IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ERIC L VAN ZEE
Claimant

EMW GROSCHOPP INC
Employer

APPEAL NO. 08A-UI-00485-S2T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 12/16/07 R: 01
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

EMW Groschopp (employer) appealed a representative's January 7, 2008 decision (reference 01) that concluded Eric Van Zee (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for January 30, 2008. The claimant participated personally. The employer participated by Connie Vander Ploeg, Vice President of Administration. The employer offered and Exhibit One was received into evidence.

ISSUE:

The issue is whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds that: The claimant was hired on October 6, 2005, as a full-time Manufacturing Technician 1. He worked from 3:30 p.m. to 11:30 p.m. each day.

On November 15, 2007, the claimant requested time off to seek alcohol dependence treatment. The employer told the claimant he had to quit work to go into treatment. The employer made the claimant sign a document saying he was quitting. The claimant entered treatment on November 15, 2007. After he was an in-patient, the employer contacted him and said he could use Family Medical Leave (FMLA). The employer provided the necessary paperwork to the treatment center. The FMLA paperwork indicated his probable discharge date would be December 15, 2007. On December 15, 2007, the claimant's primary counselor wrote a letter stating the claimant could return to work on December 17, 2007, but the claimant was referred for continuing care.

On December 17, 2007, the claimant was to report to an alcohol and drug treatment center at 4:00 p.m. The claimant informed the employer of this at approximately 2:00 p.m. The employer told the claimant that if he did not appear for work, he would be terminated. The claimant went to treatment and the employer terminated him. The employer did not provide any paperwork to the treatment center to extend the FMLA.

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:
>
> 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(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 last incident of absence was a properly reported treatment of illness that occurred on December 17, 2007. 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 that would be a

final incident leading to the discharge. The claimant was discharged, but there was no misconduct.

DECISION:

The representative's January 7, 2008 decision (reference 01) is affirmed. The employer has not met its proof to establish job-related misconduct. Benefits are allowed.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/kjw