispositive of the issue of qualification for unemployment insurance benefits. A properly reported absence related to illness or injury is excused for the purpose of Iowa Employment Security Law because it is not volitional. Excessive absences are not necessarily unexcused. Absences must be both excessive and unexcused to result in a finding of misconduct. A failure to report to work without notification to the employer is generally considered an unexcused absence. However, one unexcused absence is not disqualifying since it does not meet the excessiveness standard.

Claimant left work early without notice on June 5, 2017, because he suddenly became ill and could not immediately locate a supervisor. This absence would generally be excused due to illness, but because claimant made no attempt to notify the employer he was leaving early, is not properly reported and therefore not excused. Claimant's next absence, on June 6, 2017, is excused, as it was also due to illness and was properly reported. Claimant had no other issues with his attendance. Claimant's final absence, on June 6, 2017, was properly reported as excused. Because his last absence was related to properly reported illness or other reasonable grounds, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct. Even if claimant was considered to have been separated from work on June 5, this one absence does not establish that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Accordingly, benefits are allowed.

During his testimony, the claimant indicated the employer concluded he had voluntarily quit. 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); see also Iowa Admin. Code r. 871-24.25(35). 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). While the employer may have indicated to claimant that he was considered to have voluntarily separated from employment, the facts do not support this conclusion. Claimant testified he did take one piece of personal property home with him on the day in question, but retained his security badge, notified the employer he would not be in to work on June 6 due to illness, and reported to work on June 7. All of these actions support claimant's assertion that he did not intend to quit, but was discharged.

The final issue to be determined is whether claimant is able to and available for work. For the reasons that follow, the administrative law judge concludes that the claimant was not able to and available for work for the week beginning July 16 and ending July 22, 2017.

Iowa Code section 96.4(3) provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph (1), or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

Iowa Admin. Code r. 871-24.23(25) provides:

Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.

(25) If the claimant is out of town for personal reasons for the major portion of the workweek and is not in the labor market.

Claimant testified he was in Mexico from July 17 through 25, 2017 for his brother's wedding. This trip removed claimant from the labor market for the entire week beginning July 16. Claimant returned on July 25, 2017 and was therefore available for work again the majority of the work week beginning July 23, 2017. Accordingly, claimant was not able and available for work for the one week period beginning July 16, 2017, but has otherwise been able and available for work.

DECISION:

The July 12, 2017, (reference 01) unemployment insurance decision is reversed. The claimant's appeal is timely. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible. Benefits withheld based upon this separation shall be paid to claimant. However, benefits shall be withheld from the week beginning July 16 and ending July 22, 2017, as claimant was out of the country and therefore not able to and available for work.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

nm/rvs