IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

GEORGE G TRIZIS
Claimant

HY-VEE INC
Employer

APPEAL NO. 18A-UI-01738-S1-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/07/18
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

George Trizis (claimant) appealed a representative's February 5, 2018, decision (reference 02) 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 March 6, 2018. The claimant participated personally. The employer was represented by Keith Mokler, Hearings Representative, and participated by Ryan Roberts, Store Director, and Steven Almonrode, Food Service Director. The claimant offered and Exhibits A and B were received into evidence. The employer offered and Exhibit 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 September 11, 2016, as a full-time back of house manager. The claimant signed for receipt of the employer's handbook on September 11, 2016. The handbook stated that employees who could not work a shift must contact the store director or a supervisor as early as possible prior to the start of the shift. The handbook did not have a progressive disciplinary policy for attendance. On January 21, 2017, the employer issued the claimant a written warning for failure to follow clocking out procedures. The employer notified the claimant that further infractions could result in termination from employment.

For the week ending July 16, 2017, the claimant's paystub reflected he worked 23.7 regular hours and took 27 hours of vacation for a total of 50.7 hours. The employer recorded on the claimant's time card that he did not properly report his absences for his nine-hour shifts on July 11 and 12, 2017. The claimant never worked 68 hours in one week. Neither the claimant nor the employer have any information to show the claimant was scheduled to work on July 11 or 12, 2017.

On July 17, 2017, the claimant's shift started at 5:00 a.m. Prior to his shift he attempted to report his absence due to illness to his supervisor but she did not answer her telephone. The

claimant knew he had to cover his shift and found someone to work his hours. Near 10 a.m. on July 17, 2017, the claimant stopped by work to make certain everything was okay. His supervisors talked to him about reporting his absence to a supervisor prior to the start of his shift.

For the week ending July 23, 2017, the claimant's paystub reflected he worked 37.5 regular hours and took 18 hours of vacation for a total of 55.5 hours. The employer recorded on the claimant's time card that he did not properly report his absences for his nine-hour shifts on July 22 and 23, 2017. The claimant had never been scheduled 73 hours in one week. Neither the claimant nor the employer has any other records for July 22 or 23, 2017.

The claimant became increasingly more ill. On or about July 23, 2017, he had a meeting with the employer where he apologized for being sick. The claimant was having intestinal issues that caused bleeding. He requested and was granted vacation days on July 24, 25, 26, and 27, 2017, to recover from his infirmity. The claimant told the employer he should be back to work on July 28, 2017.

At about 4:15 a.m. on July 28, 2017, the claimant was admitted to the hospital. He properly reported his absence to his supervisor. Later that day, he was released to return to work without restrictions. On July 29, 2017, the claimant returned to work and provided his release to the store director. The store director told him to leave without looking at his doctor's notes. On July 29, 2017, the store director signed a termination document that indicated the claimant had been terminated after a suspension when the claimant had never been suspended. The store director accidentally put a name in the employee's signature spot. When he realized the mistakes, he did not remove it or redo the report.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

Iowa Code section 96.5(2)a provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 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 disqualification shall continue 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 identified six absences. The absences on July 11, 12, 22 and 23, 2017, raise questions that the employer could not answer. The employer's record keeping did not provide information normally associated with an employee's absence. 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 on July 28, 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.

The claimant's and the employer's testimony is inconsistent. The administrative law judge finds the claimant's testimony to be more credible. With regard to the employer, there were discrepancies between the employer's time editor and the paystub and there were discrepancies on the termination report.

DECISION:

The representative's February 5, 2018, decision (reference 02) 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/rvs