

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BRYANT D TUEL

Claimant

APPEAL NO. 09A-UI-16886-LT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CBIZ M&S CONSULTING SERVICES LLC

Employer

OC: 10/11/09

Claimant: Respondent (1)

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

Iowa Code § 96.5(1) – Voluntary Leaving

STATEMENT OF THE CASE:

The employer filed a timely appeal from the October 30, 2009 (reference 01) decision that allowed benefits. After due notice was issued, a telephone conference hearing was held on December 15, 2009. Claimant participated with his parents Valerie and Larry Tuel and was represented by his father Larry Tuel, Attorney at Law. Employer participated through human resources manager Sara Gordan. Claimant's Exhibits 1 through 14 were admitted to the record.

ISSUE:

The issue is whether claimant quit the employment without good cause attributable to the employer or if he was discharged for reasons related to job misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant most recently worked full-time as an associate or staff accountant at Myers and Stauffer and was separated from employment on April 30, 2009. During the week of April 20 he reported daily absences to his supervisor Andy Johnson. He continued to be absent on April 27 and 28 and left a message each day on Johnson's voice mail and the main number voice mail. He did not call or report for work on April 29 because while on the way to work he received a voice mail message from Gordan that his services were no longer needed. A letter confirming the separation was sent April 30. Employer alleges that claimant was a no call-no show because prior supervisor Jeff Marston and office manager Amy Perry did not receive messages. Employer does not keep a log of calls from supervisors of the main number. Employer's policy considers two consecutive work days without calling or reporting to be a voluntary leaving of employment. Sometime in February 2009 Perry issued a broad attendance reporting memo to the department as a whole, requiring that absenteeism messages be left with the immediate supervisor and the main number; but employer knew that claimant was diagnosed with bi-polar disorder, depression, anxiety, and post-traumatic stress disorder (PTSD) during the fall of 2008 and had never issued verbal or written warnings about his absences, including no call-no show absences on December 23 and 24, 2008.

REASONING AND CONCLUSIONS OF LAW:

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

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.

871 IAC 24.26(21) provides:

Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:

(21) The claimant was compelled to resign when given the choice of resigning or being discharged. This shall not be considered a voluntary leaving.

871 IAC 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 § 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 § 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). Since claimant did not have three consecutive no call-no show absences as required by rule in order to consider the separation job abandonment, and was on his way to work on April 29 when he received the voice mail that the employment relationship had been terminated, the separation was a discharge rather than a voluntary leaving of employment.

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.

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.

871 IAC 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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 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. IDJS*, 364 N.W.2d 262 (Iowa 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. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. The term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." An absence is an extended tardiness, and an incident of tardiness is a limited absence. Absences related to issues of personal responsibility

such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984).

A reported absence related to illness or injury is excused for the purpose of the Iowa Employment Security Act. A failure to report to work without notification to the employer is generally considered an unexcused absence; however, employer has not rebutted the claimant's credible testimony that he did notify his immediate supervisor Andy Johnson. Employer has not established misconduct and even had he not reported the final absences, employer acquiesced to claimant's history of December 2008 no call-no show absences and had not issued a direct intervening written warning. Benefits are allowed.

DECISION:

The October 30, 2009, reference 01, decision is affirmed. Claimant did not quit but was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/pjs