IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

CHRISTOPHER D KEPHART
Claimant

HY-VEE INC
Employer

APPEAL NO. 18A-UI-06896-S1-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 05/27/18
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Christopher Kephart (claimant) appealed a representative's June 15, 2018, decision (reference 01) that concluded he was not eligible to receive unemployment insurance benefits after his separation from employment with Hy-Vee (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for July 11, 2018. The claimant participated personally. The employer was represented by Bruce Burgess, Hearings Represented, and participated by Lisa Stowater, Vice President of Distribution; Terry Graybill, Warehouse Director; and Leticia Uribe, Assistant Manager of Human Resources. The claimant offered and Exhibit A 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 August 6, 2008, as a full-time warehouse generalist one. The claimant signed for receipt of the employer's handbook on August 6, 2008. On October 2, 2017, the claimant signed for receipt of the employer's new attendance policy. The attendance policy states that employees will be terminated after accumulating nine attendance points. Under the employer's policy, a doctor's certification would not excuse an absence. The employer would assess the employee an attendance point for an absence excused by a physician.

The claimant properly reported his absences due to illness on November 5, 6, 7, 15, December 3, 4, 5, 16, 17, and 18, 2017. On November 27 and 28, 2017, the claimant properly reported his absences because his child was ill. On December 19 and 20, 2017, the employer issued the claimant written warnings for attendance issues. The warnings indicated the claimant had accrued four and five points, respectively. The employer notified the claimant that further infractions could result in termination from employment.

The claimant properly reported his absence due to illness on December 27 2017, and January 4, 2018. On January 6, 2017, the employer issued the claimant two written warnings for attendance issues. The warnings indicated the claimant had accrued six and seven points. The employer notified the claimant that further infractions could result in termination from employment. The claimant properly reported he was sick with the flu on March 6, 7, and 8, 2018. He was assessed one attendance point for the three-day absence.

On May 29, 2018, the claimant was sick, in the bathroom, and unable to call the employer immediately. As soon as he could, he reported his absence due to illness. He properly reported his absence on May 30 and 31, 2018. The claimant saw a medical professional on May 31, 2018. He was released him to return to work on June 1, 2018. The employer assessed one attendance point for the three-day absence. On June 1, 2018, the employer terminated the claimant for accruing nine attendance points.

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). 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 on May 29, 30, and 31, 2018, and due to illness. Two days were properly reported. On May 20, 2018, the claimant reported his absence to the best of his capability. His ability was limited by his medical condition. The claimant's absence does not amount to job misconduct because the absences were either properly reported or reporting was delayed due to the claimant's medical condition. 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 June 15, 2018, decision (reference 01) is reversed. 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