IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

CHAD R ULIN
Claimant

BOB BITTERMAN
MASTER TOOL & MANUFACTURING INC
Employer

APPEAL NO. 16A-UI-08652-S1-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 07/17/16
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

Master Tool & Manufacturing (employer) appealed a representative's August 1, 2016, decision (reference 01) that concluded Chad Ulin (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 August 26, 2016. The claimant participated personally. The employer participated by Robert Bitterman, President/Co-owner; Clint Bitterman, Vice President/Co-owner; Travis Ficken, Computer Numerical Controlled Supervisor; and Sue Hobson, Office Assistant. The employer offered and Exhibit One and Two were received into evidence. Exhibit D-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 August 3, 2015, as a full-time computer numerical controlled operator. He worked Mondays through Fridays and sometimes on Saturdays. One of the things the claimant liked about his job was that he could set his own start time. He was to work eight to ten hour shifts and get his work done. The employer has a handbook but the claimant did not sign for receipt of it.

On August 14, 2015, the employer changed their smoking policy. The employer did not allow smoking on company property but did allow employees to smoke in their personal vehicles. On October 7, 2015, the employer had a talk with the claimant about drinking. The claimant indicated he was not drinking. The claimant told the employer he had problems with getting enough sleep. On April 4, 2016, the employer issued the claimant a written warning and suspension for failure to follow company policies. The specific policies the claimant violated were not mentioned in the warning. The employer notified the claimant that further infractions could result in termination from employment.

On July 5, 2016, the claimant notified the employer he would not be at work because he was moving. On July 6, 2016, the claimant told the employer he would be absent due to illness. The claimant was hospitalized and unable to notify the employer of his absence on July 8 and 11, 2016. On July 11, 2016, the claimant told the employer he was being released on July 13, 2016. On July 12, 2016, the claimant gave the employer more information about his hospital stay. He was released on July 13, 2016. On July 13, 2016, the employer terminated the claimant for tardiness on July 1, 2016, for smoking in the wrong area on July 1, 2016, and for absences. The claimant was hospitalized in a different place from July 14 to August 10, 2016.

The claimant filed for unemployment insurance benefits with an effective date of July 17, 2016. The employer participated personally at the fact-finding interview on July 29, 2016, by Robert Bitterman.

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.
>
> 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). Unreported absences do not constitute job misconduct if the failure to report is caused by mental incapacity. Roberts v. Iowa Department of Job Service, 356 N.W.2d 218 (Iowa 1984). 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 an improperly reported illness. The claimant's absence does not amount to job misconduct because the claimant could not properly report his absence due to his hospitalization.

An employer may discharge an employee for any number of reasons or no reason at all, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, the employer incurs potential liability for unemployment insurance benefits related to that separation. Inasmuch as the employer had not previously warned the claimant about any of the issues leading to the separation, it has not met the burden of proof to establish the claimant acted deliberately or negligently in violation of company policy, procedure, or prior warning. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. 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 August 1, 2016, 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/pjs