IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

MICHAEL A ROE Claimant **KRAFT HEINZ FOODS COMPANY LLC** Employer	**APPEAL 22A-UI-01355-DH-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 11/14/21** **Claimant: Respondent (1)**

Iowa Code § 96.5(1) - Voluntary Quit
Iowa Code § 96.5(2)a - Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(8) - Current Act
Iowa Code § 96.3(7) - Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 - Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer/appellant, Kraft Heinz Foods Company, LLC, filed an appeal from the December 6, 2021, (reference 01) unemployment insurance decision that allowed benefits based upon finding the record for the 11/16/2021 dismissal from work showed no willful or deliberate misconduct. Notices of hearing were mailed to the parties' last known addresses of record for a telephone hearing scheduled for February 7, 2022. The claimant, Michael Roe, participated. The employer participated through Donna Henry, the party representative and Gina Bray, human resources coordinator. Employer's Exhibit of 2 pages was admitted. Judicial notice was taken of the administrative file.

ISSUE:

Was the separation a layoff, discharge for misconduct or a voluntary quit without good cause?
Was the claimant overpaid benefits?
Should claimant repay benefits and/or charge employer due to employer participation in fact finding?

FINDINGS OF FACT:

Having heard the testimony and reviewed the evidence in the record, the undersigned finds:

Claimant was employed as a full-time, team lead, starting July 26, 2021, through his last day worked on November 15, 2021. The workdays were 12 hours long. Originally, claimant was to work four on and four off, but over time, he would be "force" to come in on days not otherwise his four days on schedule, which sometimes impacted his childcare. Claimant was discharged from employment on November 16, 2021, first thing when he arrived at work for leaving early on October 3, 11 and November 15, 2021. The early leaves were approximately two hours early.

Employer has an employee handbook that was provided to claimant. Per the employer, new hires are on a 120 probationary period, and should a probationary employer have three absence issues for any reason, they are discharged, and this is in the handbook. Claimant states he was unaware of the policy. No copy of the policy was submitted by the employer. Claimant had three incidents of absences on the above referenced dates. Claimant's leaving early on October 3 and 11, 2021 resulted in a Corrective Action Form being issued. Employer's Exhibit page 1. Claimant's leaving was regarding his child and his child's health needs.

Claimant is a single parent and has child who utilizes an inhaler and a nebulizer. On November 15, 2021, a "forced" day for claimant to work, claimant was notified that his child was experiencing a health problem (asthma attack and allergy reaction). Claimant advised the employer of the situation, requested permission to leave work early, and asked if the employer needed any documentation regarding the health matter. Employer told claimant they did not need any documentation, that he could go, but it is strike three. Claimant arrived home to assist with the inhaler and started the nebulizer.

When claimant reported to work on November 16, 2021, he was stopped at the door, taken to his supervisor's office, informed he was discharged from work for the absences, the employer took his work badge and work clothing, and had claimant escorted out of the building. Employer followed up by sending a November 23, 2021, letter to claimant. Employer's Exhibit page 2.

Claimant received $4,408.00 total in benefits for eight weeks ending 01/08/22. Employer submitted documents in fact finding, but did not participate in the fact finding interview.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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.

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.

Iowa Admin. Code r. 871-24.1(113)c provides:

> Definitions.
>
> Unless the context otherwise requires, the terms used in these rules shall have the following meaning. All terms which are defined in Iowa Code chapter 96 shall be construed as they are defined in Iowa Code chapter 96.
>
> (113) *Separations.* All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.
>
> c. *Discharge.* A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in establishing disqualifying job misconduct. *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). The Iowa Court of Appeals found substantial evidence of misconduct in testimony that the claimant worked slower than he was capable of working and would temporarily and briefly improve following oral reprimands. *Sellers v. Emp't Appeal Bd.*, 531 N.W.2d 645 (Iowa Ct. App. 1995). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). The focus of the administrative code definition of misconduct is on deliberate, intentional or culpable acts by the employee. *Id.*

When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.,* 391 N.W.2d 731 (Iowa Ct. App. 1986).

Further, poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000).

The requirements for a finding of misconduct based on absences are twofold. First, the absences must be excessive. *Sallis v. Emp't Appeal Bd.*, 437 N.W.2d 895 (Iowa 1989). The term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." An absence is an extended tardiness, and an incident of tardiness is a limited absence. 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.* See, *Gimbel v. Emp't Appeal Bd.*, 489 N.W.2d 36 (Iowa Ct. App. 1992) where a claimant's late call to the employer was justified because the claimant, who was suffering from an asthma attack, was physically unable to call the employer until the condition sufficiently improved; and *Roberts v. Iowa Dep't of Job Serv.*, 356 N.W.2d 218 (Iowa 1984) where unreported absences are not misconduct if the failure to report is caused by mental incapacity.

An employer's point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits; however, an employer is entitled to expect its employees to report to work as scheduled or to be notified as to when and why the employee is unable to report to work.

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. The employer is entitled to establish reasonable work rules and expect employees to abide by them. A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

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 final incident that led to the third absence was for a family medical emergency. Claimant notified his employer of the situation, requested permission to leave work early, and asked if the employer needed any documentation regarding the health matter. Employer told claimant they did not need any documentation, that he could go, but it is strike three. Claimant reports the need

to leave work, with it being within an hour or two of the end of his shift on a day that he otherwise isn't scheduled, but the company is working overtime shifts. The absence is excusable. If not excusable, three early leaves over the course of time in question is not excessive. Lastly, the work rule that does not factor the reason why the absence exists, is not reasonable. No last act (third absence) is proven and therefore no misconduct is shown.

The employer did not meet their burden of proof. While employer may have had a good reason to terminate claimant, there was not a disqualifying reason established and therefore no disqualification is imposed.

DECISION:

The December 6, 2021, (reference 01)) unemployment insurance decision is **AFFIRMED**. Claimant was discharged for no disqualifying reason. The remaining issues of overpayment of benefits, repayment of benefits and whether to charge employer's account are moot.

Darrin T. Hamilton
Administrative Law Judge

March 4, 2022
Decision Dated and Mailed

dh/scn