**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS**

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

**COREY E DIXON**
Claimant

**KRAFT PIZZA CO**
Employer

**APPEAL NO. 09A-UI-05464-DT**

**ADMINISTRATIVE LAW JUDGE DECISION**

**Original Claim: 03/08/09**
**Claimant: Appellant (2)**

Section 96.5-2-a – Discharge

**STATEMENT OF THE CASE:**

Corey E. Dixon (claimant) appealed a representative's March 31, 2009 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment from Kraft Pizza Company (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on May 5, 2009. The claimant participated in the hearing. The employer failed to respond to the hearing notice and provide a telephone number at which a witness or representative could be reached for the hearing and did not participate in the hearing. Based on the evidence, the arguments of the claimant, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

**ISSUE:**

Was the claimant discharged for work-connected misconduct?

**FINDINGS OF FACT:**

The claimant started working for the employer on July 12, 2006. He worked full time as a slicer at the employer's Davenport, Iowa, meat preparation facility on a weekend shift, Friday, Saturday, and Sunday, 2:24 p.m. until 1:00 a.m. His last day of work was February 22, 2009. The employer discharged him on February 20, 2009. The reason asserted for the discharge was excessive absenteeism.

During the past year of the claimant's employment, he had missed work on a number of occasions, all of which had been due to illness on his part. When he missed work due to an asthma attack in January 2009, he received a final warning for attendance.

The claimant's mother was diagnosed with cancer and she was scheduled to go to Iowa City for radiation on February 14. The claimant was her only means of transportation. On February 12, the claimant contacted the employer to request that he be allowed to be off work on February 13 and February 14 on vacation so he could transport her to Iowa City the evening of the 13th and stay with her through her treatment on the 14th and then return her to Davenport that evening. The employer denied the vacation request for unspecified reasons. The claimant then informed

the employer he would have to be absent those days regardless, as he was needed to transport his mother for her treatment.

When the claimant returned to work, he was advised that he had exceeded his attendance points and would be discharged, but was allowed to work through the end of the weekend schedule on February 22.

**REASONING AND CONCLUSIONS OF LAW:**

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, 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 is misconduct that warrants denial of unemployment insurance benefits are two separate matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits, an employer must establish the employee was responsible for a deliberate act or omission that was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior that 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

Absenteeism can constitute misconduct; however, to be misconduct, absences must be both excessive and unexcused. 871 IAC 24.32(7). A determination as to whether an absence is excused or unexcused does not rest solely on the interpretation or application of the employer's attendance policy. 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. 871 IAC 24.32(7); Cosper, supra; Gaborit v. Employment Appeal Board, 734 N.W.2d 554 (Iowa App. 2007). The claimant's prior absences were all excusable due to illness, and the final absence was related to a properly-reported absence for reasonable grounds. There is no showing of excessive unexcused absenteeism as needed to establish work-connected misconduct. The employer has failed to meet its burden to establish misconduct. Cosper, supra. The claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

**DECISION:**

The representative's March 31, 2009 decision (reference 01) is reversed. The employer did discharge the claimant, but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

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