IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

SILVIA P HERNANDEZ
Claimant

TYSON FRESH MEATS INC
Employer

APPEAL NO: 12A-UI-05087-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 03/18/12
Claimant: Appellant (2)

Section 96.5-2-a – Discharge
Section 96.5-1 – Voluntary Leaving

STATEMENT OF THE CASE:

Silvia P. Hernandez (claimant) appealed a representative's April 23, 2012 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment from Tyson Fresh Meats, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on May 24, 2012. The claimant participated in the hearing. Will Sager appeared on the employer's behalf. Anna Pottebaum served as interpreter. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was there a disqualifying separation from employment either through a voluntary quit without good cause attributable to the employer or through a discharge for misconduct?

OUTCOME:

Reversed. Benefits allowed.

FINDINGS OF FACT:

The claimant started working for the employer on August 9, 2010. She worked full-time on the second shift as a production worker at the employer's Storm Lake, Iowa, pork processing facility. Her last day of work was February 22, 2012.

After about two hours on her shift on February 22, the claimant's supervisor informed the claimant that she had an emergency phone call. She went to the office and spoke by phone to her son, who informed her that the claimant's mother was deathly ill. The claimant then informed her supervisor that she needed to leave and travel to see her mother, who was in Guatemala, before she died. The supervisor told the claimant to go ahead and leave; she told the claimant she could be gone for two weeks. However, the supervisor failed to complete any leave paperwork to that effect, and did not advise the claimant that any paperwork was needed.

The claimant did call into the office the next day and left a message reasserting that she was absent because of her mother's illness; she left for Guatemala later that day. She returned to the country late on March 6. She sought to return to her shift on March 8, but was told at that time that she no longer had job, that she had accumulated too many points.

The employer has a 14-point attendance policy. If a person has reached the 14-point level and then is a three-day no-call, no-show, she is considered to have voluntarily quit by job abandonment. If the employer does return after the 14 points, a review is conducted to determine if there were extenuating circumstances.

The employer determined that as of February 24, the claimant was at 15.5 points. It considered the following occurrences:

Date	Occurrence/reason if any
05/09/11	Absence, personal illness, 1 point.
05/13/11	Absence, personal illness, 1 point.
06/06/11	Tardy, personal illness, .5 point.
07/22/11	Absence, personal illness, 1 point.
08/01/11	Absence, personal illness, 1 point.
08/05/11	Absence, personal illness, 1 point.
08/08/11	Absence, personal illness, 1 point.
09/19/11	Absence, personal illness, 1 point.
09/20/11	Absence, personal illness, 1 point.
01/16/12	Absence, personal illness, 1 point.
02/06/12	Absence, personal illness, 1 point.
02/13/11	Absence, personal illness, 1 point.
02/20/11	Absence, personal illness, 1 point.
02/21/11	Absence, personal illness, 1 point.
02/23/11	Absence, family illness, 1 point.
02/24/11	Absence, family illness, 1 point.

The employer considered the claimant a no-call, no-show for work on February 27, February 28, and February 29. As a result, it considered the claimant to have voluntarily quit by job abandonment.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not eligible for unemployment insurance benefits if she quit the employment without good cause attributable to the employer or was discharged for work-connected misconduct. Iowa Code §§ 96.5-1; 96.5-2-a.

Rule 871 IAC 24.25 provides that, in general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. A voluntary leaving of employment requires an intention to terminate the employment relationship and an action to carry out that intent. *Bartelt v. Employment Appeal Board*, 494 N.W.2d 684 (Iowa 1993); *Wills v. Employment Appeal Board*, 447 N.W.2d 137, 138 (Iowa 1989). The employer asserted that the claimant was not discharged but that she voluntarily quit by job abandonment. The claimant reasonably believed the statement of her supervisor that she could be gone out of the country to see her mother for two weeks; she clearly intended on returning, and in fact did

attempt to return to work. The administrative law judge concludes that the employer has failed to satisfy its burden that the claimant voluntarily quit. Iowa Code § 96.6-2. As the separation was not a voluntary quit, it must be treated as a discharge for purposes of unemployment insurance. 871 IAC 24.26(21).

The issue in this case is then whether the employer discharged the claimant for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue is not whether the employer was right or even had any other choice but to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982).

In order to establish misconduct such as to disqualify a former employee from benefits, an employer must establish the employee was responsible for a deliberate act or omission that was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior that 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, 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(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

The reason the employer effectively discharged the claimant was her attendance points. Excessive and unexcused absenteeism can constitute misconduct. 871 IAC 24.32(7). A determination as to whether an absence is excused or unexcused does not rest solely on the interpretation or application of the employer's attendance policy. 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. 871 IAC 24.32(7); *Cosper*, supra; *Gaborit v. Employment Appeal Board*, 734 N.W.2d 554 (Iowa App. 2007). All of the claimant's attendance points but for February 23 and February 24, 2012 were due to properly reported illness; the employer has not established the claimant had excessive unexcused absences. Further, the final absence was related to properly reported reasonable grounds; the employer knew or should have known that after February 24 the claimant would be absent for an additional two weeks and that she would not be able to call in from out of the country. Therefore, no final or current incident of unexcused absenteeism occurred that establishes work-connected misconduct and no disqualification is imposed. The employer has not met its burden to show disqualifying misconduct. *Cosper*, supra. Based upon the evidence provided,

the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's April 23, 2012 decision (reference 01) is reversed. The claimant did not voluntarily quit and the employer did discharge the claimant, but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

ld/kjw