IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

CRAIG A WRIGHT
Claimant

PIZZA HUT
Employer

APPEAL NO. 12A-UI-05168-HT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 04/01/12
Claimant: Respondent (1)

Section 96.5(1) – Quit
Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The employer, Pizza Hut, filed an appeal from a decision dated April 26, 2012, reference 01. The decision allowed benefits to the claimant, Craig Wright. After due notice was issued, a hearing was held by telephone conference call on May 30, 2012. The claimant participated on his own behalf. The employer participated by Area Manager Kelly Kramer.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits or quit work with good cause attributable to the employer.

FINDINGS OF FACT:

Craig Wright was employed by Pizza Hut from August 5, 2010 until March 19, 2012 as a part-time shift manager. His last day of work was Wednesday, March 14, 2012, and he was no-call/no-show to work for scheduled shifts on March 17 and 18, 2012. The schedule for that period had been posted the evening of March 13, 2012, but Mr. Wright did not check it before he left work the next day.

The claimant maintains the general manager, Jason, had approved his request for vacation for those two days but admitted Jason often made mistakes and scheduled people on the days they had requested vacation. He deliberately did not check the schedule in case this had happened and it would "be on Jason's head" if Mr. Wright failed to show up for the shifts.

He was planning on returning to work on Monday, March 29, 2012, but was informed by a shift manager Jason had fired him and he was to bring in his keys. Mr. Wright did not bring in his keys but gave them to a delivery driver who turned them in for him. He made no attempt whatsoever to contact Jason to remind him of the approved time off, nor did he make any effort to contact the corporate office to try to retain his job.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5-1 provides:

> An individual shall be disqualified for benefits:
>
> 1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

871 IAC 24.25(4) provides:

> Voluntary quit without good cause. 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. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:
>
> (4) The claimant was absent for three days without giving notice to employer in violation of company rule.

The claimant did not quit. Even though the employer's policy states two days of no-call/no-show to work is considered a voluntary quit, the Iowa Administrative code requires there to be three days no-call/no-show before an employee may be considered a voluntary quit.

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.

The claimant was discharged for missing two scheduled shifts. There is no proof one way or the other whether the general manager had actually approved the time off for March 17 and 18, 2012. There is no dispute the claimant deliberately refused to look at the schedule before he left work on Wednesday night so he could claim ignorance of the fact he was scheduled those days. Mr. Wright admitted he did nothing to attempt to contact the employer or the corporate offices to try and save his job, just surrendered his keys to one of the delivery drivers to return for him.

All evidence points to the fact the claimant was trying very hard to be fired, and succeeded. But the employer still has the burden of proof to establish the claimant was discharged for substantial, job-related misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). Two unexcused absences, without proof of prior attendance problems and previous warnings, does not constitute excessive, unexcused absenteeism. 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. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits.

The employer failed to provide evidence from the general manager, the only firsthand eye witness to the claimant's alleged request for vacation. 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, 2*40 N.W.2d 682 (Iowa 1976). The administrative law judge concludes that the hearsay evidence provided by the employer is not more persuasive than the claimant's denial of such conduct. The employer has not carried its burden of proof to establish that the claimant committed any act of misconduct in connection with employment for which he was discharged. Misconduct has not been established. The claimant is allowed unemployment insurance benefits.

DECISION:

The representative's decision of April 26, 2012, reference 01, is affirmed. Craig Wright is qualified for benefits, provided he is otherwise eligible.

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Bonny G. Hendricksmeyer
Administrative Law Judge

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Decision Dated and Mailed

bgh/css