IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JAMES E JOHNSON
Claimant

PINNACLE HEALTH FACILITIES XVII
Employer

APPEAL NO. 14A-UI-06067-S2T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 05/11/14
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Pinnacle Health Facilities XVII (employer) appealed a representative's June 2, 2014 (reference 01) decision that concluded James Johnson (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known address of record, a telephone hearing was scheduled for July 7, 2014. The claimant participated personally. The employer participated by Jim Feauto, Administrator; Julie Gray, Director of Nursing; and Jenny O'Tool, Assistant Director of Nursing. The employer offered and Exhibit One was received into evidence. Exhibit D-1 is admitted 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 December 26, 2012 as a part-time environmental aide. The claimant signed for receipt of the employer's attendance policy on December 27, 2012. The claimant understood he could properly report his absence by notifying the employer prior to the start of his shift. More notice to the employer meant he would be assigned fewer attendance points for his absence. The employer had a time clock in the break room. The time clock was not set at the same time as the clock in the room. The claimant clocked in a few minutes late due to the time discrepancy approximately 250 times during his employment. The employer never issued him any attendance points for tardiness. The employer mentioned the tardiness once but did not warn him of any consequences.

On April 30, 2013 the employer issued the claimant a written warning for failure to appear for work and not notifying the employer of his absence. The claimant read the schedule incorrectly. On July 5, 2013 the employer issued the claimant a written warning for eight properly reported absences due to medical issues. On January 15, 2014 the employer issued the claimant a written warning for four properly reported absences due to medical issues. The employer notified the claimant with each warning that further infractions could result in termination from employment.

On May 8, 2014 the claimant appeared for work and felt ill. He was dizzy and had a headache. The charge nurse took his blood pressure and found that it was high. She told him to go home. The claimant left work within the first hour of his shift. He went to the free clinic where he was placed on medication. On May 9, 2014 the claimant was not scheduled to work. He had the same symptoms on May 9, 10, and 11, 2014. The claimant properly reported his absences due to illness on May 10 and 11, 2014. On May 12, 2014 the claimant was not scheduled for work. He saw a physician who changed his medication to decrease the swelling in the claimant's legs and ankles. The doctor wrote a note saying he was treated on May 12, 2014 and could return to work on May 13, 2014.

On May 12, 2014 the claimant had a message from the employer saying he had to see the employer before returning to work. At 4:15 p.m. on May 12, 2014 the claimant took the doctor's note to the employer but his supervisor had left for the day. The claimant arrived at work on May 13, 2014 and worked for some time before speaking to the employer. The employer terminated the claimant on May 13, 2014 for absenteeism.

The claimant filed for unemployment insurance benefits with an effective date of May 11, 2014. The employer's representative participated at the fact-finding interview on May 29, 2014 by supplying documents. The employer's representative did not supply the name of a first-hand witness to the fact finder to provide rebuttal information to the fact finder.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

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 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). The employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The last incidents of absence were for properly reported illness which occurred in May 2014. The claimant's absence does not amount to job misconduct because it was properly reported. 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 2, 2014 (reference 01) decision is affirmed. The employer has not met its proof to establish job related misconduct. Benefits are allowed.

_____
Beth A. Scheetz
Administrative Law Judge

_____
Decision Dated and Mailed

bas/can