IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ELIZABETH KNOX
Claimant

TYSON FRESH MEATS INC
Employer

APPEAL NO. 13A-UI-03900-S2T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 02/24/13
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Elizabeth Knox (claimant) appealed a representative's March 29, 2013 decision (reference 01) that concluded she was not eligible to receive unemployment insurance benefits because she voluntarily quit work with Tyson Fresh Meats (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for May 1, 2013. The claimant participated personally. The employer participated by Kris Rossiter, Employment Manager.

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 May 31, 2011, as a full-time production laborer. The claimant had been ill in June 2012, and was told by her physician not to work in cold temperatures any more. The claimant notified her employer, bid on a new job, and started working in an area that met her doctor's requirements. In February 2012, the employer moved the claimant into a cold area again and the claimant became ill. She properly reported her absence due to illness on February 22, 2013. When she returned to work she provided her doctor's note.

On February 28, 2013, the employer called the claimant in to discuss her absence. The company doctor told the claimant she could work in the cold area if she wore hot pads in her shoes. The claimant asked who would buy the hot pads and the medicine when she was sick. The doctor told her she should buy the hot pads and the medicine. The employer suspended the claimant for the day and took her badge. She was instructed to return the following day.

On Friday, March 1, 2013, the claimant returned and told the security guard she was there to see the employer. The security guard contacted the employer. The security guard instructed the claimant to wait outside, rather than in the lobby. The claimant waited outside in the cold for four hours. The employer did not see the claimant. She left voice messages for the employer.

The claimant returned on Monday, March 4, 2013, and was instructed to wait outside in the cold for three hours and left voice messages for the employer. The employer would not see her. On Tuesday, March 5, 2013, the claimant waited for four hours in the cold. The employer would not see her. On Wednesday, March 6, 2013, the claimant waited for 3.5 hours in the cold. The employer would not see her. On Thursday, March 7, 2013, the claimant waited for 4.5 hours in the cold. The employer would not see her. On Friday, March 8, 2013, the claimant's boyfriend who worked for the employer asked the employer for information. The employer told him she could be terminated.

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:
>
> 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.

871 IAC 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 incident of absence was a properly reported illness which occurred on February 22, 2013. 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 March 29, 2013 decision (reference 01) is reversed. 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/css