IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

PETER MACHOK
Claimant

SMITHFIELD FRESH MEATS CORP
Employer

APPEAL NO. 19A-UI-04808-S1-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 05/12/19
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Peter Machok (claimant) appealed a representative's June 4, 2019, decision (reference 01) that concluded he was not eligible to receive unemployment insurance benefits after his separation from work with Smithfield Fresh Meats (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on July 10, 2019. The claimant was represented by Steve Hamilton, Attorney at Law, and participated personally. The employer participated by Becky Jacobsen, Human Resources Manager. The employer offered and Exhibits 1 and 2 were received into evidence. The claimant offered and Exhibit A was received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on February 13, 2018, as a full-time production worker. He signed for receipt of the employer's handbook on February 13, 2018. The employer's attendance policy stated that an employee who accumulated twelve attendance points in a rolling calendar year would be terminated. The employer issued the claimant a verbal warning on August 29, 2018, and a written warning on October 11, 2019, for accruing attendance points. All of the absences were for medical issues and properly reported. The claimant provided a doctor's note excusing every absence. The warnings indicated that further infractions might result in the claimant's termination from employment.

The employer has a policy regarding re-injury or aggravation after being released from a doctor after an initial worker's compensation injury. If the worker has been released and is reinjured or the injury is aggravated, the worker should report the situation to his supervisor/nurse. If no documentation of the injury is recorded, he should see his own personal physician. The worker should bring the documentation from his personal physician to the employer's nurse or to the human resource manager, if necessary, for the employer to document the injury or aggravation.

On April 14, 2018, the claimant suffered a work-related back injury. He properly reported the injury to his supervisor and was sent to the company nurse. The nurse put him on a schedule for icing his back for a few days. Several days later, the company doctor examined the claimant on site. He placed the claimant on restrictions for a few weeks. In May 2018, the company doctor told the employer to schedule the claimant for an appointment with him at the hospital in Denison, Iowa. In June 2018, the claimant had x-rays and magnetic resonance imaging (MRI).

The company doctor told the employer to schedule the claimant for an appointment with a specialist. The specialist saw the claimant on November 15, 2018. The specialist told the claimant he would not recommend surgery. He told the claimant he was releasing the claimant from all restrictions and returning him to his previous job. The specialist told the claimant he would have pain and advised the claimant to quit work if he could not do the job.

The claimant returned to work without restrictions from November 15 to November 19, 2018, and worked in pain. He reported his back pain to the nurse and asked to see the doctor. She said he was released by the doctor, his worker's compensation case was closed, and she would not send him to the doctor. She did not complete a report indicating a new or aggravation of an old injury. The claimant went back to work.

The claimant saw his own physician and that doctor sent him to a specialist on December 13, 2018. After seeing the previous x-rays and MRI, the claimant's personal specialist diagnosed him with a work-related lumbar spine disc injury. The claimant took the information to the employer's nurse on December 14, 2018. The nurse sent him to the human resources manager. The human resources manager sent him to the supervisor to find a job the claimant could perform with his twenty-pound weight restrictions. No work was available. No report of injury was completed by the employer. The employer told the claimant to take a medical leave of absence without pay and return when he was released by his physician.

Without a job, the claimant could not afford to stay in his residence or pay for a phone. He left home on December 20, 2018, and stayed with a friend in Texas until April 27, 2019. His phone service was disconnected. Following the claimant's instructions, the claimant's roommate/co-worker in Iowa properly reported the claimant's absence each week after December 14, 2018, until his termination. The claimant's roommate/co-worker was also named "Peter". The claimant was absent due to his back injury.

On March 6, 2019, the employer sent a certified letter to the claimant's Iowa address. The letter requested updated medical information by March 13, 2019, or the claimant would be considered terminated. "Peter" signed for receipt of the letter. On March 15, 2019, the employer sent a certified letter to the claimant's Iowa address. The letter requested updated medical information by March 29, 2019, or the claimant would be considered terminated. On March 29, 2019, the letter was returned to the employer undelivered.

The employer identified the telephone number of the claimant's weekly absence reporting. On March 27, 2019, the employer called that number in an effort to talk to the claimant. "Peter" the claimant's roommate/co-worker answered the telephone and said the claimant was in Texas.

On March 28, 2019, the employer sent a certified letter to the claimant's Iowa address. It was incorrectly dated March 18, 2019. The letter said the claimant may qualify for Family Medical Leave Short Term Disability. The letter included certification forms to return by "fifteen days of your first date of absence" or December 31, 2018. "Peter Machok" signed for receipt of the letter. On April 12, 2019, the employer sent the claimant a termination notice based on his

accrual of attendance points. The termination letter did not mention failure to provide documentation.

On April 27, 2019, the claimant returned to his Iowa address in anticipation of a doctor's appointment on May 14, 2019. He found all the letters from the employer and learned he was terminated. The claimant applied for unemployment insurance benefits with an effective date of May 12, 2019. On May 14, 2019, the claimant's doctor stated that the claimant should remain "in an off-work status until further notice.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

Iowa Code section 96.5(2)a provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 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 disqualification shall continue 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(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. Excessive absences are not misconduct unless unexcused. Absences due to properly reported illness can never constitute job misconduct since they are not volitional. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The claimant's absences were all properly reported and due to a medical issue. The claimant's absence does not amount to job misconduct because it was properly reported. The employer has failed to provide any evidence of willful and deliberate misconduct which would be a final incident leading to the discharge. The claimant was discharged but there was no misconduct.

DECISION:

The representative's June 4, 2019, decision (reference 01) is reversed. The claimant was discharged. Misconduct has not been established. Benefits are allowed provided the claimant is otherwise eligible.

_____
Beth A. Scheetz
Administrative Law Judge

_____
Decision Dated and Mailed

bas/rvs