IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MARIA L GALVAN
Claimant

WEST LIBERTY FOODS LLC
Employer

APPEAL NO. 17A-UI-12496-TN-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 11/05/17
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge for misconduct

STATEMENT OF THE CASE:

West Liberty Foods, LLC filed a timely appeal from a representative's decision dated November 29, 2017, reference 01, which held the claimant eligible for unemployment insurance benefits, finding that the claimant was dismissed form work on November 11, 2017 for excessive absences, but finding that the absences were due to illness and were properly reported. After due notice was provided, a telephone hearing was held on December 27, 2017. Although duly notified, the claimant did not participate. The employer participated by Ms. Alexandria Dixon, Human Resource Specialist, and Ms. Nickki Bruno, Human Resource Supervisor.

ISSUE:

At issue is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

Having considered all of the evidence in the record, the administrative law judge finds: Maria L. Galvan was employed by West Liberty Foods, LLC from December 13, 2011 until November 11, 2017, when she resigned from employment in lieu of being discharged for attendance infractions. Ms. Galvan worked as a full-time production worker and was paid by the hour. Her immediate supervisor was Steve DeLong.

Ms. Galvan tendered her written resignation from employment with West Liberty Foods, LLC on November 11, 2017 in lieu of being discharged by the company. The employer had an attendance policy in place. Under the terms of the policy, employees are subject to discharge if they accumulate eight attendance infraction points within a 12-month rolling period. Employees are assessed one point for each day's absence that is properly reported and are assessed a half point for arriving to work late or leaving early. Failure to report without notification results in a 3-point assessment.

Ms. Galvan had received a warning from the company after she had accumulated seven infraction points, and was aware that if she accumulated one more point, she would be

discharged from employment. The claimant had recently been ill and had called off work each day after Thursday, November 2, 2017.

Ms. Galvan was aware that even though she had called in, she would receive one infraction point for each day she had been absent, because she had not been able to obtain a doctor's note that would have allowed her to combine all the absences into one infraction. On November 11, 2017, the claimant and her employer knew with certainty that the additional infraction points that Ms. Galvan had accumulated in her final week of employment would result in her termination. The claimant in effect, had the choice of resigning or being discharged and elected to resign to save her employment history, in hopes of being rehired by the company in the future.

REASONING AND CONCLUSIONS OF LAW:

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(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.

In the case at hand, the claimant chose to resign rather than being discharged from her employment after she had exceeded the permissible number of attendance infraction points due to illness. Ms. Galvan had received a warning from the company after she had accumulated seven infraction points for absences due to illness that had been properly reported. Because the claimant had exhausted all of the time available to her under the provisions of the Family Medical Leave Act, but continued to be ill.

Both Ms. Galvan and her employer knew that the claimant's discharge was eminent, because the claimant had been ill since November 2, 2017, and unable to work. Although the claimant had called in each day to report her impending absence, she was subject to discharge under the company's no-fault attendance policy. The claimant was given the option of resigning or being discharged by the employer and elected to resign in hopes of being rehired in the future.

Iowa Admin. Code r. 871-24.26(21) provides:

> Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:
>
> (21) The claimant was compelled to resign when given the choice of resigning or being discharged. This shall not be considered a voluntary leaving.

Because the claimant was compelled to resign or otherwise face discharge from employment, the claimant's job separation is not considered to be a voluntary leaving. The question then becomes whether the evidence in the record established work-connected misconduct on the part of the claimant sufficient to warrant the denial of unemployment insurance benefits? It does not.

The claimant is not qualified to receive unemployment insurance benefits if an employer discharges the claimant for reasons that constitute work-connected misconduct. See Iowa Code Section 96.5(2)a. The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. See *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance appeal. 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 willful wrong doing or repeated carelessness or negligence that equals willful misconduct and culpability. See *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 665 (Iowa 2000).

In order for a claimant's absences to constitute misconduct that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant's unexcused absences were excessive. See 871 IAC 24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the evidence must first establish that the most recent absence that prompted the decision to discharge the employee was unexcused. See 871 IAC 24.32(8). Absences related to issues of personal responsibility such as transportation or oversleeping are considered unexcused. Absences related to illness are considered excused, provided the employee has complied with in policy regarding notifying the employer of the absence. See *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984).

The evidence in the record establishes that Ms. Galvan did follow the employer's attendance policy by calling in each day to report her impending absence and that the claimant's absences were due to illness. The employer's no-fault absenteeism policy is not dispositive of the issue of qualification of benefits. Because the claimant's absences were due to illness and the claimant did properly notify the employer of the absences, the absences were excused for the purposes of Employment Security Act. Accordingly, Ms. Galvan's job separation on November 11, 2017 took place under non-disqualifying conditions.

DECISION:

The representative's decision dated November 29, 2017, reference 01, is affirmed. The claimant was dismissed from work for no disqualifying reason. Unemployment insurance benefits are allowed provided the claimant is otherwise eligible.

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Terry P. Nice
Administrative Law Judge

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Decision Dated and Mailed

rvs/rvs