IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

MICHAEL T ANDERSON
Claimant

WELLS ENTERPRISES INC
Employer

APPEAL NO. 18A-UI-08643-S1-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/15/17
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

Wells Enterprises (employer) appealed a representative's August 7, 2018, decision (reference 02) that concluded Michael Anderson (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 September 5, 2018. The claimant participated personally. The employer was represented by Jackie Boudreaux, Hearing Representative, and participated by Daniel Stockmaster, Associate Business Partner. Exhibit D-1 was received into evidence. The employer offered and Exhibit 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 April 24, 2017, as a full-time Category B, Cake Two. He signed for receipt of the employer's electronic handbook on April 24, 2017. The employer's attendance policy indicates employees will be terminated if they accrue ten occurrences in a rolling calendar year. The claimant properly reported all his absences and told the employer the reason for his absence. The employer did not keep a record of the reasons for the claimant's absences.

In November 2017, the employer laid off the claimant for a five-week period. The handbook did not have any language connecting the layoff period to the attendance policy. The claimant thought he had a period of five weeks with no attendance issues. After his layoff, the employer told the claimant his rolling twelve-month period had been in suspension. The employer did not explain to the claimant the dates of his rolling "twelve-month" period.

On March 17, April 30, and May 18, 2018, the claimant properly reported his absence due to illness. The employer issued the claimant Attendance Discussion Planners on April 3, May 2,

and May 25, 2018, for his absences. Each Planner notified the claimant of his occurrence total. It did not indicate all the dates of the occurrences or that he could be terminated for further absences. Each Planner stated, "Progressive discipline steps for attendance will stay on record for a rolling 12 months unless otherwise indicated below. The rolling 12-month period will be suspended for Leave of Absences or Lay Offs greater than 30 consecutive calendar days". None of the Planners indicated anything other than a twelve-month period. As of May 25, 2018, the employer said the claimant had nine occurrences.

On June 30, 2018, the claimant properly reported his absence due to illness. On July 10, 2018, the employer terminated the claimant for having accrued ten occurrences in some period of time. The dates of the ten occurrences were not provided to the claimant.

The claimant filed for unemployment insurance benefits with an effective date of October 15, 2017. The employer provided the name and number of Kristin Schlipman as the person who would participate in the fact-finding interview on August 6, 2018. The fact finder called Ms. Schlipman but she was not available. The fact finder left a voice message with the fact finder's name, number, and the employer's appeal rights. The employer did not respond to the message. It did not provide any documents for the fact finding interview with dates, specific rules or policies that the claimant violated.

REASONING AND CONCLUSIONS OF LAW:

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

Iowa Code section 96.5(2)a provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 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 disqualification shall continue 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). 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 June 30, 2018. The claimant's absence does not amount to job misconduct because it was due to illness, properly reported, and too remote from the date of termination, July 10, 2018. In addition, the employer was unable to provide the dates of the rolling calendar period, the ten occurrences within the period, or the reasons for the absences within the period. 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 7, 2018, decision (reference 02) 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/rvs