IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

MIGUEL A LEYVA SABORIT
Claimant

HORMEL FOODS CORPORATION
Employer

APPEAL NO. 18A-UI-12412-S1-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 12/02/18
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

Hormel Foods Corporation (employer) appealed a representative's December 21, 2018, decision (reference 01) that concluded Miguel Leyva Saborit (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for January 15, 2019. The claimant participated personally through Rusty Perez, interpreter. Esperanza Martinez, former co-worker, testified for the claimant. The employer was represented by Todd Richardson, Hearings Representative, and participated by Elizabeth Dean, Human Resources Manager; Nicholas Marsh, Production Supervisor; and Kellie Langden, Claims Specialist. Exhibit D-1 was received into evidence. The employer offered and Exhibit 1 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 considered all of the evidence in the record, finds that: The claimant was hired on July 27, 2017 as a full-time palletizer. He signed for receipt of the employer's Spanish policies on July 27, 2017. The work rules state "Walking off the job will not be condoned." This section refers to employees who quit work without completing an X80 form.

The employer issued the claimant a written document in English on June 13, 2018, for not reporting his absence thirty minutes in advance. The claimant cannot read English. A translator was present on June 13, 2018, even though employer does not have a policy of providing interpreters.

On December 2, 2018, the claimant reported for work on time for his 6:30 a.m. to 12:30 p.m. shift. He felt sick but thought he could work through the six hour shift. When he arrived at work, the employer told the claimant his hours had changed and he had to work until 3:00 p.m. The employer has no policy requiring them to inform employees of shift changes prior to the start of the shift.

The claimant notified his supervisor as best he could that he did not feel well enough to work the longer shift. The supervisor said the claimant had to work the longer shift. His only option was to write his name on an overtime paper and hope that another employee would want his hours. The claimant knew it was Sunday and there would be no one to take his hours. In English he repeatedly said, “Me no good. I need go home”. The claimant explained his situation to a person who could interpret. The interpreter did not tell the supervisor what the claimant told him. The supervisor did not think he needed an interpreter because the claimant was speaking English. He heard everything he needed to hear. The supervisor told the claimant that if he left, he would be terminated. The claimant did not think this was correct because he was reporting his absence due to illness to his supervisor and should only receive one-half point. He told the employer he was leaving.

On December 3, 2018, the claimant reported for his shift but the employer would not let him perform work. He was sent home. Later, the human resources manager spoke with the claimant. She understood that the claimant told the supervisor he was ill and had to leave. The claimant did not write his name on an overtime list. On December 6, 2018, the human resources manager terminated the claimant. His termination documentation indicated that he walked off the job, referring to the failure to complete an X80 form.

The claimant filed for unemployment insurance benefits with an effective date of December 2, 2018. He received $2,335.00 in benefits after the separation from employment. The employer participated personally at the fact finding interview on December 20, 2018, by Kelly Langden, claims specialist. She did not have any firsthand knowledge of the events leading to the separation. Some documents were provided for the fact-finding interview.

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, regardless of the source of the individual’s wage credits:
>
> 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 disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r.871-24.32(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 illness which occurred on December 2, 2018. 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 which would be a final incident leading to the discharge. The claimant was discharged but there was no misconduct.

DECISION:

The representative's December 21, 2018, decision (reference 01) is affirmed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/rvs