IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

NICKY BEERY
Claimant

KATECHO INC
Employer

APPEAL NO. 10A-UI-06079-S2

ADMINISTRATIVE LAW JUDGE DECISION

Original Claim: 03/21/10
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Nicky Beery (claimant) appealed a representative's April 14, 2010 decision (reference 01) that concluded he was not eligible to receive unemployment insurance benefits because he was discharged from work with Katecho (employer) for excessive unexcused absenteeism after being warned. After hearing notices were mailed to the parties' last-known addresses of record, a hearing was scheduled for June 8, 2010, in Des Moines, Iowa. The claimant participated personally. The employer participated by Jayne Schmeling, Director of Human Resources, and Jake Harris, Production Supervisor. The employer offered and Exhibit One 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 having considered all of the evidence in the record, finds that: The claimant was hired on December 8, 2003, as a full-time production assembler. The claimant signed for receipt of the employer's handbook on December 8, 2003. The handbook states that an employee who accumulates seven points in six months will be terminated. At management discretion, absences lasting for two days in a row for the same reason could total one point. Also at management discretion, an employee could make up missed time. The claimant lives with his mother, who suffers from diabetes. Her diabetes is not under control and she periodically suffers from seizures. The claimant is her sole care giver when she suffers health issues. The employer told the claimant he should apply for Family Medical Leave (FMLA) for his absences due to his mother's condition. The claimant chose not to apply.

The claimant was absent due to illness that was properly reported on September 21, 2009, and February 23, 2010. He had transportation issues on October 12, 2009, and January 20, 2010. The claimant was absent for personal issues on March 8, 2010. The claimant could not remember if this absence was due to his mother's illness. The employer issued the claimant a written warning on March 9, 2010, for accumulating five points.

On March 18, 2010, the claimant received a call that his mother was in the hospital after having a seizure. The claimant properly reported to his supervisor that he was leaving work to go to the hospital. On March 19, 2010, the claimant properly reported to the employer that he was staying home with his mother after her seizure. The employer assigned one point per day to the claimant's attendance history rather than assigning one point for the two consecutive days of absence for the same issue. The claimant assumed that one point would be assigned.

On March 21, 2010, the claimant's point for September 21, 2009, fell off his attendance total. The claimant returned to work on March 22, 2010. At the end of his shift, the employer terminated the claimant for accumulating seven attendance points in a six-month rolling period.

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(7) provides:

> (7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. The term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

During the six-month period, the claimant had two or three absences due to personal issues. The remaining absences were due to the claimant's illness or his mother's illness and properly reported. 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 claimant's absences due to illness do not amount to job misconduct, because they were properly reported. Likewise, the absences to take care of his ailing mother cannot be considered misconduct, because they were not volitional and properly reported. The claimant's absences for his own and his mother's illness will not be considered. This leaves us with two or three absences in six months for transportation and a personal issue. The claimant's absences were not excessive. The employer did not provide sufficient evidence of job-related misconduct. Benefits are allowed.

DECISION:

The representative's April 14, 2010 decision (reference 01) is reversed. The employer has not met its burden of 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