IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

FIDEL A DE LA O RIVAS Claimant **THE MASCHHOFFS LLC** Employer	**APPEAL 15A-UI-10996-JCT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 08/30/15** **Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting
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 filed an appeal from the September 23, 2015, (reference 01) unemployment insurance decision that allowed benefits based upon separation. The parties were properly notified about the hearing. A telephone hearing was held on October 15, 2015. The claimant participated personally with CTS interpreter, Sylvia Cartenja. The employer participated through Roxana Frederking, associate director, human resources. The administrative law judge took official notice of the administrative record. Employer Exhibits One and Two were admitted into evidence.

ISSUES:

Did the claimant voluntarily leave the employment with good cause attributable to the employer or did the employer discharge the claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a production technician and was separated from employment on August 26, 2015.

The claimant last performed work on August 21, 2015. On Sunday, August 23, 2015, the claimant called the employer, and spoke to Sheila. He informed Sheila that he would not be into work on August 24, 2015, because his young daughter, was hospitalized. The claimant's daughter remained hospitalized Sunday through Wednesday. It was the claimant's understanding that Sheila handled the phone calls on the weekends, when his manager, Larry Luck, was not available. Sheila was not in a management role but conveyed the message would be given to the claimant's supervisor. She sent him a text message asking if he would be to work on Monday, and he responded if he was able, he would go. The claimant did not perform work the next three days due to his daughter's continued hospitalization. On

August 24, 2015, the claimant's supervisor left him a voice message asking when he would be back to work. The claimant left a voicemail back for him. On August 25, 2015, the claimant left a voicemail for his supervisor, and also his supervisor's manager, Eric. The claimant was made aware by his supervisor on August 26, 2015, that he had no-call/no-showed for three days and separated. Mr. Luck, nor his manager, Eric, nor Sheila, attended the hearing or offered written statements in lieu of participation.

The employer has a policy which requires employees to call their managers one hour before their shift, if they are going to miss work without notice. In addition, the employer's policy states that three days of no-call/no-show will result in a voluntary separation due to job abandonment (Employer Exhibit One). The claimant was provided a copy and signed acknowledgement of handbook policies (Employer Exhibit Two). Neither document was offered to the claimant in Spanish, nor was it translated for him during his employment. Prior to separation, the claimant had no warnings for his attendance.

The administrative record reflects that claimant has received unemployment benefits in the amount of $2315.00, since filing a claim with an effective date of August 30, 2015, through the week ending October 3, 2015. The administrative record also establishes that the employer did not participate in the fact-finding interview or make a witness with direct knowledge available for rebuttal.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant did not quit but was discharged from employment for no disqualifying reason.

Iowa Code § 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.

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 unemployment insurance law disqualifies claimants who voluntarily quit employment without good cause attributable to the employer or who are discharged for work-connected misconduct. Iowa Code §§ 96.5(1) and 96.5(2)a. A voluntary quitting of employment requires that an employee exercise a voluntary choice between remaining employed or terminating the employment relationship. *Wills v. Emp't Appeal Bd.*, 447 N.W.2d 137, 138 (Iowa 1989); *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438, 440 (Iowa Ct. App. 1992). A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608,

612 (Iowa 1980). In this case, the claimant did not have the option of remaining employed nor did he express intent to terminate the employment relationship. Where there is no expressed intention or act to sever the relationship, the case must be analyzed as a discharge from employment. *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438 (Iowa Ct. App. 1992).

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). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (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). Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness or injury cannot constitute job misconduct since they are not volitional. *Cosper, supra.*

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, employer incurs potential liability for unemployment insurance benefits related to that separation. A reported absence related to illness or injury is excused for the purpose of the Iowa Employment Security Act. The administrative law judge is sympathetic to the reasonable positions of each party because of the failure to communicate promptly and clearly with each other, however, the employer carries the burden of proof in a discharge from employment. The claimant testified he made multiple efforts to call the employer and responded to messages left for him. The employer did not present Mr. Luck, Eric or Sheila to testify or offer testimony that rebutted the claimant's assertions. The Iowa Supreme Court has ruled that if a party has the power to produce more explicit and direct evidence than it chooses to present, the administrative law judge may infer that evidence not presented would reveal deficiencies in the party's case. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976). Mindful of the ruling in *Crosser*, *id.,* and noting that the claimant presented direct, first-hand testimony, the administrative law judge concludes that the claimant's recollection of the events is more credible than that of the employer.

Although the claimant was absent and not in complete compliance with the employer's policies of proper notification of absences, since the employer had not previously warned the claimant about its specific expectations about reporting, frequency of absences, or arranging absences in advance, it has not met the burden of proof to establish that the claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee might even infer employer acquiescence after multiple unreported absences without warning or counseling. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given.

It cannot be ignored that the employer provided the claimant the applicable policies and handbook acknowledgement with the knowledge that he does not speak or read English but expected him to understand the policy written in English without providing translation or interpretation assistance. With limited knowledge or understanding of the reporting policy, the claimant took reasonable steps in calling his employer prior to his shift on August 24, 2015 to

notify of his daughter's hospitalization. While the employer may have been justified in discharging the claimant, work-connected misconduct as defined by the unemployment insurance law has not been established in this case. Benefits are allowed.

Because the claimant is eligible for benefits, he has not been overpaid benefits. As a result, the issues of recovery of any overpayment and possible relief from charges are moot.

DECISION:

The September 23, 2015, (reference 01) decision is affirmed. The claimant was discharged from employment for no disqualifying reason. The claimant has not been overpaid benefits. The employer's account shall not be relieved of charges. Benefits are allowed, provided he is otherwise eligible.

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Jennifer L. Coe
Administrative Law Judge

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Decision Dated and Mailed

jlc/pjs