IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ROSA M PEREZ
Claimant

HORMEL FOODS CORPORATION
Employer

APPEAL NO: 19A-UI-02584-TN-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 03/03/19
Claimant: Respondent (2)

Iowa Code § 96.5(2)a – Discharge
Iowa Code § 96.3(7) – Benefit Overpayment
871 IAC R 24(10) – Chargeability for Overpayment based upon employer's participation in fact-finding.

STATEMENT OF THE CASE:

Hormel food Corporation filed a timely appeal from the March 18, 2019, reference 01 fact-finder's unemployment insurance decision dated March 18, 2019, (reference 01) that held claimant eligible to receive unemployment insurance benefits, finding that she was dismissed from work on February 26, 2019 but that the record did not show willful or deliberate misconduct. After due notice was provided, a telephone hearing was held on April 12, 2019, May 15, 2019 and June 27, 2019. Claimant participated. Participating as a witness for the claimant was Ms. Sandra Armenta, who was claimant's personal interpreter. Employer participated by Ms. Robin Moore, Hearing Representative and witnesses Elizabeth Dean, Safety and Human Resource Manager, Allison Wong, Company Engineer, Kellie Langden and Ms. Katie Friend, Disability Case Manager, Meti-Care company. Employer's Exhibits 1 and 2 and Claimant's Exhibit A were admitted into the hearing record.

ISSUES:

The first issue is whether the claimant was discharged for work-connected misconduct sufficient to warrant the denial of unemployment insurance benefits.

The second issue is whether Rosa Perez has been overpaid job insurance benefits.

The third issue is if the claimant has been overpaid, is the claimant liable to repay the overpayment or should the employer be held chargeable based upon the employer's participation in the fact-finding interview.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having considered the evidence in the file, the administrative law judge finds: Rosa Perez was employed by Hormel Foods Corporation from February 14, 2017 until February 26, 2019 when she was discharged by the employer. Ms.

Perez was employed full-time and was paid by the hour. Ms. Perez last performed services for Hormel Foods Corporation on January 2, 2019.

Ms. Perez was discharged after she had failed to supply necessary medical documentation to support her extended absence from work, and exceeded the maximum infraction points allowed under the company's "no-fault" attendance policy. The company also believed that Ms. Perez had contrived to take time away from work that otherwise would not have been approved by supplying documentation to facilitate her two month return to Cuba.

Hormel policy is that if an employee is excessively absent from work without good reason, they are subject to discharge. The policy states employees who are absent from work are assessed infraction points for each occurrence unless the absence has been previously excused, protected by medical leave of absence or covered by FMLA. On January 3, 2019, Ms. Perez provided the employer a doctor's note that purported to excuse her from work that day and until February 5, 2019. The doctor's note did not provide a sufficient explanation to support the claimant's need to be absent from work for the extended period.

On January 22, 2019, Ms. Perez provided another doctor's note that excused her from work for additional time until March 4, 2019. The second doctor's note also did not have sufficient information to excuse Ms. Perez from work from January 22 through March 4, 2019. Because no additional information had been provided establishing that the absence was medically necessary. The company provided short-term disability and family and medical leave act certification paperwork to the claimant that was to be completed by Ms. Perez and her health provider and instructed Ms. Perez that the forms were to be completed and to be returned to the company.

On February 4, 2019, Ms. Perez returned the paperwork for the short-term disability and (FMLA), but the paperwork she submitted excused Ms. Perez from work for different dates. The reason stated was "counseling due to medical discord." Because the dates were inaccurate and a number of questions had not been completed, Ms. Perez was sent a letter dated February 6, 2019 informing her that she was not eligible for short-term disability or protection under the Family and Medical Leave Act because she had not provided complete answers. The claimant was again requested paperwork for FMLA and disability to have her health care provider complete the required documents and return them to the company within seven days. The letter also placed Ms. Perez on notice that if she failed to provide the required notification within the seven days, her absences from work would not be excused and if she exceeded the company's maximum number of absence occurrences she would be subject to discharge from employment. Ms. Perez was also informed on February 4, 2019 through an interpreter that she must have the portions of the paperwork for FMLA and disability form completed by her doctor.

Hormel Corporation concluded the information that had been provided on the forms and returned by Ms. Perez was not specific to what medical condition made it necessary for Ms. Perez to be absent from work for such an extended period. The statement by the medical practitioner in the form "could not perform work" was not considered sufficient.

When the company had not received a response from Ms. Perez within the seven days specified in the employer's February 6, 2019 letter to the claimant, the claimant's absences were not excused by the company and Ms. Perez was assessed points under the company's attendance policy.

Subsequently, while the company continued to contact Ms. Perez for more medical information, the company received information that the claimant had left the United States, and returned to Cuba.

Although Ms. Perez had been notified by the company that the information that she had previously provided for short-term disability and protection under the FMLA was not sufficient, Ms. Perez provided no additional documentation to support her need for her to be absent for an extended period. Ms. Perez did not inform the company that she was going to return to, or that she was in Cuba until her return from Cuba.

Ms. Perez had been specifically warned that failure to submit the required medical information to support her medical need to be absent would result in termination from employment. Ms. Perez continued to be absent, and her absences were unexcused. Hormel Foods Corporation gave given Ms. Perez a substantial period of time to verify the medical reasons for the absences but she had not done so.

During the time that the company was reviewing Ms. Perez's requests to be absent for short-term disability and protection under the Family and Medical Leave Act, the matter was also being reviewed by Ms. Katie Friend, the chief of disability claims for a third party company that administers disability claims for Hormel Foods Corporation. Ms. Friend confirmed to Hormel Foods Corporation that the information provided by Ms. Perez was deficient and that substantial parts of the paperwork had not been completed. Ms. Friend also noted that in addition to the omissions on the forms, that the claimant's request to be absent for two months was clearly excessive especially since no treatments were listed except prescription medications by her doctor.

As part of her duties as disability case manager, Ms. Friend followed up on the claim by placing a call to Dr. Archer, the physician who had verified Ms. Perez's need to be away from work for the extended period of time. Ms. Friend testified during the telephone conversation with Dr. Archer he stated that Ms. Perez was not disabled and that he had advised Ms. Perez that she was placing her job in jeopardy by requesting to be authorized to be absent because of disability. Dr. Archer further stated that he had signed the medical authorization to be absent only because Ms. Perez demanded that he do so and there had been no follow up visits by the claimant. Dr. Archer further stated that he was only aware that Ms. Perez was in Cuba because of information provided to him by interpreter, Sandra Armenta, during a telephone conversation. Ms. Friend further testified during the telephone conversation, Dr. Archer specifically "rescinded" his previous verification that Ms. Perez was unable to work and rescinded his verification of her need to be away from work for that reason. Ms. Friend informed Hormel Foods Corporation by letter that she was denying Ms. Perez's claim for disability and informed the company of Dr. Archer's statements.

During the time that Ms. Perez was sent letters asking for more documentation, the company also made repeated attempts to contact Ms. Perez by telephone. The company's attempts to directly reach Ms. Perez by phone were unsuccessful. Ms. Perez responded to the messages left by the employer by calling Hormel Foods Corporation back late at night when the Human Resource Department or anyone aware of the issues was available.

Based upon the claimant's failure to respond to repeated attempts for more information, Dr. Archer's rescinding his previous verification of disability for Ms. Perez and her numerous days that she had not reported for work that were not covered by short-term disability or the Family and Medical Leave Act, Ms. Perez was discharged from her employment.

It is Ms. Perez's position that she had gone to a doctor for work-related "depression" on January 3, 2019 and the company had been informed of both the doctor visit and the reason. Ms. Perez's further position is that she had been authorized by Dr. Archer to be off work from January 3, 2019 to February 5, 2019 subsequently he also authorized her to be away from work from February 4 through March 5, 2019.

Ms. Perez further asserts that because of work caused depression, her martial anxiety, and because she does not speak the English language she was referred by Dr. Archer for Spanish language counseling. Ms. Perez elected to go to Cuba for treatment chose the clinic adjacent to her previous home in Cuba because the clinic was familiar with her psychiatric history.

Ms. Perez does not dispute that she received correspondence sent to her by Hormel Foods Corporation but that because she does not speak English, the company had a responsibility to communicate with her in the Spanish language. Claimant also maintains Sandra Armenta was acting as a personal interpreter to assist her in communicating.

While Ms. Perez knew in advance that she would be traveling to Cuba for "treatment" she did not inform Hormel Foods Corporation she would be out of the country for treatment. She left her home telephone number for the company to reach her if needed and she believed that was sufficient. Ms. Perez knew that the employer required that she provide more medical information to justify her absence for work, and she had Ms. Armenta to translate for her. Ms. Perez knew or should have known that without additional medical information, her absences from work were not excused and she would be terminated. Ms. Perez did not comply with the company's reasonable request for information.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the employer has sustained its burden of proof in establishing work-connected misconduct on the part of the claimant sufficient to warrant the denial of job insurance benefits. It has.

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.

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See *Lee v. Employment Appeal Board*, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See *Gimbel v. Employment Appeal Board,* 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

In the case at hand, the testimony of the witnesses and evidence in the record is highly disputed. The administrative law judge having heard the testimony and questioned the witness, and having considered the matter concludes that: The evidence in the record establishes that Ms. Perez requested to be absent from work for two months for depression and provided verification from a medical practitioner of the medical need of Ms. Perez to be absent for treatment. Because the documentation provided by Ms. Perez contained numerous portions that had not been completed by either Ms. Perez or her examining physician, the employer took reasonable and substantial steps to notify Ms. Perez that additional documentation was needed in order for her absences to be excused. The company sent letters, certified letters, and made repeated phone calls to the number provided by Ms. Perez. In spite of the employer's repeated attempts, Ms. Perez did not respond with the needed information. Ms. Perez engaged in what appeared to be a pattern of returning the employer's calls late at night to avoid providing the information that the employer was seeking and to avoid questions.

The employer has established by a preponderance of the evidence that Ms. Perez was discharged for work-connected misconduct sufficient to warrant the denial of Unemployment Insurance benefits.

During this time that the company was trying to contact Ms. Perez, Ms. Perez's claim for disability was being reviewed by a third party company that was administering disability claims and assessing them for Hormel Foods Corporation. Ms. Katie Friend, a disability case manager for the Meti-Care Company was reviewing Ms. Perez's disability claim, and Ms. Friend also noted that there were significant medical omissions on the documentation that had been provided by Ms. Perez. Ms. Friend questioned the request for two months of medical leave

noting that no treatment plan had been listed she considered and the amount of time as clearly excessive. In an effort to move forward, Ms. Friend contacted Dr. Archer, the physician who had verified Ms. Perez's need to be away from work for the two months. During the conversation, Dr. Archer stated that the claimant was not disabled and that he had warned Ms. Perez that she was jeopardizing her employment by requesting disability. Dr. Archer further verified to Ms. Friend that he had provided verification of disability only because Ms. Perez "demanded" that he do so. Dr. Archer also stated that he knew that Ms. Perez was in Cuba only because that information was told to him by Ms. Amenta, who acted as Ms. Perez's interpreter. Dr. Archer then specifically rescinded his previous verification that Ms. Perez was disabled stating that she was not. Ms. Friend denied Ms. Perez's claim and informed Hormel Foods Corporation by letter not only of her decision but also what had transpired in her conversation with Dr. Archer.

In this matter, Ms. Perez strongly maintains that it was necessary for her to receive psychological treatment in Cuba because Spanish language was used and needs because the place of treatment was near her previous home the staff was familiar with her because of past treatment. Ms. Perez strenuously sets forth that the correspondence requests for more information sent to her by the company were not in Spanish and the employer sent the requests in English because they knew that she could not speak English and could not respond. Conversely, Ms. Perez also asserts that Sandra Armenta acted as her personal interpreter on many occasions during this time and assisted Ms. Perez's communication with Hormel Foods Corporation and others. The administrative law judge finds Ms. Perez's assertion that she had no reasonable way to know what the employer's expectations were, strains credibility.

The preponderance of the evidence in the record establishes that the claimant had been given adequate and reasonable notice that her request for short-term disability would not be approved without further documentation and that any further time away from work without the required documentation would be unexcused and could lead to termination. Although the Ms. Perez was given an extended period of time to do so, Ms. Perez did not provide information that was required. The claimant's request for short-term disability was denied by a third party company. During that company's investigation of the matter, the previous verification of disability and inability to work given by Dr. Archer was specifically rescinded by Dr. Archer. Dr. Archer had also verified that he warned Ms. Perez at the time that her attempt to claim disability would jeopardize employment. A subsequent letter that was attributed to Dr. Archer and interpreted from "Spanish to English" by Ms. Armenta contained in Claimant's Exhibit A, lacks credibility.

The administrative law judge having considered the matter at length finds the weight of the evidence is established in favor of the employer. The testimony of the employer's witnesses is more credible, and given more weight because the testimony is more specific and is consistent.

Accordingly, the administrative law judge finds that the claimant was discharged for willful work-connected misconduct sufficient to warrant the denial of job insurance benefits. Benefits are denied.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received could constitute and overpayment. The administrative record reflects that the claimant has received unemployment benefits in the amount of $8,406.00 since filing a claim with an effective date of March 3, 2019 for the benefit weeks ending March 9, 2019 through July 6, 2019. The administrative record also establishes that the employer did participate in the fact-finding interview or make a first-hand witness available for rebuttal.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code section 96.3(7)a, b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid benefits.

Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment and the employer will not be charged for benefits paid.

DECISION:

The representative's unemployment insurance decision dated March 18, 2019, reference 01 is reversed. Claimant was discharged for work-connected misconduct. Unemployment insurance benefits are withheld until the claimant has worked in and been wages for insured work equal to ten times her weekly benefits amount and is otherwise eligible. The claimant has been overpaid unemployment insurance benefits in the amount of $8,406.00 and is liable to repay this amount to Iowa Workforce Development. The employer's account shall not be charged based upon the employer's participation in the fact-finding interview.

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Terry P. Nice
Administrative Law Judge

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Decision Dated and Mailed

tn/scn