

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KYLE R ROUSH
Claimant

APPEAL NO. 11A-UI-15620-AT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FAREWAY STORES INC
Employer

OC: 11/06/11
Claimant: Respondent (2-R)

Section 96.5-1 – Voluntary Quit
Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Fareway Stores, Inc. filed a timely appeal from an unemployment insurance decision dated November 30, 2011, reference 01, that allowed benefits to Kyle R. Roush. After due notice was issued, a telephone hearing was held January 5, 2012, with Mr. Roush participating. Human Resources Generalist and Eastern Regional Vice President Gary Worrall participated for the employer. The administrative law judge takes official notice of Agency benefit payment records.

ISSUES:

Was the separation a quit or a discharge?

Was the separation a disqualifying event?

FINDINGS OF FACT:

Kyle R. Roush was employed by Fareway Stores, Inc. from July 29, 2009, until September 10, 2011. He initially worked part-time at the Fareway Store in Ottumwa, Iowa. At his request, he transferred to a full-time position at a Fareway Store in Des Moines, Iowa. He was scheduled to begin his new position on September 6. He did not report to work at that time. He called his former manager in Ottumwa to say that he was having difficulty lining up housing in Des Moines. The Ottumwa manager said that he must contact his new supervisor in Des Moines. He did not do so. He finally showed up at the Des Moines store on September 8, 2011. He was unshaven and not ready to go to work. He announced that he would begin his new position on the following Monday. This was not acceptable to the employer. The employer ended the employment on September 10, 2011.

The claimant has received unemployment insurance benefits since filing a claim effective November 6, 2011.

REASONING AND CONCLUSIONS OF LAW:

The first step in analyzing this evidence is to characterize the separation. In closing argument, the employer referred to the rule that provides that three consecutive days of absence without contact in violation of a company rule is considered to be a quit. There is no evidence in the hearing record of such a rule. Furthermore, the claimant was maintaining contact with the company, although not with the store where he was assigned. The administrative law judge characterizes the separation as a discharge.

Iowa Code section 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.

871 IAC 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.

Excessive unexcused absenteeism is misconduct. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). The evidence establishes that Mr. Roush was absent beginning on September 6, 2011, because of a matter of personal responsibility, housing. The administrative law judge concludes that the evidence is sufficient to establish disqualifying misconduct.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault,

the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

The question of whether the claimant must repay the benefits he has received is remanded to the Unemployment Insurance Services Division.

DECISION:

The unemployment insurance decision dated November 30, 2011, reference 01, is reversed. Benefits are withheld until the claimant has worked in and has been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The question of repayment of benefits is remanded.

Dan Anderson
Administrative Law Judge

Decision Dated and Mailed

kjw/kjw