IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

BO T WITTERN
Claimant

AGAN TRI-STATE DRYWALL SUPPLY INC
Employer

APPEAL NO. 16A-UI-11061-S1-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 09/18/16
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Bo Wittern (claimant) appealed a representative's October 6, 2016, decision (reference 01) that concluded he was not eligible to receive unemployment insurance benefits after his separation from employment with Agan Tri-State Drywall Supply (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for October 27, 2016. The claimant participated personally. Tony Blair, former co-worker participated on behalf of the claimant. The employer participated by Danny Pick, Manager; Jeremy Allison, Office Manager; Randy Hongslo, Sales Person; and Troy Tucker, Warehouse Manager.

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 5, 2011, as a full-time delivery driver working from 6:30 a.m. to whenever the work was done. The employer has a handbook but the claimant did not receive a copy. The employer has a policy that states employees must report an absence twenty-four hours in advance. The claimant was unaware of this policy.

The claimant had issues with his back and sometimes the job aggravated those issues. The claimant saw a chiropractor for relief and did not ask for workmen's compensation benefits. He reported his absences each time at about 5:45 a.m. and brought a doctor's note to the employer. Between March 11 and July 11, 2016, the claimant had two chiropractic appointments and called in sick twice. The employer thought the claimant was absent too many Fridays. The employer remembers telling the claimant he was done being sick or going to the chiropractor on Friday. The employer did not need an employee like this.

On Thursday, September 15, 2016, the claimant's back started hurting at work after he unloaded a truck by himself. He called his chiropractor many times before he could reach them. He made an appointment for the following day at 10:30 a.m. A co-worker overheard the

claimant make the appointment. On Friday, September 16, 2016, at 5:50 a.m., the claimant notified the employer he would not be at work because of his medical appointment. On Monday, September 19, 2016, the employer terminated the claimant for excessive absences.

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).

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 on September 16, 2016. It is considered properly reported because the claimant reported his absence prior to the start of his shift. A twenty-four hour report policy for illness is unreasonable. In addition, there is no evidence the claimant received the policy. 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 October 6, 2016, decision (reference 01) 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