IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JOSHUA D BALLANGER
Claimant

SWIFT PORK COMPANY
Employer

APPEAL NO. 17A-UI-01897-S1-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/23/16
Claimant: Respondent (1)

Section 96.5-1 - Voluntary Quit
Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

Swift Pork Company (employer) appealed a representative's February 10, 2017, decision (reference 02) that concluded Joshua Ballanger (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 March 13, 2017. The claimant participated personally. The employer participated by Kristy Knapp-Steele, Human Resources/Family and Medical Leave Act Coordinator. Exhibit D-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 December 5, 2016, as a full-time production worker. He signed for receipt of the employer's handbook. The handbook indicates that if an employee provides the employer with a doctor's note, three consecutive absences will be assessed one point.

The employer recorded the claimant as being absent on December 7, 2016, and assessed him one attendance point. The claimant remembers being at work. The claimant properly reported his absences due to illness on January 4, 5, 6 and 7, 2017. On January 9, 2017, the employer recorded receiving the claimant's doctor's note excusing him from work all those days. The employer assessed the claimant four points for the claimant's four absences.

On January 25, 2017, the claimant told his supervisor he was having problems at work due to his allergies. The supervisor sent the claimant to the health department. The health department sent the claimant to the human resources manager. The human resources manager told the claimant he was a probationary employee in his first forty-five days of employment. He also told him that during his probationary period he could be terminated if he

accumulated 2.5 attendance points. He said the claimant had accumulated five attendance points. The human resources manager gave the claimant two choices. The claimant could sign an exit interview form, leave work, and he might be rehired in six months. If the claimant did not complete an exit interview form, the claimant might be rehired in a year. The claimant was not given the option to return to work. The claimant completed the exit interview form.

The claimant filed for unemployment insurance benefits with an effective date of October 23, 2016. The employer participated personally at the fact-finding interview on February 9, 2017, by Rogelio Bahena.

REASONING AND CONCLUSIONS OF LAW:

The first issue is whether the claimant voluntarily quit without good cause attributable to the employer. For the following reasons the administrative law judge concludes he did not.

Iowa Admin. Code r. 871-24.26(21) provides:

> Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:
>
> (21) The claimant was compelled to resign when given the choice of resigning or being discharged. This shall not be considered a voluntary leaving.

If an employee is given the choice between resigning or being discharged, the separation is not voluntary. The claimant had to choose between resigning or being fired. The claimant's separation was involuntary and must be analyzed as a termination.

The issue becomes whether the claimant was discharged for misconduct. For the following reasons the administrative law judge concludes he was not.

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).

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). The employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The last incident of absence was a properly reported illness which occurred in January 7, 2017. The claimant was not discharged until January 25, 2017. The claimant's absence does not amount to job misconduct because it was properly reported. The employer has failed to provide any evidence of willful and deliberate misconduct which would be a final incident leading to the discharge. The claimant was discharged but there was no misconduct.

DECISION:

The representative's February 10, 2017, decision (reference 02) is affirmed. 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/rvs