IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

BRANDON B HEARD
Claimant

HY-VEE INC
Employer

APPEAL NO. 15A-UI-14271-S1-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 11/22/15
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Brandon Heard (claimant) appealed a representative's December 17, 2015, decision (reference 03) that concluded he was not eligible to receive unemployment insurance benefits after his separation from employment with Hy-Vee (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for January 22, 2016. The claimant participated personally. The employer was represented by Julia Day, Employer Representative, and participated by Gregory Nystrom, Human Resources Manager, and Terry Dunlap, Night Stock Manager. The employer offered and Exhibit One 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 August 15, 2015, as a part-time night stock person. The claimant signed for receipt of the employer's handbook on August 15, 2015. The claimant properly reported his absence due to illness twice and because his newborn son was sick once. The person who answered the telephone told the manager that the claimant said he was too tired to work twice and he was sick once. The employer issued the claimant a written warning on October 9, 2015, for absences. The employer notified the claimant that further infractions could result in termination from employment. The claimant properly reported his absence due to illness on November 18, 2015. On November 20, 2015, the claimant properly reported his absence from work due to a snowstorm. The employer thought the claimant could have walked seven blocks to work in the storm. The employer stopped putting the claimant on the schedule. The claimant called the employer and discovered he had been 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 § 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).

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). In light of good faith effort, absences due to inability to obtain child care for sick infant, although excessive, did not constitute misconduct. McCourtney v. Imprimis Technology, Inc., 465 N.W.2d 721 (Minn. App. 1991).

All of the claimant's absences were properly reported and for illness or for the illness of an infant. None of these absences constitute misconduct. The claimant's final absence was due to a snowstorm. One absence alone is not excessive. The employer did not provide sufficient evidence of job-related misconduct. The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

The claimant's and the employer's testimony was not the same regarding the claimant's reporting of his absences. If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. Crosser v. Iowa Department of Public Safety, 240 N.W.2d 682 (Iowa 1976).

The employer may have had the power to present testimony. The employer could not provide the name of the person who had made the comments about the claimant. The administrative law judge finds the claimant's testimony to be more credible because he was an eye witnesses to the events for which he was terminated.

DECISION:

The representative's December 17, 2015, decision (reference 03) is reversed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/pjs