IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

SIMONA F SALIH
Claimant

MARZETTI FROZEN PASTA INC
Employer

APPEAL NO: 10A-UI-15697-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 12/27/09
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Simona F. Salih (claimant) appealed a representative's November 5, 2010 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment from Marzetti Frozen Pasta, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on January 31, 2011. The claimant participated in the hearing. Beth Crocker of TALX Employer Services appeared on the employer's behalf and presented testimony from one witness, Steve Bowers. Val Monafu served as interpreter. During the hearing, Employer's Exhibits One and Ten 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 August 13, 2007. She worked full time as a production worker at the employer's Altoona, Iowa facility, working on an 11:00 p.m. to 7:30 a.m. schedule. Her last day of work was October 5, 2010. The employer discharged her on that date. The reason asserted for the discharge was excessive absenteeism.

The employer has an eight-point attendance policy. As of about September 1, 2010, the claimant only had 1.5 points, which had arisen from a one point absence on July 7 for an unknown reason, and a half point leaving early on June 28 for an unknown reason.

Between September 1 and October 5 the claimant incurred seven more points. The additional points were for single point absences which occurred on September 3 (overtime), September 10 (overtime), September 16, September 17 (overtime), and September 23. The employer did not have information as to what the reasons were for the absences. The claimant indicated that one of the absences from overtime was due to an illness of her daughter where her supervisor had agreed she was not needed, and that at least the September 23 absence was due to her

personal illness. The final occurrence was a two-point no-call, no-show absence on October 1. The reason for that absence was because the claimant had gone earlier in the day to see her estranged husband in another city, had gotten into an argument with him which resulted in her getting locked out of his residence without her keys or access to a phone, and thus being unable to drive back to Altoona or call the employer.

The employer asserted that a warning should have been given to the claimant after September 17 when the claimant was at about 5.5 points. However, the employer could provide no evidence that a warning had actually been given to the claimant, and the claimant denied knowing she had that many points by that date. The only warning actually delivered to the claimant was a 6.5 warning given to the claimant; however, while the warning was given in response to her absence on September 23 which was due to illness, this warning was not given to her until October 4, after the final two-point occurrence had already happened. On October 5, after adding the two points for the October 1 absence, the employer discharged the claimant.

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 which 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 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. 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 or other good reasons 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). Even if the employer chooses to maintain a "no fault" attendance policy, in order to establish misconduct it is the employer's burden to show that the absences were unexcused. From the available information, while the final absence might have been for a personal reason that would not be considered excused, at least some of the prior occurrences were for excusable reasons such as personal illness, and the employer has not established that of the claimant's attendance points, an excessive amount were for unexcused reasons. Further, in order to establish the necessary element of intent, the final incident must have occurred despite the claimant's knowledge that the occurrence could result in the loss of her job. Cosper, supra; Higgins v. IDJS, 350 N.W.2d 187 (Iowa 1984). The claimant had not previously been effectively warned in advance that she was approaching discharge and that a future absence could result in termination. Higgins, supra. 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 November 5, 2010 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 she 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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