IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

RAUL VAZQUEZ Claimant **HORMEL FOODS CORPORATION** Employer	**APPEAL 17A-UI-10266-NM-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 09/17/17** **Claimant: Appellant (2)**

Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from the October 5, 2017, (reference 01) unemployment insurance decision that denied benefits based on his voluntary quit by refusing to work. The parties were properly notified of the hearing. A telephone hearing was held on November 20, 2017. The claimant participated and testified with the assistance of a Spanish language interpreter from CTS Language Link. The employer participated through Hearing Representative Robin Moore and Human Resource Manager Elvia Rodriguez. Employer's Exhibits 1 and 2 and claimant's Exhibit A were received into evidence.

ISSUE:

Did claimant voluntarily leave the employment with good cause attributable to the employer or did employer discharge the claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a stuffer and hanger from April 28, 2017, until this employment ended on September 15, 2017, when he was discharged.

On September 7, 2017, claimant notified a supervisor, Robert Salinas, that he was experiencing some pain in his back. The nurse had gone home for the day, but Salinas offered him a back support. Claimant declined the support and, according to the employer, said he could return to work. Claimant went back to the line, but then disappeared. Claimant testified he was in so much pain he could not work and sought medical attention. Claimant did not notify anyone he was leaving. Claimant then went and saw the doctor, getting a note excusing him from work for September 7. (Exhibit A). Claimant believed the note also excused him from work on September 8 and had his wife, who also worked for this employer, bring in the note prior to the start of his shift the following day. The note was given to a receptionist and placed in Rodriguez's mail box, but she did not see it until the following Monday. Claimant was next scheduled to work on September 9, 2017 at 3:00 p.m., but was still experiencing back pain. Claimant went in to see the doctor again, at 3:23 p.m., and received a second note excusing

him from work until September 11, 2017, but did not call in to report he would be absent on September 9. Claimant could not recall for certain if he sent a copy of this note into the employer with his wife, but Rodriguez testified she believed there was a copy in her mailbox when she came in to work on Monday.

The employer's policies, which claimant signed an acknowledgement of on April 28, 2017, prohibit walking off the job and require employees to notify the employer of an absence at least a half hour prior to their start time. (Exhibit 2). Claimant testified he did not tell anyone he was leaving early on September 7, because he did not think anyone would care. Claimant further testified he did not believe he needed to call in to report his absences because his attendance history was very good and he believed his doctor's note would excuse his absences. Claimant had no prior warnings for leaving work early without permission or for his attendance.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant did not voluntarily quit but was discharged from employment for no disqualifying reason.

Iowa Code §96.5(1) provides:

> An individual shall be disqualified for benefits:
>
> 1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

A voluntary quitting means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer and requires an intention to terminate the employment. *Wills v. Emp't Appeal Bd.*, 447 N.W. 2d 137, 138 (Iowa 1989); *see also* Iowa Admin. Code r. 871-24.25(35). A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980). Where a claimant walked off the job without permission before the end of his shift saying he wanted a meeting with management the next day, the Iowa Court of Appeals ruled this was not a voluntary quit because the claimant's expressed desire to meet with management was evidence that he wished to maintain the employment relationship. Such cases must be analyzed as a discharge from employment. *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438 (Iowa Ct. App. 1992). Here, the claimant, through his wife, remained in contact with the employer. He sent medical excuses and returned to work on September 11, when he was medically cleared to do so. Claimant's actions show a clear intent to remain employed. Accordingly, his separation will be analyzed as a discharge from employment.

Iowa Code § 96.5(2)a provides:

> An individual shall be disqualified for benefits:
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> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
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> 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.

Iowa Admin. Code r. 871-24.32(1)a provides:

> Discharge for misconduct.

> (1) Definition.
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> 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(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 employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness 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. Iowa Admin. Code r. 871-24.32(7); *Cosper*, supra; *Gaborit v. Emp't Appeal Bd.*, 734 N.W.2d 554 (Iowa Ct. App. 2007). Medical documentation is not essential to a determination that an absence due to illness should be treated as excused. *Gaborit*, supra.

The requirements for a finding of misconduct based on absences are therefore twofold. First, the absences must be excessive. *Sallis v. Emp't Appeal Bd.*, 437 N.W.2d 895 (Iowa 1989). The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins* at 192. Second, the absences must be unexcused. *Cosper* at 10. The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused either because it was not for "reasonable grounds," *Higgins* at 191, or because it was not "properly reported," holding excused absences are those "with appropriate notice." *Cosper* at 10. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins, supra.* An employer's no-fault absenteeism policy or point system is not dispositive of the issue of qualification for unemployment insurance benefits. A properly reported absence related to illness or injury is excused for the purpose of Iowa Employment Security Law because it is not

volitional. Excessive absences are not necessarily unexcused. Absences must be both excessive and unexcused to result in a finding of misconduct. A failure to report to work without notification to the employer is generally considered an unexcused absence. However, one unexcused absence is not disqualifying since it does not meet the excessiveness standard.

Here, claimant's failure to work his entire shift on September 7, 2017 would normally be considered excused, as he left due to injury. However, claimant did not tell anyone he was leaving to seek medical treatment, making his absence for the remainder of the day unexcused. Claimant did not call in to report his absence the following day, but did send his wife with a doctor's note, which he reasonably believed explained and excused his absence due to his injury for that day. Claimant's September 8 absence is therefore excused. Claimant could not recall for certain whether he sent his second doctor's note with his wife, but the fact that the Rodriguez had the note in her mailbox when she arrived Monday indicates he did. However, claimant did not call in and report his absence on September 9, nor did he even get his medical excuse until after his shift started, making it impossible for his wife to have properly reported his absence on his behalf that day. Accordingly, claimant's absence on September 9 is unexcused, while his absence on September 10 is excused. This leaves claimant with two unexcused absences, which generally does not meet the excessiveness standard or, correspondingly, the standard for misconduct.

Furthermore, an employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Inasmuch as employer had not previously warned claimant about his attendance, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. Benefits are allowed.

DECISION:

The October 5, 2017, (reference 01) unemployment insurance decision is reversed. The claimant did not voluntarily quit but was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible. Benefits withheld based upon this separation shall be paid to claimant.

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Nicole Merrill
Administrative Law Judge

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Decision Dated and Mailed

nm/rvs