IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

RHINEY M HUGH
1219 – 2ND ST SE
CEDAR RAPIDS IA 52401

PMX INDUSTRIES INC
5300 WILLOW CREEK DR SW
CEDAR RAPIDS IA 52404-4303

Appeal Number: 05A-UI-07141-RT
OC: 06-05-05 R: 03
Claimant: Appellant (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5-2-a - Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant, Rhiney M. Hugh, filed a timely appeal from an unemployment insurance decision dated June 20, 2005, reference 01, denying unemployment insurance benefits to him. After due notice was issued, a telephone hearing was held on July 27, 2005, with the claimant participating. Gerald D. Johnson, Assistant Area Manager, and Tammie M. Klaman, Human Resources Manager, participated in the hearing for the employer, PMX Industries, Inc. Employer's Exhibits One through Four were admitted into evidence.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibits One through Four, the administrative law judge finds: The claimant was employed by the employer as an operator in the Slip and Pack Department from August 24, 1998 until he was discharged on June 2, 2005. The claimant was discharged for allegedly falsifying information on his time sheet and for attendance. On May 20, 2005, the claimant had a doctor's appointment. Employees who miss work for medical reasons are required to fill out a time sheet as shown at Employer's Exhibit One. The claimant did so as shown at the first page of Employer's Exhibit One indicating that he was leaving at 1500 or 3:00 p.m. The claimant went to his physician and received a vaccination. The claimant waited a few minutes at the physician's office and did not feel ill so he got in his car to drive back to work. The claimant began to feel ill in his car so he went home. He became nauseated and did not call the employer but fell asleep and did not notify the employer that he was not coming to work.

When the claimant returned to work the following Monday, May 23, 2005, the claimant completed the time sheet by showing that he returned at 1900 or 7:00 p.m. which was the claimant's actual quit time. The claimant was attempting to report that he did not return to work after clocking out at 3:00 p.m. The claimant did not provide an explanation for his absence. The employer's witness, Gerald D. Johnson, Assistant Area Manager, noted the claimant's failure to complete an explanation and took the time sheet to the claimant and he filled it in as shown on the second page of Employer's Exhibit One "Hipo shot." On May 20, 2005, the claimant consulted Lori Fortmann, Payroll Specialist, who helped him fill out the time sheet. Ms. Fortmann told the claimant to sign out at 3:00 p.m. and explained that he needed to write in the time when he got back. She believed the claimant said I'm not coming back. However, the claimant asked Ms. Fortmann what would happen if he didn't show back up for work. Ms. Fortmann did not really answer the question. When the claimant returned to work on May 23, 2005, he filled in the time 1900 or 7:00 p.m. as noted above.

The employer has policies as shown at Employer's Exhibit Three prohibiting the altering or falsifying or destroying of any record including time keeping records and further prohibiting the falsification of information or making a material omission on any company document. The claimant received a copy of these policies and signed an acknowledgement as shown at Employer's Exhibit Three. The claimant had received no relevant warnings or disciplines for similar behavior.

The claimant was issued one point for this absence and this would have caused his discharge for attendance. The claimant was at the discharge level. However, the employer had no documentation of any of the other absences the claimant had. If the claimant had called the employer and took a half-day of absence for May 20, 2005, he would not have been at the discharge level because that would not have given him an entire attendance point. The claimant was entitled to one half day of casual pay, which, if he would have taken that, would not have resulted in his discharge. The claimant's prior absences were because of personal problems he encountered during a divorce.

REASONING AND CONCLUSIONS OF LAW:

The question presented by this appeal is whether the claimant's separation from employment was a disqualifying event. It was not.

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.

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).

871 IAC 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.

The parties agree, and the administrative law judge concludes, that the claimant was discharged on June 2, 2005. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. Excessive unexcused absenteeism is disqualifying misconduct and includes tardies and necessarily requires the consideration of past acts and warnings. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). It is well established that the employer has the burden to prove disqualifying misconduct. See Iowa Code section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. Although it is a close question, the administrative law judge concludes that the employer has

failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The employer's witnesses really proposed two reasons for the claimant's discharge; falsifying information on a time sheet and attendance.

Concerning falsification of a time sheet, when the claimant went for a doctor's appointment to receive a vaccination, the claimant reported out on the appropriate time sheet at 1500 or 3:00 p.m. as shown at Employer's Exhibit One. However, the claimant never returned to work that day. When the claimant returned to work on the next working day, Monday, May 23, 2005, he completed the time sheet by adding the time 1900 or 7:00 p.m. to the end time, which was actually the time for the end of the claimant's shift. The claimant did so because he did not return to work and believed this was the way he should fill out the form. The claimant did not write any explanation in the explanation column. When requested to do so the claimant wrote "Hipo shot." The claimant was attempting to disclose that he had missed the time for a shot or vaccination from his physician. The employer believed that the claimant had skipped out from returning to work and had falsified the time sheet as shown at Employer's Exhibit One. However, the claimant testified that after he received his vaccination he felt all right at the doctor's office, but when he got into his car he felt ill and went home. The claimant testified that he did not call the employer because he was nauseated and fell asleep. There is no evidence to the contrary. The claimant's testimony is sufficiently credible to establish that there is not a preponderance of the evidence that the claimant deliberately falsified the employer's time sheet. There was evidence that the claimant told Lori Fortmann, Payroll Specialist, who helped the claimant fill out the time sheet initially, that he was not returning to work. The claimant testified that what he told her was what would happen if he did not show up for work. He got no response from Ms. Fortmann so when he did return to work the next working day, he completed the time sheet with 1900 or 7:00 p.m. Ms. Fortmann's testimony is merely hearsay according to Employer's Exhibit Four, which is her signed statement and does not outweigh the claimant's direct testimony as to what he told Ms. Fortmann. The claimant had received no relevant warnings or disciplines for this or other behavior. The claimant had been employed by the employer for almost seven years. On the record here, the administrative law judge is constrained to conclude that the claimant's completion of the time sheet was not a deliberate or willful falsification nor was it carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. At most, the claimant's completion of the time sheet was ordinary negligence in an isolated instance or a good faith error in judgment or discretion and is not disqualifying misconduct.

The other reason for the discharge was the claimant's attendance. The employer's witnesses testified that the claimant was at the discharge level at the time he was absent on May 20, 2005. However, the employer could not document any of the claimant's other absences. The employer's witnesses did concede that the claimant had a half-day of casual pay and if he had appropriately claimed the partial day absence on May 20, 2005, the claimant would not have been discharged. The claimant credibly testified that his absences were for serious personal problems arising out of his divorce. Under the evidence here, the administrative law judge is constrained to conclude that the claimant's absences including the partial day absence on May 20, 2005, were for reasonable cause or personal illness and properly reported or the claimant demonstrated good cause for not properly reporting them and, as a consequence, the absences are not excessive unexcused absenteeism and not disqualifying misconduct.

In summary, and for all the reasons set out above, although it is a close question, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct and, as a consequence, he is not disqualified to receive unemployment insurance

benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits, and misconduct to support a disqualification from unemployment insurance benefits must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant his disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided he is otherwise eligible.

DECISION:

The representative's decision of June 20, 2005, reference 01, is reversed. The claimant, Rhiney M. Hugh, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he was discharged but not for disqualifying misconduct.

pjs/pjs