

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

ROBERT A WEAVER
Claimant

NESPER SIGN ADVERTISING INC
Employer

APPEAL 16A-UI-13024-JCT
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 10/23/16
Claimant: Appellant (1)

Iowa Code § 96.5(2)a – Discharge/Misconduct
Iowa Code § 96.5(1)d – Voluntary Quitting/Illness or Injury
Iowa Code § 96.4(3) – Ability to and Availability for Work
Iowa Admin. Code r. 871-24.22(2) – Able & Available - Benefits Eligibility Conditions

STATEMENT OF THE CASE:

The claimant filed an appeal from the December 1, 2016, (reference 04) unemployment insurance decision that denied benefits based upon separation. The parties were properly notified about the hearing. A telephone hearing was held on December 28, 2016. The claimant participated personally. The employer participated through Donna Garland, vice president. Claimant Exhibit A and Employer Exhibit 1 were received into evidence. The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

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

Is the claimant able to and available for work effective October 23, 2016?

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: The claimant was employed beginning May 2, 2016 as a full-time outdoor sign installer, and last performed work on October 11, 2016. The day of separation and reason for separation are disputed.

The undisputed evidence is the claimant went to the doctor on October 11, 2016, in response to a personal, non-work related injury associated with his neck, which was also causing pain through his arm due to a pinched nerve. The claimant's doctor issued restrictions that prohibited looking overhead and lifting more than ten pounds with his right hand (Claimant Exhibit A). The restrictions were intended for two weeks until his next appointment. The

claimant made the employer aware of the restrictions, which they could not accommodate. An informal unpaid leave of absence was agreed upon, as claimant did not have sick time to cover his absence or qualify for any other leave. On October 25, 2016, the claimant returned to his doctor, who renewed his restrictions for another three weeks. The claimant again returned to the employer with medical documentation and again was told the employer could not provide him work within his restrictions. The claimant had previously worked in construction and was of the assumption that if he was able to work (albeit it with restrictions) but the employer temporarily did not have work available for him, that he may be eligible for unemployment insurance benefits.

The claimant did not explain his plan to the employer, and the employer believed the claimant intended to return to work, so it initially continued the claimant's health insurance into November. However, upon learning the claimant had filed a claim for benefits, the employer determined the claimant quit the employment because he filed for unemployment benefits. The claimant stated he spoke with Phil Garland on November 1, and explained he had filed for benefits, and Mr. Garland explained he wanted him to get better and return, and not to take it personally when the employer contested the benefits as they do with all employees.

Then on November 14, 2016, the claimant text messaged the employer about discontinuing his insurance so that he could move to his wife's (Claimant Exhibit A). On November 21, 2016, the claimant states that in a conversation with Ms. Garland, she told him they could no longer keep him due to insurance issues, and that he was told "I'm going to have to let you go." The employer maintains the claimant quit by way of filing for unemployment insurance benefits.

The claimant has not been released from his doctor's care without restrictions, and the same restrictions of not lifting over 10 pounds and not looking overhead remain in place, at the time of the hearing. The claimant has another doctor's appointment on January 24, 2016 and hopes to be released from his medical restrictions at that time. His job search has included primarily maintenance positions consistent with his job history, and primarily jobs with the federal government, including at Estes Park, Colorado and Nashville. He has acknowledged that he could not perform the job functions if hired at this time for maintenance, but believes he would be by the time the application/hiring process was complete.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant did not quit but was discharged for no disqualifying reason.

Iowa unemployment insurance law disqualifies claimants who voluntarily quit employment without good cause attributable to the employer or who are discharged for work-connected misconduct. Iowa Code §§ 96.5(1) and 96.5(2)a. Disqualification from benefits pursuant to Iowa Code § 96.5(1) requires a finding that the quit was voluntary. *Geiken v. Lutheran Home for the Aged Ass'n*, 468 N.W.2d 223, 226 (Iowa 1991). A voluntary quitting of employment requires that an employee exercise a voluntary choice between remaining employed or terminating the employment relationship. *Wills v. Emp't Appeal Bd.*, 447 N.W.2d 137, 138 (Iowa 1989); *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438, 440 (Iowa Ct. App. 1992). 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 credible evidence presented does not support that the claimant quit the employment. The employer maintains the claimant's overt action of severing the employment occurred by way of him establishing a claim for unemployment insurance benefits. The administrative law judge is persuaded that the claimant's actions lacked the requisite intent to quit the employment. The claimant is correct inasmuch as a person may be eligible for

unemployment insurance benefits at times when there is temporarily no work available, as routinely happens in industries like construction. His case at hand does not fall under the same section of unemployment law as a temporary layoff would, but it does not translate into an intent to sever the employment either. Had the claimant intended to quit by way of this application for benefits, he would not have text messaged the employer on November 14, 2016 to discussing moving his insurance from the employer to his wife. Rather, he would have known his insurance would end immediately or soon after filing for the unemployment benefits. Further, the claimant intended to remain employed based on his discussion with Mr. Garland on November 1, 2016, but was informed that effective November 21, 2016, the employer would discontinue insurance and employment. In this case, the claimant did not have the option of remaining employed nor did he express intent to terminate the employment relationship. Where there is no expressed intention or act to sever the relationship, the case must be analyzed as a discharge from employment. *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438 (Iowa Ct. App. 1992). Thus, the burden of proof shifts to the employer.

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 of proof in establishing disqualifying job misconduct. *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). 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).

Although an employer is not obligated to provide light duty work for an employee whose illness or injury is not work related, the involuntary termination from employment while under medical care was a discharge from employment. In spite of the expiration of the agreed upon leave period, since the claimant was still under medical care and had not yet been released to return to work without restriction as of the date of separation, no disqualifying reason for the separation has been established. Benefits are allowed, provided the claimant is otherwise eligible.

The next issue is whether the claimant is able to and available for work. For the following reasons, the administrative law judge concludes he is not, and therefore ineligible for benefits effective October 30, 2016.

Iowa Code § 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. 871-24.22(1)a provides:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(1) Able to work. An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.

a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

Iowa Admin. Code r. 871-24.23(35) provides:

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

(35) Where the claimant is not able to work and is under the care of a physician and has not been released as being able to work.

To be able to work, "[a]n individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood." *Sierra v. Emp't Appeal Bd.*, 508 N.W.2d 719, 721 (Iowa 1993); *Geiken v. Lutheran Home for the Aged*, 468 N.W.2d 223 (Iowa 1991); Iowa Admin. Code r. 871-24.22(1). "An evaluation of an individual's ability to work for the purposes of determining that individual's eligibility for unemployment benefits must necessarily take into consideration the economic and legal forces at work in the general labor market in which the individual resides." *Sierra* at 723.

The claimant acknowledged he is making a job search but currently he cannot actually perform the jobs for which he is applying. Inasmuch as the claimant has not been medically released to work, benefits are withheld until such time as the claimant obtains a medical release to return to some type of work of which he is capable of performing given any medical restrictions.

DECISION:

The December 1, 2016, (reference 04) decision is affirmed. The claimant did not quit but was discharged for no disqualifying reason. The claimant is not able to and available for work at effective October 23, 2016. Benefits are withheld until such time as he obtains a medical release to return to some type of work for which he is qualified given his education, training, and work history.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/rvs