IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

LEVI J MILLS Claimant **FLEXSTEEL INDUSTRIES INC** Employer	**APPEAL 15A-UI-08837-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 07/12/15** **Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from the August 4, 2015, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on August 27, 2015. Claimant participated. Employer did not participate.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a utility from March 11, 2012, and was separated from employment on July 13, 2015, when he was discharged.

The employer has an attendance policy that allows an employee to have five occurrences a year. If an employee is not feeling good, they can leave work and receive an occurrence. When an employee receives five occurrences in a year, the employee is placed on a six-month probationary period. If the employee misses anytime during the probationary period, then the employee is terminated. The employee also receives a three-day suspension at five occurrences. The policy also provides that an employee will be warned as occurrences are accumulated. Claimant was aware of the employer's policy.

On July 10, 2015, claimant went home from work sick. Claimant told his supervisor that he was not feeling good, but his supervisor told him he needed to stay. Claimant then went to his union representative, which told claimant to go talk to the human resources. When claimant went to human resources, they brought in another supervisor to the meeting. Claimant asked to use vacation for July 10, 2015, but the supervisor denied this request. The supervisor told claimant if he needed to leave he would have to take an occurrence. Claimant then took the one-half occurrence and left. Claimant did not go to the doctor; he thought he just needed some Pepto-Bismol and rest. Production was not shut down because claimant left. Claimant thought his vacation request was denied because the employer had already refused a co-worker's vacation

request. On prior occasions, the employer had allowed claimant to take vacation the same day he wanted it. Claimant had used 4 ½ occurrences going into July 10, 2015. Claimant was aware that he was going to be at five occurrences after taking this one-half occurrence. Claimant did not think his job was in jeopardy.

On July 13, 2015, claimant's supervisor told him to leave work and come back later for a meeting with the union and the employer. When claimant came back, claimant was told by the employer that he had voluntarily quit when he left on July 10, 2015. On July 10, 2015, the employer did not tell claimant it would be considered job abandonment if he left. When claimant left on July 10, 2015, he was told it would be an occurrence. The employer told claimant that he refused work and told his supervisor he was not going to do the work and walked out. Claimant denied saying this to his supervisor. On July 13, 2015, claimant expected the employer was going to place him on a six month probation period and a three day suspension, pursuant to the employer's policy. Claimant is aware of other employees reach five occurrences and they were placed on six-month probation and a three-day suspension. Those employees were not discharged.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

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(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 employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.,* 391 N.W.2d 731 (Iowa Ct. App. 1986).

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job-related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation.

A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to assess points or impose discipline up to or including discharge for the incident under its policy. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. The employer's policy provides that employees that receive five occurrences are placed on a probationary period and suspended for three days. Claimant had received prior warnings for obtaining occurrences, but had not yet been placed on a six-month probationary period. On July 10, 2015, claimant was aware that by leaving work because he was sick he was going to reach five occurrences. Claimant and the employer had agreed he would receive an occurrence if he left. Claimant made the decision to leave at that point knowing the resulting discipline would be a one-half occurrence. Claimant knew this would result in him receiving a three-day suspension and six months of probation. However, on July 13, 2015, instead of following their policy, the employer just discharged

claimant. Claimant never expressed any intention to quit, which was evident by his reporting to work on July 13, 2015.

Furthermore, claimant testified that other employees that reached five occurrences received the discipline detailed by the attendance policy (suspension and probation). Even though the claimant may have left work and taken an occurrence, the consequence was more severe than other employees received for similar conduct. Others involved in the same or similar incidents were not discharged, instead they were suspended and placed on six months of probation, thus claimant seems to have been the subject of the disparate application of the policy, which cannot support a disqualification from benefits. Benefits are allowed.

DECISION:

The August 4, 2015, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

_____
Jeremy Peterson
Administrative Law Judge

_____
Decision Dated and Mailed

jp/css