IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JUAN ESPINOZA
Claimant

CURLYS FOODS
Employer

APPEAL NO. 09A-UI-18028-ET

ADMINISTRATIVE LAW JUDGE DECISION

Original Claim: 10-18-09
Claimant: Appellant (2)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the November 16, 2009, reference 02, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on January 11, 2010. The claimant participated in the hearing. Leticia Cvetnich, Human Resources Assistant; Rocky Gonzales, Production Supervisor on Third Shift; and Lee Wallace, Production Supervisor of Day Shift, participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time cookhouse operator for Curlys Foods from September 8, 2008 to October 14, 2009. He was discharged for exceeding twelve attendance points. The claimant was absent due to illness October 6 and 7, 2008, and received two points; he left early January 5, 2009, and received one-half point; he was absent due to illness February 4, March 23, March 30, May 14, and May 17, 2009, and received one point for each incident; he was absent July 17, 19, and 20, 2009, because he had to drive to the Mexican border to pick up his children and received three points; and he left early September 23, 2009, and received one-half point for a total of eleven points. The claimant requested three weeks off, beginning September 24, 2009, to go to Mexico to see his mother because she was ill and refusing to see a doctor. He made his request two to three weeks before he wanted to leave. Originally, the employer did not anticipate there would be a problem with his taking vacation at that time but then discovered another employee had already requested the same weeks off; and because it was a six-person department the employer could not be down two employees at the same time for that length of time. The claimant asked Human Resources Manager Kathy Peterson about FMLA and was told he did not qualify because he did not have any medical documentation. He asked about a leave of absence but Ms. Peterson denied his request because of his attendance record. The claimant inquired about providing the FMLA medical documentation when he was in Mexico or when he returned but Ms. Peterson told him he would still be fired without the

possibility of rehire. The claimant called the employer September 24, 2009, and said he was on his way to Mexico because of a family emergency and stated he would send or fax paperwork supporting his need to be with his mother but never sent the paperwork because he knew his employment would be terminated anyway after speaking to Ms. Peterson.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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.

The employer has the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000). While the claimant did exceed the allowed number of attendance points, eight of his twelve points were accumulated for absences due to properly reported illness, three points were accumulated when he drove to the Mexican border and back to pick up his children, and one point was accumulated for leaving early on two occasions. The claimant requested three weeks off to go to Mexico and take care

of his ill mother but his request was eventually denied because another employee in that department requested the same time off prior to the claimant's asking and that department only has six employees. It appears the claimant had a legitimate FMLA claim but understood from Ms. Peterson he would not qualify because he could not provide medical documentation regarding his mother before going to Mexico and she did not give him the opportunity to take the paperwork with him to Mexico and have it completed by her mother's physician. Ms. Peterson was unable to participate in the hearing; but based on the claimant's understanding of her statements about FMLA, he believed he could not use it while he was gone. The claimant did have one week of vacation, which would have ended October 1, 2009, and was back on the ninth working day, October 14, 2009, following that one week off. If any employee is absent for compelling personal reasons and the period of absence does not exceed ten working days, the claimant is not considered to have voluntarily quit his job. 871 IAC 24.25(20). The same principle can be applied on a termination due to an absence for compelling personal reasons when a claimant is denied FMLA to which he was entitled. Under these circumstances, the administrative law judge concludes the claimant's actions and attendance do not rise to the level of disqualifying job misconduct. Therefore, benefits are allowed.

DECISION:

The November 16, 2009, reference 02, decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

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Julie Elder
Administrative Law Judge

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Decision Dated and Mailed

je/kjw