

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

ROBERT D ROBERTS
Claimant

APPEAL NO. 19A-UI-00727-S1-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

FAREWAY STORES INC
Employer

OC: 12/30/18
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

Fareway Stores (employer) appealed a representative's January 17, 2019, decision (reference 01) that concluded Robert Roberts (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for February 8, 2019. The claimant participated personally. The employer participated by Theresa McLaughlin, Director of Human Resources, and Rick Beckwith, Corporate Supervisor. Exhibit D-1 was received into evidence. The employer offered and Exhibit 1 was received 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 May 8, 2017, as a full-time grocery clerk. He signed for receipt of the employer's handbook on May 8, 2017. The handbook had a policy that says an employee may be terminated for "failure to sign a written evaluation or receipt of a reprimand".

He applied for and was granted Family Medical Leave (FMLA) for a personal medical condition and had surgery on August 3, 2018. After his FMLA was exhausted he properly reported his absence due to medical issues on October 8, 15, 22, 23, November 6, 7, 14, 2, 29, December 1, and 3, 2018. He had a doctor's note excusing him from work on November 28, 29, and December 3, 2018. He took a long lunch on November 29, 2018, because MidAmerican mistakenly shut off his lights at home. On November 19 and 20, 2018, he was absent from work to take his mother to and from Ames, Iowa, where his niece was in the hospital after a suicide attempt.

On December 4, 2018, the employer issued him a reprimand. The reprimand stated, "Robert is advised that if his absences are for FMLA qualifying reasons, he is to contact the FMLA

administrator to file an FMLA claim. If the absences are later approved and protected as FMLA leave, this reprimand will be removed from his record.” The employer notified the claimant that further infractions could result in termination from employment. Following the reprimand, the claimant filed for additional FMLA.

On December 5, 6, 8, 15, 2018, the claimant properly reported his absences due to medical reasons. On December 17, 2018, he tried to report his medical absence on time but the employer’s telephone line was busy. He continued to call until the line was answered. At that time, his call was after the proper reporting period.

On December 20, 2018, the supervisor took the claimant to a common break area through which other employees and vendors walked. The supervisor presented the claimant with information from a third party FMLA vendor indicating the claimant’s request for FMLA was denied as of December 17 and 18, 2018. The claimant had never seen this information. Then the supervisor presented the claimant with a reprimand and three-day suspension for irregular attendance and told him to sign it.

Above the signature line there were two sentences. “Future violations may result in in additional disciplinary action including suspension and/or termination. The company will not permit any form of retaliation or discrimination against any employee who, in good faith, reports a possible violation or for participating in an investigation”.

The claimant said he wanted to look into the FMLA approval more. The supervisor told the claimant that if he did not sign the document he would be fired. The claimant did not want to sign it because he thought he could not investigate the matter further. When the claimant did not sign the reprimand, the supervisor left the room. He returned fifteen to twenty minutes later with a termination document. He told the claimant he was terminated for not signing the reprimand.

The claimant filed for unemployment insurance benefits with an effective date of December 30, 2018. The employer participated personally at the fact finding interview on January 15, 2019, by Maggie Worrall.

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, 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(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). Sixteen of the claimant's absences were due to medical issues and properly reported to the best of the claimant's ability. That leaves one long lunch to get his lights turned back on and two absences when the claimant drove his mother to visit a very sick family member. The claimant's three absences do not rise to the level of misconduct. The employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge.

The employer argues that the final incident was the claimant not signing the December 20, 2018, reprimand for irregular attendance. The failure to acknowledge the receipt of a written reprimand by signing it constitutes job misconduct as a matter of law. *Green v. Iowa Department of Job Service*, 299 N.W.2d 651 (Iowa 1980). The question of whether the refusal to perform a specific task constitutes misconduct must be determined by evaluating both the reasonableness of the employer's request in light of all circumstances and the employee's reason for noncompliance. *Endicott v. Iowa Department of Job Service*, 367 N.W.2d 300 (Iowa App. 1985).

In this case, the December 20, 2018, reprimand document did not inform the claimant the purpose of his signature. Without identifying information, the claimant would not know whether his signature would be taken as an acknowledgement of the truthfulness of the document, an

acknowledgement of receipt of the document, an acknowledgement that he got a copy of the document, or any number of possibilities. It is understandable for employers to want proof that employees have received documents. The employer should take the extra step of putting clarifying language on corrective action forms. The claimant's refusal to sign the document without the appropriate language was reasonable and did not rise to the level of misconduct. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The representative's January 17, 2019, decision (reference 01) is affirmed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/rvs