IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JACOB SHINN
Claimant

BIRDNOW ENTERPRISES INC
Employer

APPEAL NO. 12A-UI-02388-WT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/22/12
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Employer filed an appeal from a fact-finding decision dated March 2, 2012, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on March 27, 2012. Claimant participated personally. Employer participated by Jeremy Birdnow, Owner-Operator. Claimant's direct supervisor, Gordie Yeager, also participated.

ISSUE:

The issue in this matter is whether claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: Jacob Shinn was a detailer for Birdnow Enterprises in Oelwein. He was hired in April 2011. He was terminated for excessive absenteeism on January 26, 2012. He was absent 12.5 times in a seven-month period. He had been written up on a final warning on October 27, 2011. On January 26, 2012, claimant was ill. The employer did not ask him for a medical note for the final absence.

REASONING AND CONCLUSIONS OF LAW:

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.

871 IAC 24.32(4) provides:

> (4) Report required. The claimant's statement and the employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation. The Iowa Supreme Court has opined that one unexcused absence is not misconduct even when it followed nine other excused absences and was in violation of a direct order. Sallis v. EAB, 437 N.W.2d 895 (Iowa 1989). Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984), held that the absences must be both excessive and unexcused. The Iowa Supreme Court has held that excessive is more than one. Three incidents of tardiness or absenteeism after a warning has been held misconduct. Clark v. Iowa Department of Job Service, 317 N.W.2d 517 (Iowa App. 1982). While three is a reasonable interpretation of excessive based on current case law and Webster's Dictionary, the interpretation is best derived from the facts presented.

The final incident which lead to the claimant's termination was an absence on January 26, 2012. Claimant was sick on that date. He is found credible. Genuine illness is considered an excused absence under Iowa law. *See* Higgins, 350 N.W.2d at 188.

The employer acknowledges that all or nearly all of claimant's 12.5 absences were for the illness of himself or an immediate family member. The employer alleges that the absences were not "properly reported" in that the claimant did not provide medical excuses as required by the employer's policy. The claimant alleged that he provided excuses when specifically asked. The employer maintained that there were no medical excuses in his file whatsoever, which indicated he never provided a single medical excuse.

While the claimant certainly did not provide a medical excuse for all of his absences, the greater weight of the evidence suggests that the employer never warned him for failing to turn in a medical excuse. The employer testified that it had a policy requiring medical excuses and that Mr. Shinn was aware of the policy. The employer gave the claimant a written warning for absenteeism on October 27, 2011, but did not warn him about failing to turn in medical excuses. Since the claimant was never warned, he was never on notice that he would be discharged for failing to document his absences. Had the employer taken this step, the outcome may be different. Importantly, the claimant was discharged on January 26, 2012, for calling in sick on that date. In other words, he was terminated for being absent. He was not terminated for failing to turn in a medical excuse for that date. In reality, he was never even given an opportunity to turn in a medical excuse for his absence for that date.

In this matter, the evidence fails to establish that claimant was discharged for an act of misconduct.

DECISION:

The fact-finding decision dated March 2, 2012, reference 01, is affirmed. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements.

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Joseph L. Walsh
Administrative Law Judge

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Decision Dated and Mailed

jlw/pjs