IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

FERNANDO VELIZ
Claimant

TYSON FRESH MEATS INC
Employer

APPEAL NO: 17A-UI-07202-JE-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 06/18/17
Claimant: Appellant (2)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the July 11, 2017, reference 01, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on August 1, 2017. The claimant participated in the hearing. Jeaneth Ibarra, Human Resources Manager, participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time material handling team member for Tyson Fresh Meats from December 8, 2014 to June 20, 2017. He was discharged for failing to properly report his last absences due to a misunderstanding and exceeding the employer's allowed number of attendance points.

The employer's no-fault attendance policy allows employees to accumulate ten points in a rolling calendar year before termination occurs. A properly reported absence is assessed one point; an incident of tardiness less than two hours in duration is assessed one-half point; a properly reported absence on a day that extends the employees weekend is assessed two points; and a no-call/no-show is assessed three points.

The claimant left early for personal business reasons October 19, 2016, and received one-half point; he was absent due to illness October 25, 2016, January 13, 2017; and January 27, 2017, and received one point for each of those dates; he left early February 7, 2017 and February 20, 2017, and received one-half point for each of those dates for a total of four and one-half points. On April 10, 2017, the employer issued the claimant a written warning for accumulating five attendance points during the preceding 12 months.

On June 9, 2017, the claimant reported a non-work related shoulder injury and was sent to see the employer's nurse. He was told to see his own doctor and that he could not return until he had a full release. The claimant told his supervisor he was instructed to see his own doctor and his supervisor told him to go home, as it was too late for the claimant to go to the clinic when he was sent home, and get the FMLA paperwork and that would clear the points he would be assessed for his upcoming absence. The claimant believed that because his supervisor was aware of the situation and that he would not be at work for at least a few days he did not have to call in everyday and report his absences. The claimant was previously on FMLA for a work-related injury and did not have to call in everyday because he was on approved leave. Consequently, he did not call in and report his absences June 10 or June 12, 2017, and was assessed three points for a no-call/no-show for each of those absences. The claimant went to the clinic June 12, 2017, because it was not open Saturday, June 10, 2017, and received a doctor's note excusing him from working from June 9 through June 16, 2017. The employer also assessed the claimant one point each day for June 13, 14 and 15, 2017. As a result, the employer notified the claimant June 20, 2017, his employment was terminated for exceeding the allowed number of attendance points.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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).

The employer has the burden of proving disqualifying misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 665 (Iowa 2000).

Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness cannot constitute job misconduct since they are not volitional. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The standard in attendance cases is whether the claimant had an excessive unexcused absenteeism record. (Emphasis added).

During the last 12 months of his employment, the claimant accumulated 15.50 attendance points. Of those points, one and one-half points were due to leaving early and can be considered unexcused. The remainder of his absences, with the exception of June 10 and June 12, 2017, were due to properly reported illness. While it was a misunderstanding on the part of the claimant, he should have reported his absences June 10 and June 12, 2017. Because he failed to do so he earned three points for each of those two days. With that said, however, by taking the six points from his no-call no-show absences June 10 and June 12, 2017, and adding it to his one and one-half points for leaving early, the claimant only had seven and one-half points unrelated to absences due to properly reported illness. Consequently, the administrative law judge must conclude that because the claimant did not have ten points in unexcused absences according to Iowa law, benefits must be allowed.

DECISION:

The July 11, 2017, reference 01, decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

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Julie Elder
Administrative Law Judge

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Decision Dated and Mailed

je/scn