IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

FRANCICO SIMON
Claimant

TYSON FRESH MEATS INC
Employer

APPEAL NO: 15A-UI-04000-LDT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 03/01/15
Claimant: Appellant (2)

Section 96.5-2-a – Discharge
Section 96.5-1 – Voluntary Leaving

STATEMENT OF THE CASE:

Francico Simon (claimant) appealed a representative's March 27, 2015 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment from Tyson Fresh Meats, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on June 3, 2015. This appeal was consolidated for hearing with one related appeal, 15A-UI-04001-LDT. The claimant participated in the hearing and was represented by Nick Brown, Attorney at Law. Sarah Ochoa appeared on the employer's behalf. Ike Rocha served as interpreter. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was there a disqualifying separation from employment either through a voluntary quit without good cause attributable to the employer or through a discharge for misconduct?

OUTCOME:

Reversed. Benefits allowed.

FINDINGS OF FACT:

The claimant started working for the employer on May 17, 2010. He worked full time as a second shift production worker at the employer's Storm Lake, Iowa pork processing facility. His last shift of work was the evening of December 5, 2014.

The claimant had indicated to the employer that he needed at least a couple months off due to some family illness in Guatemala, specifically that his father was ill and the claimant needed to be available to provide assistance. The claimant's father did recover by about mid-January 2015, but his daughter, who was also ill, passed away on February 5. It took the claimant

several weeks to deal with resulting issues, but he returned to Iowa on March 2. He sought to return to work on March 5, but was told he no longer had a job.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not eligible for unemployment insurance benefits if he quit the employment without good cause attributable to the employer or was discharged for work-connected misconduct. Iowa Code §§ 96.5-1; 96.5-2-a.

Rule 871 IAC 24.25 provides that, in general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. A voluntary leaving of employment requires an intention to terminate the employment relationship and an action to carry out that intent. *Bartelt v. Employment Appeal Board*, 494 N.W.2d 684 (Iowa 1993); *Wills v. Employment Appeal Board*, 447 N.W.2d 137, 138 (Iowa 1989). The employer asserted that the claimant was not discharged but that he voluntarily quit by being gone from work beyond the three weeks the employer had been willing to wait for him. The administrative law judge concludes that the employer has failed to satisfy its burden that the claimant voluntarily quit. Iowa Code § 96.6-2. As the separation was not a voluntary quit, it must be treated as a discharge for purposes of unemployment insurance. Rule 871 IAC 24.26(21).

The issue in this case is then whether the employer discharged the claimant for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue is not whether the employer was right or even had any other choice but to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. Rule 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. Rule 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, 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. Rule 871 IAC 24.32(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

The reason the employer effectively discharged the claimant was his inability to return to work within three weeks of December 5, 2014. The claimant was eligible for twelve weeks of FMLA which would have protected him to March 5, but he was not offered this protection by the employer; the employer was only willing to allow the claimant to be off for three weeks as a regular personal leave. The employer asserts this was because the claimant did not seek FMLA protection. However, the employer had knowledge that the claimant's requested leave was for a reason covered by FMLA. The federal regulation regarding FMLA, 29 CFR § 825.300 specifies in pertinent part:

> . . . when the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying reason, the employer must notify the employee of the employee's eligibility to take FMLA leave within five business days, absent extenuating circumstances … [1]
> [and]
>
> . . . when the employer has enough information to determine whether the leave is being taken for a FMLA-qualifying reason . . ., the employer must notify the employee whether the leave will be designated and will be counted as FMLA leave . . .[2]

The regulation further specifies:

> An employee giving notice of the need for FMLA leave does not need to expressly assert rights under the Act or even mention the FMLA to meet his or her obligation to provide notice . . .[3]

The FMLA provisions in particular were enacted to be an employee protection and shield, not a sword to be used by an employer as a weapon against the employee. See, *Beal v. Rubbermaid Commercial Products*, Inc., 972 F. Supp. 1216, 1226 – 1227 (S.D. IA 1997) (employees are not required to specifically request or even mention FMLA, "he or she must only request leave time and state the reason for the leave."

The claimant was effectively discharged because he was unable return to work at the time expected by the employer due to the continued need for the leave of absence and because the employer failed to classify the leave as under FMLA. Absenteeism can constitute misconduct; however, to be misconduct, absences must be both excessive and unexcused. Absences due to properly reported illness cannot constitute work-connected misconduct since they are not volitional, even if the employer was fully within its rights to assess points or impose discipline up to or including discharge for the absence under its attendance policy. Rule 871 IAC 24.32(7); *Cosper*, supra; *Gaborit v. Employment Appeal Board*, 734 N.W.2d 554 (Iowa App. 2007). The claimant's continued absence from work was for an excusable reason. The claimant's actions that led to the loss of his job were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

The employer has not met its burden to show disqualifying misconduct. *Cosper*, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

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[1] 29 CFR §825.300 (b)(1).
[2] 29 CFR §825.300(d)(1)
[3] 29 CFR §825.301(b)

DECISION:

The representative's March 27, 2015 decision (reference 01) is reversed. The claimant did not voluntarily quit and the employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

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