IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

RICHARD RICHBOW
Claimant

KAISER CONTRACT CLEANINING SPECIALISTS INC
Employer

APPEAL NO. 09A-UI-01961-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/11/09 R: 03
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Richard Richbow (claimant) appealed a representative's February 6, 2009 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment with Kaiser Contract Cleaning Specialists, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on March 2, 2009. The claimant participated in the hearing. Scott Layde appeared on the employer's behalf. During the hearing, Claimant's Exhibits A and B were entered into evidence. Based on the evidence, the arguments of the parties, 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 February 25, 2008. He worked full time as a laborer in the employer's industrial sanitation business at a Waterloo, Iowa, business client. His normal work schedule was 12:00 a.m. to 8:00 a.m., with his first shift of the week beginning at 12:00 a.m. on Tuesday morning but referred to as "Monday night," and his last regular shift of the week beginning at 12:00 a.m. on Saturday morning but referred to as "Friday night." His last day of work was some additional hours worked later on "Saturday"1. The employer discharged the claimant when he reported for work on "Monday night," 12:00 a.m. on what was actually Tuesday, January 13, 2009. The reason asserted for the discharge was excessive absenteeism.

[1] The employer asserts that the claimant did not work any additional hours on "Saturday," that the last shift he worked was "Friday night" into Saturday morning, but the employer was unable to reconcile the hours reflected on the claimant's paystub which appeared to include hours from four regular days worked plus the additional hours the claimant asserted he worked later on "Saturday." While the administrative law judge finds that the claimant most likely did work some additional hours on "Saturday," the result in this case would be the same even if in fact he had not.

The claimant had approximately 15 prior absences, at least a number of which were due to medical issues. On November 28, 2008, the employer had given the claimant a final warning and suspension due to these attendance issues.

The claimant had an on-going medical condition that necessitated him periodically seeing a doctor in Iowa City. At the end of the shift that had begun on "Wednesday night" and ended at 8:00 a.m. on Thursday, January 8, the claimant had informed his supervisor that he would not be in at work that evening because he was going to be going to Iowa City to see his doctor that day. The claimant spent essentially the entire day either in transit or in Iowa City, returning home at approximately 9:35 p.m. He then called the employer's message system and left the message as required at least 30 minutes prior to the start of his shift that he would not be to work that evening. When the claimant reported back for work on "Friday night," he gave his supervisor a doctor's note dated January 8 excusing him from work for the shift. The claimant proceeded to work the regular shift that night, and then worked some additional overtime hours on "Saturday."

The employer was not clear as to whether it was aware of the doctor's note or not when the decision was made to discharge the claimant; however, the employer conceded that whether or not the claimant had provided a doctor's note would not have affected the employer's decision, it had determined the claimant had missed too much work, even it was for documented medical reasons.

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). Because the final absence was related to properly reported illness or other reasonable grounds, no final or current incident of unexcused absenteeism occurred that establishes work-connected misconduct and no disqualification is imposed. 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 February 6, 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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