IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ALISHA A THOMAS
Claimant

CASEY'S MARKETING COMPANY
Employer

APPEAL NO. 17A-UI-06002-S1-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 05/14/17
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Alisha Thomas (claimant) appealed a representative's June 1, 2017, decision (reference 01) that concluded she was not eligible to receive unemployment insurance benefits after her separation from employment with Casey's Marketing Company (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for June 27, 2017. The claimant participated personally. The employer participated by Kevin Sinnwell, District Manager, and Michael Myers, Area 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 considered all of the evidence in the record, finds that: The claimant was hired on August 1, 2011, and at the end of her employment she was working as a full-time store manager. The claimant signed for receipt of the employer's handbook on August 1, 2011. The employee must notify her supervisor of an absence prior to the normally scheduled work time.

The claimant requested and was granted Family Medical Leave (FMLA) from January 25, 2017, to April 24, 2017, for a non-work-related injury to the claimant's finger. She returned to work during this period with restrictions. Her physician limited her work time to four hours after surgery on her broken finger. The claimant also had stage three cervical cancer. Sometimes the claimant worked longer than four hours so she could complete the jobs that needed to be performed. On April 19, 2017, the employer issued the claimant a written warning for working outside her doctor's restrictions.

On April 20, 2017, the claimant was supposed to start work at 9:00 a.m. but her hand was swollen. At 6:55 a.m. the claimant left a message for her supervisor saying she would not be at work. At 6:57 a.m. on April 20, 2017, the claimant called her store/work location and told the employees she would not be at work. On April 20, 2017, at 3:54 p.m. the claimant spoke to her supervisor. She told the supervisor that she had a doctor's appointment and her hand was healing. Her doctor said she could now work nine hours per day.

On April 26, 2017, the claimant was at the emergency room until 3:00 a.m. because of pain and swelling in her hand. She was supposed to be at work at 6:00 a.m. She called the store/work location at 5:01 a.m. and her supervisor at 7:12 a.m. to report her absence. On April 28, 2017, the claimant was dizzy and nauseous from the prescription drugs and fell down her basement stairs. Her ankle was swollen. At 5:00 a.m. she called her store/work location to advise them of her situation. The corporate trainer who answered the telephone said she would notify the supervisor for her but the claimant had to come to work because the store needed her. The claimant said she had to let the swelling go down before she could come to work. On April 28, 2017, the claimant reported to work at 8:02 a.m. The employer issued her a written warning for failure to properly report her absences to a supervisor before the start of her shift on April 26 and 28, 2017. The employer issued her a second written warning for being absent without reporting on April 20, 2017.

On May 3, 2017, the claimant called her supervisor to say her fever was 103 and she should be able to report to work by May 4, 2017. On May 3, 2017, at 6:17 p.m. the supervisor called the claimant. The supervisor said the claimant could not return unless the fever had reduced. She told the claimant to call if the fever had reduced and the claimant could come to work on May 4, 2017. On May 4, 2017, the claimant left the supervisor a message. At 6:11 p.m. on May 4, 2017, the supervisor called the claimant. The claimant told the supervisor that her fever broke at 10:00 a.m. and she could report to work on May 5, 2017. The claimant said she had a doctor's appointment for her cervical cancer at 2:00 p.m. that day and they took her temperature to confirm it. The supervisor told the claimant she was set to return on May 5, 2017. On May 5, 2017, the employer terminated the claimant for being absent without proper reporting on May 4, 2017.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

Iowa Code § 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.

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(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 May 4, 2017. 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.

If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. *Crosser v. Iowa Department of Public Safety*, 240 N.W.2d 682 (Iowa 1976). The employer had the power to present testimony but chose not to do so. The employer did not provide first-hand testimony at the hearing and, therefore, did not provide sufficient eye witness evidence of job-related misconduct to rebut the claimant's denial of said conduct. The employer did not meet its burden of proof to show misconduct. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The representative's June 1, 2017, decision (reference 01) is reversed. 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